“BIGOTS IN BLACK ROBES”:

LEGAL ETHICS AND JUDICIAL HATE SPEECH

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*Abstract*

Instances of judges using, as opposed to merely mentioning, hate speech are relatively rare, but they are not unheard of. Nor are they confined to the distant past. What is more, like other forms of judicial misconduct, when judges use hate speech, this can bring the judiciary into disrepute. Judicial hate speech raises two pressing questions of legal ethics. Do, and should, existing judicial codes of conduct incorporate rules that directly or indirectly disallow judicial hate speech? And, insofar as judges benefit from judicial privilege and immunity, should that immunity be disapplied in cases of judicial hate speech when that conduct would otherwise be unlawful under relevant civil rights laws or even criminal laws? This article defends two main policy proposals, namely a specific judicial code of conduct rule that disallows the manifestation or appearance of bias or prejudice including but not limited to in the form of judicial hate speech, and the continued non-application (U.K.) and henceforth disapplication (U.S.) of judicial privilege and immunity to civil rights and criminal laws which directly or indirectly restrict the use of hate speech, provided those laws are not overbroad. The article also normatively justifies these policies. It argues there is a legitimate state interest in combating judicial hate speech because it risks damaging public confidence in the judiciary and the administration of justice; undermines assurance of civic dignity; harms or wrongs the individuals who are exposed to it; implicitly gives others permission to be bigots; and lends authority to ordinary hate speakers. Finally, the article defends First Amendment intermediate scrutiny for restrictions on judicial hate speech.

I. *Introduction*

There is already a large body of research looking at the issue of judicial misconduct and the need for a code of ethics for judges to supplement statutes on mistrials, recusals, and reversals.[[2]](#footnote-2) This includes a smaller subset of research examining, in particular, judges’ use of uncivil, intemperate, undignified, or indecorous language.[[3]](#footnote-3) In the words of Jana Stehlíková: “Although it is not forbidden to judges to express their subjective opinions, they should do so with the utmost discretion.”[[4]](#footnote-4) “When the judge’s speech is not related to the case at issue, all the more so he/she should weigh his/her words.”[[5]](#footnote-5)

However, hitherto there has been little scholarly investigation of judicial hate speech in particular.[[6]](#footnote-6) By “judicial hate speech” I mean hate speech used *by* judges, as opposed to hate speech *against* judges (although the latter issue will crop up *infra*). This article seeks to fill this gap in legal ethics.

Of course, there is a vast multi-disciplinary literature identifying the manifold ways hate speech, online and offline, can be harmful, an affront to dignity, wrong or unjust, contrary to human flourishing, socially pernicious, and bad for democracy and even political legitimacy, so much so as to warrant it being criminally proscribable or liable to civil proceedings or both.[[7]](#footnote-7) Some scholars have also looked specifically at attorneys’ use of hate speech, such as racial epithets like “nigger” or negative stereotypes about Black deviance, and at whether professional codes of conduct for attorneys need to be created or reformed to deal with this issue.[[8]](#footnote-8) It is also true that some scholars have interpreted the words used by judges to perform particular sort of judicial acts as constituting hate speech or being on a par with hate speech, by virtue of what those words do, including, for example, “I hereby find racial segregation laws to be constitutional.”[[9]](#footnote-9) However, I am interested in cases where judges explicitly use common or ordinary forms of hate speech, whether in open court, in chambers, or on social media.

To be clear, however, I am not seeking to make a general point about all of the judiciary, such as the point made by some critical race theorists that there is prevalent “unconscious bias” among the judiciary, as there is in society in general.[[10]](#footnote-10) In other words, the phrase “bigots in black robes” makes a stylistic nod to the well-known phrase “politicians in robes,” but I am not making the same sort of generalization (in the latter case the generalization is about a widespread politicization of, or activism within, judicial decision-making, or a lack of judicial restraint across the board). But by the same token, I am also not repeating the false and potentially gaslighting cliché “there are only a few bad apples.” Judges operate within, and are products of, wider society, culture, institutions, and structures, and so it would be quite wrong to assert that the structural problem of hate speech ends at the courtroom door. Neither the suggestion that all judges routinely use hate speech nor the idea that judicial hate speech is rare in the extreme and nothing to do with structures of hate speech and prejudice present within the judiciary and society as a whole seem quite right to me.

Now many judicial codes of conduct, and more general ethics codes for all legal professionals including but not limited to judges, already contain one or more rules or canons that could be reasonably interpreted to disallow judges from using hate speech inside or outside of the courtroom. However, for the avoidance of doubt and to make the meaning and consequences of the codes as predictable as possible, I propose to add the use of hate speech as a named example of a type of conduct that is already disallowed by an existing rule or canon (i.e. an extant section of codes of conduct). In particular, I shall outline and defend a model judicial code of conduct rule that disallows the manifestation or appearance of bias or prejudice including but not limited to in the form of judicial hate speech. I also defend the application of existing civil rights laws or criminal laws that directly or indirectly restrict the use of hate speech to judicial hate speech, provided that these laws are not overbroad. In other words, I advocate disapplying judicial privilege and immunity in cases involving unlawful hate speech.

I also present five normative justifications for these policies. Specifically, I argue there is a legitimate state interest in combating judicial hate speech because it risks damaging public confidence in the judiciary and the administration of justice; undermines assurance of civic dignity; harms or wrongs the individuals who are exposed to it; implicitly gives others permission to be bigots; and lends authority to ordinary hate speakers.

Although this article focuses on only one particular type of judicial misconduct, the reader should not take this to mean I am either suggesting or assuming this is the “worst” type of judicial misconduct. I am not. No doubt cases of a judge manifesting or giving the appearance of bias or prejudice towards persons on grounds of their protection characteristics are not as egregious as cases of a judge engaging in actual bias or prejudice, namely when a judge has in fact allowed their bias or prejudice against persons on grounds of their protection characteristics to influence a judicial decision affecting those persons. Other potentially equally or more serious types of judicial misconduct, at least as measured by certain benchmarks, might include severe bullying, threatening violence, sexual harassment, or using judicial status to influence or manipulate other people for person gain. Even certain types of “victimless” judicial misconduct, such as failing to follow due process, neglecting to turn up to court or delaying judgments without a reasonable excuse, lack of judicial restraint, or corruption, could be worse, once again depending on the benchmark used, than manifesting or giving the appearance of bias or prejudice. Nevertheless, to concede that the manifestation or appearance of bias or prejudice might not be the “worst” type of judicial misconduct does not make the investigation any less important.

Similarly, even if it turned out to be true that judicial hate speech is declining and far less common that it used to be at certain times in history, this would not make the investigation unnecessary. Society has every reason to care if its judges are using hate speech, even if this is the exception or a relative rare occurrence. Getting the policy response to such cases rights matters in itself as well as to ensure that the graph does not start head upwards again. There is also the symbolic importance of getting the policy right, because it sends a message to the targets of judicial hate speech that they matter. This part of providing them the assurance they are members of society with high and equal standing. I shall return to this issue of the assurance of civic dignity in Part VI.B.

In general, I believe judges should avoid using hate speech, whether inside or outside of the courtroom, unless doing so falls under a legitimate exception. For example, a judge might need to mention or quote certain specific examples of hate speech that were used by a defendant, for instance, if this is relevant to the case. A judge might also need to refer to or cite specific hate speech used by courtroom actors for the purposes of holding them in contempt of court. The ‘unless’ clause invokes a more general distinction between mentioning or quoting hate speech, on the one hand, and using hate speech, on the other hand.[[11]](#footnote-11) It is worth emphasizing that other actors in courtroom settings may also need to mention or quote hate speech (e.g. defendants, plaintiffs, witnesses, public prosecutors, defense attorneys/barristers). Moreover, courtroom purposes are not the only prima facie legitimate reasons for citing specific examples of hate speech. Other prima facie legitimate reasons might include everything academics mentioning or quoting hate speech for scholarly purposes (as I do herein); through to legislators mentioning especially notable examples of hate speech in legislative debates about whether to ban hate speech, what hate speech to ban, and how to draft sound legislation; to social media platforms citing examples of the sort of content they deem hate speech.

I should perhaps also make it clear that by focusing on the professional ethics of judges, I am not ignoring or minimizing important questions about the ethical duties of other relevant actors. For example, given that anyone in court is themselves likely to be on social media, it could be that anything a judge says is liable to be posted online by other people, unless the judge has explicitly ordered that what they say in court is privileged and not to be posted online by anyone. Potentially, however, almost every instance of judicial hate speech could wind up online at some point. So, it might be argued that all individuals in court also have ethical duties to refrain from posting examples of judicial hate speech online if they are doing so for the primary reason of (re-)using the hate speech and endorsing it. If they are posting simply to blow the whistle and denounce it, this is another matter. In addition, social media companies might have ethical duties (and in some countries including the U.K. even legal obligations) to remove certain forms of hate speech from their platforms,[[12]](#footnote-12) and this could well extend to judicial hate speech. However, to help narrow the focus of the article, I shall not discuss any of these other sorts of duties.

In addition, I do not intend to discuss related legal ethics questions concerning the (mis)conduct of other legal professionals and ordinary people who appear in court (e.g. defendants, plaintiffs, witnesses, prosecutors, defense attorneys or barristers, bailiffs). They too might end up using hate speech. But once again to make the size of the subject matter more manageable within the format of a single journal article, I shall not comment on these cases any further. Furthermore, I shall not discuss closely connected legal ethics questions about the possible misconduct of judges who fail to challenge—such as through counter-speech, informal admonishment, formal warnings, or laying charges of contempt of court—other actors’ use of hate speech in their courtrooms, chambers, or online. No doubt a model judicial code of ethics would also include a further rule that says judges should not permit persons operating under their supervision, by words or conduct, to manifest or give the appearance of bias or prejudice. According to this sort of rule, a judge should not allow a prosecutor to peddle stereotypes or archetypes of Muslims as terrorists and should not permit a defense attorney or barrister to push sexist rape myths, and this is not merely because Islamophobic and misogynistic remarks are intemperate, uncivil, or indecorous, but because they can be used to unfairly influence the thinking and decision-making of the jury in a manner that stays the hand of justice. Likewise, perhaps a judge ought not to let witnesses refer to people using racial epithets or nicknames as these may also constitute the manifestation or appearance of bias or prejudice. However, attempting to discuss all of these broader questions of legal ethics relating to the use of hate speech would make the volume of relevant cases, issues, and arguments unwieldy for a single journal article.

To further clarify, this article looks at situations where judges use hate speech whether in the ordinary or legal senses of the term “hate speech.” Roughly speaking, the ordinary sense of the term “hate speech” has to do with social norms, social rules, and social sanctions, and with how ordinary people use, and how major social institutions like media companies and Internet platforms define, the term ‘hate speech’, whereas the legal sense of the term has to do with legal norms, laws, and sanctions, and with how legislatures and courts define unlawful hate speech, including but not limited to civil rights laws proscribing hostile work environment discrimination as applied to the repeated use of racist or sexists slurs or epithets, for instance (U.S.) and criminal laws banning the stirring up of hatred on the grounds of protected characteristics (U.K.), for example.[[13]](#footnote-13) Whilst this article is ostensibly about judicial codes of conduct as well as certain civil rights and criminal laws, and so legal concepts, sometimes the discussion will hinge on the plain or ordinary meaning of the term “hate speech”. This is an area where concepts can overlap.

II. *Context*

To give additional focus, this article will only compare two jurisdictions, the U.S. and the U.K. Both countries are: multiracial, multiethnic, and multi-faith; places in which identity politics plays a substantial role in mainstream politics; societies in which the culture wars have touched on the question of hate speech; hosts to large social media companies that not merely facilitate the transmission of hate speech but also define, disallow, and remove users’ hate speech; home to judicial codes of conduct that touch on judges’ use of words and behavior; jurisdictions where the creation and policing of judicial codes of conduct is partly de-centralized, either at the level of states (within the U.S.) or at the level of nations (within the U.K.). However, they also differ in how they understand and approach the issue of hate speech, not just culturally and politically but also legally.[[14]](#footnote-14)

To expand on the last point, whilst both countries have on the books laws that can have the effect of restricting the use of hate speech, it is clear that, within the U.S., such laws, including but not limited to group defamation laws, incitement to hatred laws, cross-burning ordinances, and campus speech codes are vulnerable to being struck down as unconstitutional.[[15]](#footnote-15) Even when civil rights laws and certain tort laws have been applied to cases involving the use of hate speech, superior courts have overturned lower court decisions on First Amendment grounds.[[16]](#footnote-16) Indeed, in a string of cases US courts appear to have resolved to treat hate speech as a category of protected speech within First Amendment doctrine. In *American Booksellers Association v. Hudnut*,[[17]](#footnote-17) the U.S. Court of Appeals for the Seventh Circuit stated: “One of the things that separates our society from [societies ruled by totalitarian governments] is our absolute right to propagate opinions that the government finds wrong or even hateful.”[[18]](#footnote-18) In *Snyder v. Phelps*,[[19]](#footnote-19) the U.S. Supreme Couret opined that speech “cannot be restricted simply because it is upsetting or arouses contempt.”[[20]](#footnote-20) And in *Matal v. Tam*,[[21]](#footnote-21) the U.S. Supreme Court even more boldly declared: “Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate’.”[[22]](#footnote-22)

By contrast, in the U.K., criminal laws against stirring up hatred on the grounds of race and limited other protected characteristics have been a mainstay of both race relations and public order law since the mid-1960s. Moreover, the current versions of these offences set out in Parts 3 and 3A of the Public Order Act 1986 have not been deemed to be, as written, incompatible with the Human Rights Act 1998 by the England and Wales Court of Appeal.[[23]](#footnote-23) No cases relating to the England and Wales stirring up hatred offences in particular have come before the Law Lords/UK Supreme Court or the European Court of Human Rights (ECtHR). In the latter instance, a prerequisite of bringing a case is that a person must have already exhausted all domestic legal remedies. Nevertheless, there is little reason to imagine that either the U.K. Supreme Court or the ECtHR would find these offences, as written, incompatible with the human right to freedom of expression set out in Article 10 of the European Convention on Human Rights (ECHR). This is for a number of reasons: first, because Article 10(2) outlines a range of valid bases on which a state may restrict freedom of expression and at least two of these bases (“territorial disorder or crime,” “the protection of the reputation or rights of others”) might be reasonably taken to apply to the England and Wales stirring up hatred offences; second, because the ECtHR gives a “margin of appreciation” or leeway for states to interpret in their own way the compatibility of their laws, including hate speech laws, with the human rights set out in the ECHR; third, because the ECtHR has previously upheld a UK conviction for an expressive hate crime offence that is not entirely dissimilar to the stirring up hatred offences;[[24]](#footnote-24) fourth, because the ECtHR has frequently upheld convictions under broadly similar kinds of hate speech laws in other countries, under the margin of appreciation doctrine;[[25]](#footnote-25) fifth, because even though the ECtHR has repeatedly made it clear that the human right to freedom of expression protects even ideas that “offend, shock or disturb the State or any sector of the population,”[[26]](#footnote-26) nowhere has it declared that hate speech is a category of protected speech under the ECHR; and sixth, because despite the fact that the ECtHR has extended greater protection to speech that intermixes typical forms of hate speech with content of a clearly political and/or dissenting nature,[[27]](#footnote-27) there is little reason to think the ECtHR would treat judicial speech as on a par with political speech.

More broadly, the issue of judicial hate speech implicates a fundamental question about the status and free speech rights of judges, who are not merely citizens but public figures and, more importantly, public employees commissioned by government to serve the justice system. This dichotomy is summarized well in Principle 4.2 of the Bangalore Principles of Judicial Conduct, 2018:

A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but, in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.[[28]](#footnote-28)

In the U.K., the fact that judges are bearers of free speech rights in general terms has not prevented the Lord Chief Justice, the Head of the Judiciary of England and Wales, in consultation with the Lord Chancellor, a member of the cabinet, from handing down disciplinary measures (e.g. formal warnings, reprimands) against judges for misconduct involving hate speech (see Part IV infra).

Similarly, in the U.S., even though government employees, a class of persons which includes judges, have a First Amendment right to speak out as private citizens on matters of public concern, this is on the condition that the speech does not interfere with their being able to do their job. Governments do not necessarily violate their employee’s First Amendment rights simply by imposing legitimate restrictions on their speech or behavior. After all, at its heart, the First Amendment is designed to protect ordinary citizens from governmental restrictions of their speech as opposed to protecting what government employees say from legitimate governmental restrictions of their speech. That said, the latter restrictions must still meet certain tests, such as whether they strike a fair balance between the employee’s right to free speech and the employer’s interest in having them carry out their role properly and there being minimal disruptions in the workplace (the Pickering-Connick test).[[29]](#footnote-29) Since this test involves balancing it is nuanced and non-axiomatic; and how the courts have applied it is not entirely consistent or predictable. But the fact that a fair balance must be struck between the two sides of the scale is not disputed.[[30]](#footnote-30)

At any rate, what is clear is that US judges can, and have, faced disciplinary proceedings and administrative sanctions in respect of words or behavior, including the manifestation or appearance of bias or prejudice in the form of hate speech (see Part III infra). What is more, the relevant authorities have deemed this misconduct because it gets in the way of judges carrying out their roles properly (i.e. this misconduct has stayed the hand of justice) and, moreover, have relied upon a legitimate state interest in preserving public confidence in the justice system.

What sanctions could potentially be used against judges who have fallen short of the standards expected of them, especially standards articulated in judicial codes of conduct? I have in mind bona fide sanctions, as in, administrative sanctions applied to judges *personally* over and above judicial measures such as reversals, and *externally* imposed on judges without relying on them to call a mistrial or recuse themselves. A sliding scale of sanctions (from less to more severe) is typically present in both the U.S. and the U.K., under the relevant disciplinary procedures. This includes everything from formal advice (private); through to formal warning and reprimand (private); on to censure, as in, a formal statement of disapproval used to publicly reprimand judges for misconduct; to suspension from office for a given period of time; to “asking,” “inviting,” or “giving the opportunity” to a judge to resign their office prior to being removed or dismissed from office (i.e. forcing judges to jump before they are pushed); and on to directly removing or dismissing a judge from office; and barring a judge from ever serving as a judge in the future.

Of course, this is not to say that applying or enforcing sanctions is always straightforward. In some instances, judges have responded to the real possibility of being found to have engaged in misconduct by pre-empting sanctions that might have otherwise been applied to them. For example, in some instances, British judges have publicly committed to not presiding over cases raising certain social issues in the future or have resigned from their official positions entirely rather than face the public humiliation of being officially sanctioned (see Part IV). In these scenarios, the judges continue to receive full-pay or else are left with generous salary-matching pensions. Indeed, sometimes the upshot has been that the relevant judicial misconduct committees or offices have dropped or not even commenced investigations because doing so would be otiose. Such outcomes could be considered problematic if justice avoided is justice denied.

What if judges fall short not simply of judicial codes of conduct but also of general legal norms enshrined in civil rights laws or criminal laws that apply to all citizens? Can and should they expect the same punishments as any citizen? Suppose a judge explicitly describes a group of defendants as belonging to a race of greedy pigs who seek to control global finances all because of being Jewish and makes threats against them, all with intent to bring them into contempt in the eyes of the jury and others present in the courtroom, or even with intent thereby to stir up racial hatred against them within wider society. Absent some special form of absolute judicial privilege and immunity, a judge could be prosecuted if there were applicable hate speech laws on the statute books in the relevant jurisdiction, as would be true in the U.K., for example. At present, judges and other actors in court enjoy absolute privilege with respect to civil actions for defamation in the U.K. It is an open question whether they should enjoy the same privilege with respect to unlawful hate speech. I shall argue in Parts IV and V that the U.K.’s judicial privilege doctrine is good as it stands and should not be extended to cover criminal acts of stirring up hatred based on protected characteristics. (It is also a matter for debate whether current U.K. parliamentary privilege doctrine should be reformed such that it disapplies to circumstances involving parliamentarians in parliament that would otherwise constitute criminal offences of using threatening words or behavior with intent thereby to stir up hatred on grounds of certain protected characteristics.[[31]](#footnote-31))

In countries without any laws that directly or indirectly restrict the use of hate speech, the potential application of the doctrine of judicial privilege to judicial hate speech is moot. But there are very few, if any, such countries.[[32]](#footnote-32) Even in the U.S. persons can face liability under civil rights laws for creating a hostile work environment through repeated use of hate speech (see Part III). However, as interpreted by US courts in various cases, the general doctrine of judicial privilege and immunity grants confidentiality to the deliberations of judges behind closed doors,[[33]](#footnote-33) immunity from civil litigation on charges of “malice or corruption” for acts done within the judicial role,[[34]](#footnote-34) immunity from civil actions for judicial acts “flawed by the commission of grave procedural errors,”[[35]](#footnote-35) and immunity from liability for violating civil rights legislation including Title VII which prohibits several types of discrimination and harassment in the workplace.[[36]](#footnote-36) And such, current US legal doctrine would suggest that a judge would likewise enjoy immunity from liability for creating a hostile work environment through the repeated use of hate speech in open court and/or in chambers. The question is whether the current US policy of judicial immunity is morally defensible—a question I shall return to in Parts V and VI.

At any rate, the issue of the application or disapplication of the judicial privilege and immunity to judicial hate speech is perhaps especially controversial in countries, such as the U.K., where hate speech is not classed as category of protected speech and where there are criminal laws banning the stirring up of hatred on the grounds of protected characteristics. The U.K.’s version of the judicial privilege doctrine is not wholly unsimilar to that found in the U.S. In fact, U.K. High Court and Court of Appeal Judges enjoy absolute immunity from personal civil liability in respect of any judicial act done in the bona fide exercise of their role as judges. In the words of Justice Denning: “No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he [sic] is not liable to a [civil] action.”[[37]](#footnote-37) But, the same cannot be said of criminal proceedings against judges. Judges can be pursued in the criminal courts for criminal offences such as bribery or perverting the course of justice.[[38]](#footnote-38) Likewise, the U.K.’s judicial privilege and immunity doctrine does not extend to immunity from liability for the commission of criminal acts, including criminal acts of stirring up hatred based on protected characteristics under Parts 3 and 3A of the Public Order Act 1986.

Those who would support a policy of extending the U.K.’s judicial privilege and immunity doctrine to cover judicial hate speech have several questions to answer. Why should there be one rule for judges and another for the rest of us when it comes to criminal acts of stirring up hatred? What is it about the discharge of judicial duties and the administration of justice that is so special and/or especially vulnerable to molestation and a chilling effect from prosecutors wielding hate speech statutes that merits giving judges absolute privilege? Could it seriously be said that a judge might need to use threatening words or behavior with intent thereby to stir up hatred against homosexuals, for example, in the course of carrying out regular judicial acts? Then again, there is prior question here about the burden of proof. Perhaps those people who would defend the policy of extending the U.K.’s judicial privilege and immunity doctrine to judicial hate speech might say that it is their opponents who must justify opposition to the reform. By switching the justificatory burden, they pose a different question. What is it about judicial hate speech that is so harmful or wrong that it justifies continues non-application of the U.K.’s judicial privilege and immunity doctrine to cases of criminal judicial hate speech? Again, I seek to answer these normative questions in Part VI.

III. *U.S. Cases of Judicial Misconduct and Relevant Codes of Conduct and Civil Rights Laws*

There is a long history of judicial hate speech in America. Even justices of the U.S. Supreme Court have used racial epithets, slurs, negative stereotypes, and dehumanizing comparisons in written decisions on cases pertaining to race. For example, in *Dred Scott v. Sandford*,[[39]](#footnote-39) a case dating back to 1857, Chief Justice Taney described African Americans as “this unfortunate race”[[40]](#footnote-40) in the course of articulating a majority decision that former slaves did not have standing in federal courts because they lacked US citizenship, even after they were freed. And in *Downes v. Bidwell*,[[41]](#footnote-41) Justice Brown referred to people from Puerto Rico as “savages”[[42]](#footnote-42) whilst giving the court’s opinion that the term “the United States”, as used in a specific constitutional provision, did not include Puerto Rico, and, more generally, that “the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants.”[[43]](#footnote-43) If there is a hierarchy from bad to worse types of hate speech acts, then perhaps an official act of denying rights to individuals on the basis of their race counts as a worse hate speech act than the more ordinary act of slurring, stereotyping, dehumanizing, or degrading persons on the basis of their race. Then again, maybe it is hard to measure the relative badness of types of hate speech acts. At any rate, what is clear is that the U.S. Supreme Court’s use of epithets, slurs, and dehumanizing labels for entire racial or ethnic groups in these cases is not merely incidental. These words stigmatize and degrade these groups as despicable by their behavior and inherently inferior by their capabilities, and, what is more, the narratives about these groups implicitly informs and motivates the “legal” decisions to deprive these people of rights all because of their race, ethnicity, or origin.

But at the same time judicial hate speech is not restricted to the distant past, to the days of slavery or segregation. For example, in a legal ethics case from 1970, *re Chargin*,[[44]](#footnote-44) the Supreme Court of California upheld a decision by the Commission on Judicial Performance (State of California) to censure Superior Court Judge Gerald Chargin on the basis that his remarks about Mexican Americans in a juvenile hearing involving a fifteen-year-old Mexican-American constituted “conduct prejudicial to the administration of justice that brings the judicial office into disrepute.”[[45]](#footnote-45) Judge Chargin is reported to have “referred to the youth’s family and to Mexican Americans generally as ‘miserable, lousy, rotten people’ […] [and] also announced that ‘maybe Hitler was right’ in seeking to destroy ‘the animals’ in society.”[[46]](#footnote-46)

In another legal ethics case from 1982, *re Stevens*,[[47]](#footnote-47) the Supreme Court of California upheld a decision by the Commission on Judicial Performance (State of California) to censure Santa Barbara County Superior Court Judge Charles Stevens on the grounds that he had, since his appointment a decade earlier, “repeatedly and persistently used racial and ethnic epithets, and made racially stereotypical remarks to counsel and court personnel.”[[48]](#footnote-48) This included “remark[ing] to counsel that black persons have to learn how to live in their own neighborhoods and that it was ‘typical’ of black persons to fight unfairly” and “refer[ring] to black persons as ‘Jig, dark boy, colored boy, nigger, coon, Amos and Andy, and jungle bunny’.”[[49]](#footnote-49) At the same time, however, the Commission also made clear that in its view Judge Stevens had at all times performed his judicial duties fairly and equitably, and free from actual bias against any person regardless of race, ethnicity or sex.

In yet another legal ethics case from 1985, *re Agresta*,[[50]](#footnote-50) the Court of Appeals of the State of New York upheld a decision by the Commission on Judicial Conduct (State of New York) to censure Justice Thomas Agresta, formerly also of the Supreme Court of the State of New, for a racial comment made in open court. In particular, Justice Agresta had used the phrase “I know there is another nigger in the woodpile” in reference to a Black defendant. The Court agreed with the Commission’s finding as follows:

Racial epithets, indefensible when uttered by a private citizen, are especially offensive when spoken by a judge. Whether or not he meant it as a racial slur, [petitioner’s] use of the term ‘nigger’ in any context is indefensible. That he used the term in open court with black defendants before him and in obvious reference to a particular black person makes his conduct especially egregious.[[51]](#footnote-51)

These cases date back to the 1980s but once again it would be a mistake to imagine that the phrase “bigots in black robes” is only relevant to a bygone era. In a more recent legal ethics case from 2014, the Judicial Discipline and Disability Commission (State of Arkansas) censured, suspended, and removed from office Arkansas Circuit Court Judge Michael Maggio on the grounds that he had for several years posted racist, sexist, and homophobic content on tigerdroppings.com, a Louisiana State University sports fan website, under the name of “beauxjudge,” while openly disclosing the fact that he was a judge.[[52]](#footnote-52) The posts included the following:

From my many years in the courtroom: 1) All women have an agenda. 2) Women look at 2 bulges on a man A) the front and/or B) the back (wallet). 3) As long as either one is big enough they can make do without the other.[[53]](#footnote-53)

You make a hole in one… Doesn’t make you a golfer. But make out with another guy…You a homo.[[54]](#footnote-54)

In a case from 2018, the Commission on Judicial Performance (State of California) decided to both censure and bar from judicial office Kern County Superior Court Judge Joseph Gianquinto on various grounds related to content he posted on his Facebook page,[[55]](#footnote-55) content which the Commission judge to have manifest, amongst other things, “anti-Muslim sentiment” and “anti-Native American sentiment.”[[56]](#footnote-56) One of the numerous Facebook posts cited by the Commission was a picture of a group of Muslim men with the caption “They suck the western welfare system dry, outbreed to become a majority, lobby for their own laws and takeover.”[[57]](#footnote-57)

Finally, in a legal ethics case from 2023, the Commission on Judicial Conduct (State of New York) removed from office Washington County Court Judge Robert Putorti on several grounds, including that in the courtroom he pointed a loaded semi-automatic handgun at a criminal defendant who had in his eyes approached the bench too quickly and crossed a stop line, and after the event referring to the same defendant as “a big black man” and exaggerating his physical size as 6'9" and “built like a football player,” when doing so was not pertinent to the incident, thereby giving the appearance of racial bias.[[58]](#footnote-58) In *re Putorti*,[[59]](#footnote-59) the State of New York Court of Appeals upheld the Commission’s decision. The Court held that “[b]y repeatedly referring to the litigant in the manner that he did, petitioner exploited a classic and common racist trope that Black men are inherently threatening or dangerous, exhibiting bias or, at least, implicit bias.”[[60]](#footnote-60)

What are the legal grounds for these sorts of decisions? In the first instance, the relevant commissions are to apply the appropriate codes of ethics for the jurisdiction. So, for example, in the case of Judge Maggio, the Judicial Discipline and Disability Commission (State of Arkansas) applied the Code of Judicial Conduct (State of Arkansas). Thus, in relation to Judge Maggio’s website posts related to women and homosexuals (cited about), the Commission found that these posts had violated several rules of the Code, including the following:

1.2 A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

2.1 The duties of judicial office, as prescribed by law, shall take precedence over all of the judge’s personal and extrajudicial activities.

3.1 (C) A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not: […] (C) participate in activities that would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality […][[61]](#footnote-61)

In the case of Judge Gianquinto, the Commission on Judicial Performance (State of California) applied the Code of Judicial Ethics (State of California). In relation to Judge Gianquinto’s Facebook posts taken as whole, the Commission found that these posts had violated *inter alia* the following canons:

1 An independent, impartial, and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary is preserved. […]

2 A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. A judge shall not make statements, whether public or nonpublic, that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

4 A. (1) A judge shall conduct all of the judge’s extrajudicial activities so that they do not […] cast reasonable doubt on the judge’s capacity to act impartially.[[62]](#footnote-62)

In the case of Judge Putorti, the Commission on Judicial Conduct (State of New York) applied the Rules Governing Judicial Conduct (New York State). In relation to Judge Putorti’s behavior and his recounting of that behavior (cited above), the Commission found that he had violated the following rules:

100.1 An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. […]

100.2 (A) A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

100.3 (B) (3) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge’s direction and control.

100.3 (B) (4) A judge shall perform judicial duties without bias or prejudice against or in favor of any person. A judge in the performance of judicial duties shall not, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon age, race, creed, color, sex, sexual orientation, gender identity, gender expression, religion, national origin, disability, marital status or socioeconomic status, and shall require staff, court officials and others subject to the judge’s direction and control to refrain from such words or conduct.[[63]](#footnote-63)

IV. *U.K. Cases of Judicial Misconduct and Relevant Codes of Conduct and Criminal Laws*

Like the U.S., the U.K. has its share of bigoted judges. One of the most infamous cases of the past 50 years involved Judge Neil McKinnon and the comments he made in summing up a criminal case touching on issues of race relations and immigration. In 1978, John Kingsley Read, the then chairman of the Democratic National Party, a far-right party that had splintered off from the National Front, was brought before the Central Criminal Court of England and Wales (the Old Bailey), on charges of stirring up racial hatred, at that time a public order offence under the Race Relations Act 1965. Read had made a speech to some 300 members and others who had marched and then assembled in a car park in West Ham, London. Read is alleged to have opened his remarks by telling the audience that the Race Relations Board had an injunction against him meaning he could not use the phrase “coloured immigrants,” to which he added: “So you will forgive me if I refer to niggers, wogs and coons.” In addition, he made reference to the stabbing to death of an Asian youth in the following mocking way. “That was terribly unfortunate: one down, one million to go.”[[64]](#footnote-64)

In summing up the case to the jury, Judge McKinnon recalled that as a schoolboy in Australia one day in class he had been required to sing a song “in the Aboriginal language” and as a result his schoolmates had nicknamed him “nigger,” a nickname they still called him decades later, but that “no offence” was intended by such uses of the term. Judge McKinnon told the jury that Read’s own use of the term “nigger”’ was merely a jocular aside (“throw away lines”) and that it was difficult to hear in Read’s words anything that would amount to a criminal offence.[[65]](#footnote-65) Judge McKinnon also took the opportunity to expound some of his personal views on the state of race relations and immigration in the country. He told the jury: “Such was the affection engendered by those of our forebears in the local indigenous population […] that no sooner did the White man grant independence and freedom to [the former colonies] […] than the Black man wanted to follow the White man to England.”[[66]](#footnote-66) He added: “Of course we cannot accommodate here [an] unlimited number of immigrants coming into this country, but it is not something to be ashamed of.”[[67]](#footnote-67) “Goodness knows, we have 1,500,000 million unemployed already and all immigrants are going to do is to occupy jobs that are needed by the local population.”[[68]](#footnote-68) Arguably, these words repeated false narratives and racial tropes, such as to diminish the atrocities of the colonial past, to paint its victims as holding perpetrators in “affection,” and to cast Black immigrants in the guise of economic threats to “the local population”—all common forms of racist hate speech. Arguably, Judge McKinnon also condoned and normalized Read’s racist words by describing him as “a man who has had the guts to come forward in the past and stand up in public for the things that he believes in,”[[69]](#footnote-69) and by declaring “you have got to allow toleration and freedom of the individual.”[[70]](#footnote-70)

An all-White jury took only 10 minutes to find Read not guilty. Dismissing the case, Judge McKinnon offered the following friendly advice and sendoff to Read: “By all means propagate your views. You have been rightly acquitted. But use moderate language. I wish you well.”’[[71]](#footnote-71) In effect, Judge McKinnon was recasting Read as the victim, implying that the problem with Read’s words was only that they attracted underserved legal strife, not that they were racist or stirred up racial hatred. What followed was a public backlash against not merely the outcome of the trial but also Judge McKinnon’s language in summing up the case.[[72]](#footnote-72) “Within a couple of days more than a hundred [Labour Party MPs] had signed a motion demanding the judge’s dismissal and calling his remarks ‘an affront to human rights’.”[[73]](#footnote-73) Some newspaper editorials made the point that the case ought to be re-examined because the jury’s decision to acquit Read “could have been effected by the ‘bizarre summing up of the judge’.”[[74]](#footnote-74) In contrast to this, other editorials put forward the opposing view that McKinnon had merely been engaged in “philosophical reflection” and, moreover, that the political outcry was not merely dangerous because it threatened judicial independence but also involved a double standard, namely that politicians were stirring up hatred against a judge accused of stirring up hatred against Black immigrants.[[75]](#footnote-75) The then leader of the opposition, Margaret Thatcher MP, came out strongly against the Labour Party MPs, arguing that “[t]he moment politicians start to interfere with judicial decisions there will be no liberty.”[[76]](#footnote-76)

In terms of procedures of judicial ethics, it was reported that the Lord Chancellor privately reprimanded Judge McKinnon for his words and urged him to be more circumspect in his language in the future.[[77]](#footnote-77) It was also reported that a group of 20 non-White barristers “signed a pledge that they would not appear in cases before judge McKinnon unless he apologised.”[[78]](#footnote-78) A few days later, the Lord Chancellor announced publicly that Judge McKinnon had made a request to him that he no longer hear cases raising issues comparable to those in the Read case, to which the Lord Chancellor gave his backing.[[79]](#footnote-79) The Lord Chancellor also proffered the following expectation, in both the descriptive and prescriptive senses of expectation, concerning how courts, and by implication judges, are to handle cases raising issues of race going forward: “I am confident that the courts do and will continue to administer the law fairly and impartially to all sections of our population of whatever race, color or creed and that they will be mindful of the need in their public utterances to respect the feelings of the members of those sections.”[[80]](#footnote-80)

A more recent case involves Judge Hollingworth, a Deputy District Judge (magistrates’ court). In October 2014 Judge Hollingworth was hearing a harassment case in Preston Magistrates’ Court in Lancashire. Judge Hollingworth had found Parvan Singh guilty of harassment for bombarding his ex-girlfriend, Deepa Patel, with texts and threats. At the time Patel was working in an office while on a gap year from university. During a pre-sentencing hearing with the prosecutor, Judge Hollingworth expressed a desire to proceed with sentencing post-haste but was told by the prosecutor that Patel was not in court at that time. Judge Hollingworth is reported to have told the prosecutor to have Patel come to court so that he could complete his sentencing that afternoon. The prosecutor is reported to have said that in her view this was unlikely because Patel might not be able to get time off work at such short notice. Judge Hollingworth allegedly asked where Patel worked, but the prosecutor informed him she did not know. He was reported to have replied that it would not be a problem because “She’ll only be working in a shop or an off-licence.” The prosecutor asked Judge Hollingworth what he meant, to which he is reported to have replied as follows. “With a name like Patel, and her ethnic background, she won’t be working anywhere important where she can’t get the time off.”[[81]](#footnote-81)

It is reported that the prosecutor responded by telling Judge Hollingworth that she intended to withdraw from the case because of what he had just said. She is reported to have said “I am professionally embarrassed.”[[82]](#footnote-82) After the case had concluded and a sentence handed down, the prosecutor brought the matter to the attention of the Crown Prosecution Service (CPS) who lodged a complaint against Hollingworth with the deputy senior district judge for England and Wales. It is reported that the complaint progressed to the Lord Chief Justice and the Judicial Conduct Investigations Office (JCIO). The Office is reported to have issued a public statement clarifying that it intended to investigate the complaint but also that “Judge Richard Terrence Peter Hollingworth has resigned as a deputy district judge (magistrates’ court) […] [and] is currently refraining from all judicial duties.”[[83]](#footnote-83)

In general, the JCIO can, and often does, publish official “Statements” of the disciplinary decisions taken by disciplinary panels working under the supervision of the Lord Chancellor and Lord Chief Justice on its website, but it can also opt not to publish Statements and to remove Statements after a period of time, also at the discretion of the Lord Chief Justice and Lord Chancellor. At the time of writing, no Statements dated prior to 2019 are published on the website and, therefore, no Statements in relation to Judge Hollingworth are available.[[84]](#footnote-84)

However, other cases involving potential hate speech are available on the website. Consider the following Statement from 2023 concerning the case of Dr Christopher Pearson.

The Senior President of Tribunals, acting on behalf of the Lord Chief Justice and with the Lord Chancellor’s agreement, has issued Dr Christopher Pearson, a medically qualified member of the Social Security and Child Support jurisdiction of the Social Entitlement Chamber (First-tier Tribunal), with a formal warning for misconduct.

The Guide to Judicial Conduct reminds office-holders to respect the dignity of all and to avoid conduct which could undermine confidence in judicial impartiality.

During a private discussion with two other tribunal members, Dr Pearson made two attempts at humorous comments which led one of the members to raise concerns with a leadership judge. Following an investigation carried out under the Judicial Conduct (Tribunals) Rules 2014, Dr Pearson’s chamber president concluded that one of his comments was sexist and derogatory to single mothers who have children by different fathers, and the other had racist and antisemitic overtones.

Dr Pearson stated that he had not intended to cause offence and was sorry for having done so.

The Senior President of Tribunals and the Lord Chancellor agreed with the chamber president’s conclusions and recommendation to issue Dr Pearson with a formal warning. In doing so, they accepted that he had not intended to cause offence and that he was unlikely to repeat such conduct in future. They also noted that Dr Pearson, who was appointed to the tribunal in 2012, had a previously unblemished conduct record.[[85]](#footnote-85)

To fill in some of the details concerning the statutory background to judicial misconduct cases in the U.K., various statutes and instruments—including the Courts Act 1971, the Constitutional Reform Act 2005, the Crime and Courts Act 2013, the Judicial Conduct Rules 2023, the Judicial Conduct (Magistrates) Rules 2023, and Judicial Discipline (Prescribed Procedures) Regulations 2023—give the Lord Chancellor and Lord Chief Justice powers to handle complaints and disciplinary action against judges and magistrates. In the most serious cases, this can include the Lord Chancellor, with the agreement of the Lord Chief Justice, dismissing a judge or magistrate from office on the grounds of “misbehavior” or “misconduct.”

In 2004, the JCIO was created to support the work of the Lord Chancellor and the then Lady Chief Justice in discharging their joint responsibility for judicial discipline, including in the work of considering and deciding upon complaints against members of the judiciary. The JCIO website contains a section headed, “What can I complain about?”[[86]](#footnote-86) The website states that the JCIO can investigate “Any action that amounts to misconduct.” The second item listed under the general heading “Some examples include” is “Using racist, sexist, or otherwise offensive language.”[[87]](#footnote-87) The JCIO also receives advice from the Judges’ Council, a body in England and Wales which represents the judiciary and advises the Lord Chief Justice on judicial matters. The Council was involved in the drawing up of the Guide to Judicial Conduct, first published 2004, and most recently updated in July 2023. In relation to the issues discussed in this article, the Guide states, amongst other things:

Members of the judiciary should seek to be courteous, patient, tolerant and punctual and should respect the dignity of all. They should ensure that no one is exposed to any display of bias or prejudice on grounds which include but are not to be limited to “race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes”.[[88]](#footnote-88)

V. TWO POLICY PROPOSALS: A MODEL RULE DISALLOWING JUDICIAL HATE SPEECH AND THE DISAPPLICATION OF JUDICIAL IMMUNITY

Reflecting on these cases and associated judicial codes of conduct, I propose the following model rule. *Members of the judiciary should avoid, whether in the courtroom, in chambers, or on the Internet, the manifestation or appearance of bias or prejudice, by words or conduct, on the grounds of protected characteristics,*[[89]](#footnote-89) *and this includes but is not limited to manifestation or appearance that takes the form of hate speech, where the term “hate speech” is to be understood as having its ordinary meaning such that hate speech is what a reasonable person would consider to be hate speech.*[[90]](#footnote-90) I also propose that this rule be published with an accompanying explanatory comment as follows. *This rule can be applied to examples that include but are not limited to the use of epithets, slurs, demeaning nicknames, negative stereotypes, false narratives or myths, group defamation, dehumanizing comparisons, hate propaganda or assertions of social, civic, or moral inferiority, irrelevant references to personal characteristics, or words or behavior that are threatening, intimidating, or hostile, or that are intended to stir up or incite hatred, discrimination, or violence, all on the grounds of protected characteristics.*[[91]](#footnote-91)

In addition, I propose that in a jurisdiction with civil rights laws or criminal laws already in place which directly or indirectly restrict hate speech, then such laws should be applied without fear or favor to the words and behavior of judges, provided that those laws are not in themselves overbroad, as in, so broad as to risk sweeping up a substantially disproportionate amount of protected judicial speech.[[92]](#footnote-92) In short, there should be no judicial privilege and immunity for what would otherwise constitute unlawful hate speech under the relevant civil rights laws or criminal laws.

The U.K. currently has on the statute books criminal laws banning the stirring up of hatred on the grounds of certain protected characteristics.[[93]](#footnote-93) I suggest that these criminal laws not only already do but should continue to apply to the words or behaviour of judges. Furthermore, in the U.S., Title VII of the Civil Rights Act of 1964 proscribes hostile work environment discrimination and on occasions these civil rights provisions have been applied to cases involving the repeated use of racist hate speech to create a hostile work environment.[[94]](#footnote-94) (Of course, U.S. courts have not always deemed the use of hate speech by itself to constitute a hostile work environment, especially when it is a single use.[[95]](#footnote-95)) I believe these civil rights laws should also be applied to the words or behavior of judges, who might also use hate speech in a manner such as to create a hostile work environment. To facilitate this, I propose that existing U.S. judicial privilege and immunity doctrine should be slimmed down so that it disapplies to cases involving violations of civil rights laws, including laws against creating a hostile work environment.

It is a curious and unjustifiable loophole that someone working as a bailiff in court has no immunity from civil rights litigation for creating a hostile work environment, but a far more senior figure in the court, namely the judge, does enjoy immunity from prosecution for essentially the same civil rights wrong. Consider the U.S. case *Boxill v. O’Grady*.[[96]](#footnote-96) This involved a complaint made by a former employee of one James P. O’Grady who accused him of creating a hostile work environment *inter alia* through repeated use of misogynistic hate speech (e.g., gendered epithets, negative stereotypes, and demeaning remarks about women). The conduct allegedly commenced when O’Grady was a bailiff and continued even when he became a judge. Judge O’Grady sought a summary judgment in his favor, which the court denied in part. Writing for the court, Judge Sargus held as follows:

Judge O’Grady next contends that his alleged conduct was not sufficiently severe or pervasive to create a hostile work environment, the fourth element of a sex-based hostile work environment claim. […] Instead, Boxill testified that the conduct was frequent, commonplace, that it was severe in that it used extremely derogatory terms about women, such as “whore.” […] Accordingly, Boxill has met her burden of raising genuine issues of material fact as to whether the harassment was sufficiently severe and pervasive to alter the conditions of her employment and create an abusive working environment. Thus, Defendant is not entitled to summary judgment based on this element of Boxill’s prima facie case.[[97]](#footnote-97)

In court motions, O’Grady clarified that he did *not* seek to rely on the claim that he was entitled to judicial immunity in relation to his conduct after he became a judge, an entitlement he would not have had in relation to his conduct as a bailiff, so the court did not consider that matter.[[98]](#footnote-98) If it did, however, given current U.S. judicial privilege and immunity doctrine, it would have had to treat the same actions differently before and after O’Grady was a judge, which strikes me as unjustifiable.

Of course, a judge is different to a bailiff in that it is an essential part of the role of a judge to make pronouncements to the court. Thus, some people might argue that a judge must be free to use whatever words they deem fit without fear of *any* sort of civil proceeding against them. However, whilst it is quite clear and understandable that to be sufficiently free to do judicial acts a judge needs to be able to speak without the threat of facing civil action for defamation, for instance, it is far from obvious why a judge would need immunity from civil rights litigation for creating a hostile work environment. Provided that the relevant civil rights laws are not overbroad, there is limited risk that a substantially disproportionate amount of protected judicial speech will be swept up.

VI. *Normative Justifications for the Proposals*

I turn next to providing several normative justifications for my two main policy proposals, which, recall, are a specific judicial code of conduct rule that disallows the manifestation or appearance of bias or prejudice including but not limited to in the form of judicial hate speech, and the continued non-application (U.K.) and henceforth disapplication (U.S.) of judicial privilege and immunity to civil rights and criminal laws which directly or indirectly restrict the use of hate speech, provided those laws are not overbroad. When I speak of “normative justifications,” I mean pro tanto reasons in favor of the policies, with a particular emphasis on explaining why judicial hate speech is sufficiently harmful, wrong, or otherwise damaging to warrant the policies. These might be legitimate rationales for the policies, but they only provide narrow warrant, in the sense of saying the policies are warranted with reference to a particular morally relevant consideration or legitimate state interest in adopting the policies. This is not the same as overall warrant, as in, showing the policies are justified all things considered, taking into account all reasons for and against the policies. Manifold considerations (legal, moral, social, political, practical) go into the latter sort of assessment.[[99]](#footnote-99) Such an assessment is unfeasible in a single journal article but nonetheless I shall return to this issue in Part VII when I discuss the specific question of whether First Amendment strict scrutiny or instead intermediate scrutiny should be applied to my policy proposals.

A. *Public Confidence in the Judiciary and the Administration of Justice*

The first and most important justification for my two proposed policies is that they serve a legitimate state interest in protecting public confidence in the judiciary and the administration of justice as lawful, impartial, fair, and neutral. Suppose a judge manifests or gives the appearance of bias or prejudice through their use of hate speech (e.g. epithets, slurs, negative stereotypes, group defamatory statements, false narratives, dehumanizing comparisons, hate propaganda, etc.) about a social group or category of persons identified by a protected characteristic (e.g. race, ethnicity, nationality, citizenship status, language, religion, sexual orientation, gender identity, ability or disability, veteran status, etc.). Suppose also the hate speech is directed at a person, or simply there is at least one person, in the courtroom or chambers who is a member of the relevant social group or category of persons picked out by the hate speech (e.g. defendant, plaintiff, witness, prosecutor, defense attorney or barrister, bailiff, court stenographer, court clerk, juror, prison officer, member of the public, etc.). Suppose as well that the hate speech is either unrelated to the case or if related, nonetheless redundant or unjustified as a basis for the relevant judicial acts or decisions. In these circumstances there is a risk that this sort of manifestation or appearance of bias or prejudice could diminish public confidence that decisions are being made on the merits of the case and not from judicial animus towards certain social groups or categories of persons identified by protected characteristics. The hate speech might be reasonably interpreted by persons present in the courtroom or chambers, and by the public at large when details are reported to them, as evidence that the judge harbors bias or prejudice towards people on the basis of their protected characteristics and that the judge is therefore making unlawful, partial, unfair, and non-neutral judicial decisions in the case. Think of all the important decisions a judge makes that might fall under suspicion of actual bias or prejudice if a judge manifests or gives the appearance of bias or prejudice in their language (e.g. guilt or innocence, severity of sentence, admission of evidence, accepting or denying objections, admission of evidence, instructing jurors, summary of cases, finding persons in contempt of court or not in contempt, etc.).

The point here is that judicial hate speech can be reasonably interpreted by the public as the mask of justice slipping to reveal what really lies behind judicial decisions, i.e. the ugly truth of bias and prejudice. This is precisely why there are judicial codes of conduct related to judicial decorum in general, namely “the judicial decorum that requires judges to conceal their ethical assumptions behind their large black flowing robes.”[[100]](#footnote-100) From a professional ethics perspective, judges have a duty to be the souls of discretion and to exhibit the virtue of behaving and speaking in such a way as to avoid revealing information about their own personal or subjective views or opinions on matters of public concern. This is especially true when speaking about certain groups of people in such a way that would cause the public to believe that judges are not making or not capable of making fair and neutral decisions based solely on the merits of the case and the law.

In short, “judges must accept the restrictions that their freedom of expression is subject to in order to preserve the values without which the good functioning of the justice system would be jeopardised.”[[101]](#footnote-101) This seems to be especially important where public confidence is weakest or most at risk, such as in non-democratic countries with low public trust in public institutions across the board including the judiciary; in non-stable or newly (re-)democratised countries, like some countries within Eastern Europe, with particularly low public confidence in the justice system and the judiciary in particular due to high profile cases of corruption and/or political capture; and even in longstanding, stable democracies, like the U.S., with historically high public confidence in the judiciary, but which have seen that confidence steadily declining over the past 40 years and dropping precipitously more recently.[[102]](#footnote-102)

Of course, public confidence in the judiciary is neither linear through time nor equally geographically dispersed within a country. Sometimes a judge’s use of hate speech can hit public confidence especially hard in certain areas or regions due to the particular social context or history of those places, such as high levels of socioeconomic deprivation and/or being subject to higher levels of racial, ethnic, or religious discrimination due to its demographics. By way of illustration, consider once again the controversy in the U.K. over Judge McKinnon’s alleged use of hate speech in a case itself concerned with the alleged stirring up of racial hatred by a chairman of a far-right political party. Arguably, Judge McKinnon’s conduct posed a risk to public confidence in the judiciary not merely due to the not guilty verdict reached by the jury potentially as a result of his “bizarre” summary of the case, but also because of the blatant bias or prejudice displayed in his words (e.g. racial stereotypes, hate propaganda, racial microaggression), as well as the respect and warmth he displayed towards a far-right political figure who at the very least had expressed racist and xenophobic sentiments. Furthermore, the risk might have been heightened in those parts of the country containing higher densities of immigrant populations upon reading in the newspapers about the case. Reporting on how Judge McKinnon’s words landed with people living in the English northern town of Blackburn at the time, the journalist Peter Taylor wrote:

What the McKinnon case and its attendant publicity has done is to confirm the worst fears of both communities. Immigrants suspect that the judicial system is loaded against them in a way they had never previously seriously believed. For whites, Labour’s anti-McKinnon motion is a confirmation (possibly decisive) that politicians in London no longer understand their problems.[[103]](#footnote-103)

(Interestingly, Blackburn continues to be a town that bucks national trends. During the Brexit referendum in 2016, for example, Blackburn voted Leave with a majority of 56.3% compared to the national average majority of 51.89% for Leave.[[104]](#footnote-104) In 2024, Blackburn’s voters elected not a Labour MP but an independent MP, Adnan Hussain, in an election where Labour won a landslide majority.[[105]](#footnote-105))

The more general point here is that public confidence in the judiciary may be especially vulnerable among certain minorities within society. Indeed, evidence from the U.S., for example, shows not merely a sharp falling off of public confidence in the judiciary in recent years but substantial differentials in public confidence across demographic groups. So, for example, a 2024 Pew Research Center study of public favorability towards the U.S. Supreme Court—a reasonable proxy of public confidence—found that 48 percent of White-Americans had an “unfavorable” opinion of the Court, compared to a whopping 67 percent of Black-Americans who had an “unfavorable” opinion of the Court.[[106]](#footnote-106) When a certain demographic already has legitimate “trust issues” with the judiciary, then it can be especially corrosive for judges to manifest or give the appearance of bias or prejudice through the use of hate speech against that very demographic. This could only serve to confirm the suspicion that this group of people already has that the judiciary are biased or prejudiced against them. In one sense, it does not matter if a judge’s words or behavior only constitute the manifestation or appearance of bias or prejudice towards persons on the grounds of their protected characteristics, and not actual bias or prejudice in the sense of the judge in fact being moved to make certain judicial decisions directly because of bias or prejudice. If what is at stake is protecting public confidence in the judiciary and the administration of justice, then manifestation and appearance of bias or prejudice could matter every bit as much as actual bias or prejudice in judicial decisions. Recall from Part III the case of Judge Steven’s in which the Commission on Judicial Performance (State of California) censured him for his repeated use of racial epithets and stereotypes but at the same time made clear that in its view Judge Stevens had at all times performed his judicial duties fairly and equitably, and free from actual bias against any person regardless of race, ethnicity, or sex.

Furthermore, lack of public confidence in the judiciary, including heightened lack of confidence among vulnerable minorities or historically oppressed people, could itself have other undesirable consequences. For example, lack of public confidence in the justice system could increase public disengagement with that system and in turn, decrease its legitimacy and authority.[[107]](#footnote-107) If a particular section of society justifiably lacks confidence that the justice system is working well and providing equal protection to them, then they may also justifiably start to question whether that system even has the right to administer justice and even whether they have an obligation to cooperate with its procedures and comply with its rulings.

However, sticking with the core idea of public confidence in the judiciary and the administration of justice, it is important to remember that if this is one of the main rationales for making sure that judicial codes of conduct include specific rules disallowing the manifestation or appearance of bias or prejudice by means of judicial hate speech, then this has some important implications for the scope that rule. Suppose a judge is hearing a case involving fraudulent advertising of women’s clothing and takes the opportunity to launch a tirade against transwomen, making a series of derogatory and defamatory remarks that any reasonable person would deem to be hate speech, and that clearly manifests or gives the appearance of bias or prejudice towards transwomen. As far as the question of judicial misconduct goes, perhaps it matters not that in fact nobody in court was a transwoman. The manifestation or appearance of bias or prejudice could still damage public confidence in several ways. For example, if transwomen or transgender people in general learn of the judge’s words, they might legitimately fear that the judge or other judges will not give *them* a fair trial should they ever end up in court. Likewise, if members of other vulnerable minorities or historically oppressed communities hear about what the judge said, they could reasonably worry that if judges are prejudiced against transwomen, they might also be prejudiced against other groups. A person might think to themselves something along the lines, “First the judiciary had it in for transwomen, next they might have it in for homosexual cisgender men, or for lesbian cisgender women, and so on.”

Along similar lines, there could be an argument for extending the scope of the rule disallowing the manifestation of bias or prejudice to cover even comments made by a judge on social media. If the very reason for the rule is protecting public confidence in the judiciary and the administration of justice, then this reason would seem to hold, *mutatis mutandis*, for speech that occurs outside of the courtroom and chambers. In today’s digital society, many people get more of their news from social media than from legacy media. Interesting events, funny memes, shocking stories, public spats, and controversial uses of language are amplified and spread quickly and widely. This suggests that hate speech posted online by a judge poses a substantial threat of bringing the judiciary into disrepute and damaging public confidence. Therefore, the very reason for the rule justifies giving it a wide scope so as to cover a judge’s social media posts on top of language used in the courtroom and in chambers.

B. *Assurance of Civic Dignity*

Another normative justification for my two policies, and one that also indirectly relates to legitimacy, has to do with what the legal philosopher Jeremy Waldron calls “assurance of civic dignity.”[[108]](#footnote-108) If civic dignity is a matter of one’s “status as a member of society in good standing,”[[109]](#footnote-109) as in, social standing and legal standing as an equal citizen with the same rights as everyone else, then assurance of public dignity is about people having an assurance that they are members of society in good standing. “A well-ordered society […] has an interest in the provision of this public good, that is, in the furnishing of this assurance.”[[110]](#footnote-110) Furthermore, according to Waldron, “the prime responsibility for its provision that falls upon the ordinary citizen is to refrain from doing anything to undermine it or to make the furnishing of this assurance more laborious or more difficult.”[[111]](#footnote-111) Thus, “[t]hose who publish or post expressions of contempt and hatred of their fellow citizens, those who burn crosses, and those who scrawl swastikas are doing what they can to undermine this assurance.”[[112]](#footnote-112) However, Waldron argues that the law also has an important responsibility for the provision of the public good of the assurance of civic dignity, specifically by enforcing the obligation of individuals to refrain from undermining this assurance. According to Waldron, “that is the obligation that hate speech laws or group defamation laws are enforcing.”[[113]](#footnote-113) What is more, insofar as political legitimacy itself depends on things like public trust in government, and on the protection of the assurance of civic dignity as well as on the protection of people’s equal civic dignity itself, then these laws might also serve to protect that legitimacy, as opposed to threaten that legitimacy as some critics of these laws have alleged.[[114]](#footnote-114)

However—and this point is ignored, overlooked, or simply under-emphasized by Waldron, depending on how one reads his silence on the matter—some individuals can make a greater positive or negative contribution to the provision of the assurance of civic dignity than others, depending on their influence and audience size. It may be true that the provision of this assurance ultimately depends on what tens of millions of ordinary citizens do with their words—such as by refraining from using hate speech and by counter-speaking against hate speech—but when high-profile political figures, for example, engage in hate speech, this could be especially damaging, because vulnerable minorities may take the hint from politicians’ hate speech that they in fact lack the civic dignity on which the assurance is predicated.[[115]](#footnote-115) This might be because they interpret hate speech by politicians as evidence of legislative animus or of a willingness to deprive them of rights, or more directly as constitutive of a violation of their equal right not to be subject to hate speech.

Arguably, judicial misconduct, and specifically the manifestation or appearance of bias or prejudice in the form of judicial hate speech, may also undermine the assurance of civic dignity in a substantial or special way. How could someone who is a Muslim, for instance, feel secure or benefit from an assurance of their equal legal standing, not to mention their social standing, in the face of hearing that certain judges have used Islamophobic hate speech? If such judges have the audacity to use Islamophobic hate speech in an open courtroom, who’s to say they would not also rely on their bias or prejudice towards Muslims in their actual judicial decisions?

Just as hate speech laws—and not only the group defamation laws Waldron defends but also laws banning incitement to hatred, discrimination, or violence, and conceivably even Holocaust denial laws, for instance[[116]](#footnote-116)—can play an important role in enforcing the obligation of individuals to refrain from undermining the assurance of public dignity, a similar role might be played by more targeted legal measures that are aimed at the use of hate speech by specific categories of speakers. This could include creating or revising codes of ethics for politicians so as to incorporate rules against hate-speaking, and also disapplying parliamentary privilege and immunity with regard to criminal hate speech laws.[[117]](#footnote-117) In addition, I believe that legal measures aimed at the use of hate speech by judges could also play an important role in the overall package of public protection of the assurance of civic dignity. This includes both of my two proposals, namely judicial codes of conduct that incorporate rules against manifestations or appearances of bias or prejudice including in the form of judicial hate speech, and non-application/disapplication of judicial privilege and immunity.

These policies could be effective in ensuring that judges do not undermine assurance of civic dignity in a couple of ways. First, they could work by deterring judges from engaging in hate speech and thereby simply reducing the presence of judicial hate speech in courtrooms and chambers and the presence of recitations and copies of that particular species of hate speech across the Internet. Second, they could work by sending an important symbolic message to vulnerable minorities that bigoted judges do not represent the judiciary as a whole and do not speak for the system of justice as an institution. This official message of disapproval of judicial hate speech could reaffirm an institutional commitment to the equal standing of vulnerable minorities and thereby potentially protect their sense of their civic dignity. These policies may also serve to bolster political legitimacy, a point to which I shall return in Part VIII.

Of course, judicial misconduct and judicial hate speech in particular can do much more than damage public confidence in the justice system and undermine assurance of civic dignity (important as these are both intrinsically and instrumentally); it can also have an adverse effect on individuals who are directly on the receiving end of it, as in, those who are targeted with verbal attacks in courtrooms or chambers. It is to this other sort of normative justification for my policy proposals that I now turn.

C. *First, Do No Harm*

A plausible general principle of all professional ethics—a core tenet of medical ethics but one that is applicable to legal ethics and judicial ethics in particular—is captured by the maxim “First, do no harm.” Whatever else they do in courtrooms and chambers, judges should not unjustifiably harm the individuals with whom they come into direct contact in the course of doing judicial acts.

But what does “harm” mean here? Presumably it cannot reasonably mean something as broad as “damaging people’s vital interests.” After all, very often judges are required by law to mete out punishments to people convicted of crimes and those punishments are decidedly not in their vital interests, if vital interests include being at liberty. So, the maxim “First, do no harm” would need to be given a special reading in the context of principles of judicial ethics. Consider an interpretation along the following lines. *Do not intentionally impose, and take all reasonable steps to avoid or minimize the risk of imposing, any unnecessary harm on people in the course of doing judicial acts, where an unnecessary harm is one that could be avoided and is not essential to doing judicial acts.*

Unnecessary harms might include causing severe emotional distress to people seeking justice, in a manner that is not an inevitable or unavoidable consequence of performing judicial acts. Consider once again the U.K. case of Judge Hollingworth discussed in Part IV. The victim in the case and main witness, Patel, about whom Judge Hollingworth made the racially derogatory remark, is reported to have said this about the impact of his words upon her.

You would assume that people of this day and age, especially a judge, wouldn’t be racist. I’m more upset than angry, especially since I had already gone through so much by going to court—I was a victim of harassment, I didn’t even want to be there. And what’s worse, he did it behind my back. I’ve had counselling because of what happened with my ex, so to hear this went on is even more upsetting. I’m glad that I wasn’t in the room at the time, I don’t think I would have coped. It’s right that he’s resigned but it’s outrageous that he’s still an immigration judge—he needs to resign altogether.[[118]](#footnote-118)

A key point is that Judge Hollingworth could have easily performed the judicial task of inquiring about and organizing the availability of Patel for the sentencing hearing without expressing his own personal prejudices or biases about the most common types of employment among people with the name “Patel” or people with Patel’s ethnic background.

Harm or wrong might also take the form of a judge performing an act of social subordination through the use of hate speech. Suppose a judge uses a racial epithet, racially derogatory remark, negative stereotype or archetype based on race, a dehumanizing comparison based on race, racial hate propaganda, or some other common form of racist hate speech, about a particular racial group of whose members are present in court. This is not the same as a generic act of putting people in their place in the courtroom, such as rudely telling a group of defendants to “Go to hell!,” tersely ordering a prosecutor to “Shut the f\*\*\* up,” or passive-aggressively chiding a bailiff “When I want your opinion, I will ask for it.” Rather, the judge’s use of the aforementioned forms of racist hate speech might constitute an act of social subordination, in the sense of ranking certain people as socially inferior and thereby making them inferior in the social hierarchy, as in, making it the case that their social status is lowered in the eyes of others.[[119]](#footnote-119)

In other cases, a judge might use a dehumanizing comparison based on race or use language expressing hate propaganda about the basic worth of different races—recall the case of Judge Chargin who is reported to have alluded to Mexican Americans as “animals.” The judge’s use of these words might constitute an act of degradation, namely ranking another person or group of people as having inferior basic worth or moral value, as having not the basic worth of a human being but the basic worth of a subhuman or nonhuman animal, and thereby making them have that lower basic worth at least subjectively in the minds of other people.[[120]](#footnote-120)

How are such acts of subordination or degradation even possible? After all, even if a judge has formal authority to issue certain sorts of verdicts, such as to find someone guilty or not guilty, or to make particular courtroom decisions, such as ordering a witness to answer a question or instructing the jury to ignore a particular statement, this is not the same as having authority to subordinate or degrade in the aforementioned senses. Nevertheless, a judge may also have a certain sort of informal social authority within the particular discursive microenvironment of the courtroom or chambers, and this might be sufficient for them to perform broader acts of subordination, degradation, or humiliation.[[121]](#footnote-121) In the courtroom or chambers, a judge could have a high social standing that is distinct from their actual formal authority. This standing might reflect the mere fact that they are a judge in charge of a case but also their age, seniority, gender, socio-economic status, or their perceived epistemic standing (wisdom). People may defer to the judge’s views on the extrajudicial question of the social rank (social standing) or basic worth (moral value) of certain groups of people because they (fallaciously) assume that being knowledgeable about the law or having had experience in dealing with the public over many years, gives the judge access to special knowledge about people and about their social rank or basic worth.

At any rate, sometimes being the target of judicial hate speech can be not merely subordinating or degrading but also humiliating, such as when it is done in a public setting such as an open courtroom or simply in front of other people including in chambers.[[122]](#footnote-122) By analogy, in the Canadian case *R. v. Keegstra*,[[123]](#footnote-123) a school teacher was prosecuted under what was then § 319(2) of the Canadian Criminal Code (prohibiting wilful promotion of hatred against an identifiable group), for communicating antisemitic statements to his students, including described Jews as “child killers,” “treacherous,” and “subversive,” and using exams to test his student’s knowledge of these characterizations.[[124]](#footnote-124) Speaking to the objectives of the ban, Chief Justice Dickson opined that “a response of humiliation and degradation from an individual targeted by hate propaganda is to be expected.”[[125]](#footnote-125)

It might be especially humiliating to be targeted with hate speech by a judge in open court not simply because this is a very public setting but also because the general atmosphere is one of suspicion. People’s behavior, accounts of events, and often the contents of their character are questioned in an adversarial manner. When a judge uses common forms of hate speech, such as an epithet or negative stereotype, against an individual in open court, it could involve a double humiliation: first, having the most high status person in the room cast doubt on or condemn one’s conduct, the veracity, sincerity, or competence of one’s words, or even one’s character; second, having this done simply on the basis of an identity characteristic which might be visible for everyone to see or that has already been established as a fact in court and cannot be hidden. Consider once again the U.S. case *Boxill v. O’Grady*. Judge O’Grady sought a summary judgment in his favor, which the court denied in part. Delivering his opinion, Judge Sargus wrote as follows:

[Boxill] provided evidence that Judge O’Grady spoke about the sexual exploits of female attorneys. An objective observer could find that it is humiliating to hear women referred to in these terms, that it was embarrassing to hear Judge O’Grady’s thoughts about female attorneys and his opinion of their sexual conduct, that the frequent foul language was abusive, and that all of this could unreasonably interfere with an employee’s work performance.[[126]](#footnote-126)

I believe these points about the harms or wrongs of judicial hate speech provide a further justification for my two policy proposals, if one were needed, over and above the point about judges having a duty to refrain from conduct likely to undermine public confidence in the judiciary and the administration of justice. Importantly, a normative justification for policy proposals is not the same as the actual elements or contents of the proposals themselves. I believe judges have a general duty to avoid causing severe emotional distress to, or performing acts of subordination, degradation, or humiliation against, other people with whom they come into contact while doing judicial acts. But this does *not* mean that I am hereby proposing that authorities write such elements into the relevant judicial codes of conduct as bespoke or standalone rules, and it does *not* mean that I am hereby proposing some kind of new civil action that could be used against judges. (Elsewhere I have proposed new tests for the application of existing torts and delicts, such as the tort of intentional infliction of emotional distress, in which tort-able hate speech is defined in terms of degradation and humiliation.[[127]](#footnote-127) Yet arguably to apply that civil action to the conduct of judges would require such a huge departure from current U.S. judicial privilege and immunity doctrine as to be not a wise or practicable proposal.) A person can reasonably and without inconsistency argue that particular policies are needed partly because of certain general types of harms or wrongs associated with judicial hate speech without making those harms or wrongs bespoke or standalone elements of the proposals themselves.

Now I readily accept that some might read the above points about the harms or wrongs of hate speech with at best skepticism and at worst disbelief. This might be because, in general, they subscribe to the view that the best response to hate speech is not laws or speech codes but more speech.[[128]](#footnote-128) They might think that some of the harms or wrongs of hate speech, including not only severe emotional distress but also acts of subordination, degradation, and humiliation, can be combated through other speech and acts, notably counter-speaking and blocking. A person called a racial slur such as “nigger,” for example, could counter by explaining the deeper meaning of the term and by challenging the stereotypes conveyed. This simple act of counter-speaking could potentially mitigate or lessen the emotional distress by giving the person back a sense of control or dignity, the feeling that at least they are not taking it lying down and not allowing themselves to be turned into a victim. Likewise, a person who hears someone else aver the opinion that certain groups of people are “animals” or “savages”, or otherwise possessed of less basic worth (moral value), could interject by saying something along the lines of “That opinion is entirely wrongheaded and has no basis whatsoever in science or reasonable morality,” thereby potentially blocking the attempted act of degradation.[[129]](#footnote-129) (Of course, the issues are further complicated when, in the course of counter-speaking or blocking, the person themselves engages in yet more hate speech, “Don’t call be ‘nigger’ you fucking spic,” thus raising the question of whether there is such a thing as “righteous hate speech.”[[130]](#footnote-130))

However, as Stanley Fish points out, this sort of argument “would make sense only if the effects of speech could be cancelled out by additional speech, only if the pain and humiliation caused by racial or religious epithets could be ameliorated by saying something like ‘So’s your old man’.”[[131]](#footnote-131) But one could scarcely imagine a situation or context in which it would be more difficult for a person to counter-speak against hate speech or to block hate speech acts of subordination, degradation, or humiliation than in response to the hate speech of a judge, whether in open court or chambers. Put simply, in the case of judicial hate speech (compared to hate speech used by other sorts of speakers), there is less scope for counter-speech and blocking in virtue of the speech context and the unequal power dynamics. For one thing, a reasonable person would have legitimate fear of the possible consequences of embarrassing or antagonizing the judge. Antagonizing the judge could provoke them into making unjust legal decisions. A defendant might fear having courtroom decisions go against them during the trial, being handed down a harsher sentence if found guilty, being found guilty in a case decided by the judge rather than a jury, or being denied a reasonable plea bargain outcome—all because of trying to speak up for themselves in the face of the judge’s hate speech. Similarly, a victim of crime might fear that an antagonized judge will make decisions that weaken the case against the defendant, such as by allowing the prosecutor certain lines of questioning or disallowing certain evidence. They might also fear the judge would hand down a lighter sentence or dismiss the case entirely. Moreover, any person who takes the stand or who is present in court, might reasonably fear being held in contempt of court by a judge if they embarrass or antagonize them by blocking or counter-speaking against judicial hate speech. After all, a judge who is prepared to engage in hate speech can hardly be relied upon to exercise restraint in the application of the legal doctrine of contempt (conduct that interferes with the course of justice in a legal proceeding). This reasonable fear could also extend to when a judge posts their hate speech on social media and makes it clear they are a judge, as happened in the case of Judge Maggio discussed in Part III.

For another thing, the discursive microenvironment of the courtroom is such that it can be difficult for other persons besides the judge to have the authority, formal or informal, they might need to successfully block a judge’s act of subordination or degradation. Perhaps a prosecutor, defense attorney, or expert witness might have the status or standing to directly contradict what a judge has said about Mexican-Americans, Muslims, women, homosexuals, or transwomen, for instance, such that initially the judge has not been able thereby to rank these people as socially lesser or rank them as having lower basic worth in the eyes of the court (i.e. blocked). But if the judge is determined to persist in the matter and repeats the same stereotypes and false narratives in the face of the attempted block, “No, I say again, and please hear me, these people are…,” the block might be defeated. Here again, fear of antagonizing a judge might play into the decision to only try to block once and not twice. Moreover, ordinary people, whether defendants, plaintiffs, witnesses, or others present in court, may lack the high informal social authority of the judge, and so their attempts at blocking might fail the first time, even if they had the courage to try.

Another point worth making about the “more speech” response to the problem of judicial hate speech is that few people would seriously think this response is appropriate for other kinds of transgressive courtroom speech. Few people argue, for instance, that the right response to a prosecutor or defense attorney misquoting a witness, badgering a witness, or even posing questions to a witness containing racist stereotypes or misogynistic myths, would be for a judge to simply allow the witness to speak back or for “the other side” to speak back or to do exactly the same towards other witnesses or even towards the opposing lawyer. Sometimes the administration of justice (a fair trial) requires a judge to intervene to require the prosecutor or defense attorney to rephrase a question or even end a certain line of questioning on pain of being held in contempt of court. If it is clear that badgering a witness can undermine a fair trial and that appropriately combating this practice can mean a judge imposing restrictions on the words or behavior of prosecutors and defense attorneys (courtroom speech codes) rather than simply relying on “more speech,” then surely similar can be, and should be, said in relation to judicial hate speech, namely that it can undermine a fair trial and that appropriately combating this practice can mean relevant authorities imposing judicial codes of conduct that include rules disallowing the manifestation or appearance of bias or prejudice in the form of judicial speech.

D. *Giving Others Permission to be Bigots*

Yet another normative justification for my two policies invokes the idea that judicial hate speech might, even if implicitly and unintentionally, give others permission to be bigots. In the most egregious cases, a judge’s manifestation of bias or prejudice through the use of hate speech could be so blatant as to influence, embolden, or even sanction a jury to make a decision in the case based on their own bias or prejudice. This is not a matter of the judge’s words, for example, creating prejudice against the defendant, plaintiff, or witness in the mind of the jury *ex nihilo*. Rather, it is a case of the judge’s words acting like a dog whistle, implicitly giving the jury permission to unleash their own personal antagonism or bigotry towards the defendant, plaintiff, or witness all because of their identity characteristics. Suppose in a case involving a Columbian defendant facing charges of dealing drugs, the judge uses his own orations to paint an image of Columbian drug dealers as having a criminal propensity due to their Colombian heritage, to suggest that Colombian drug dealers are the most violent of all drug dealers all because they are Colombian, and to make repeated references to popular television programs showing Colombian drug dealers as blood-thirsty and utterly despicable. It is possible that not only do the remarks resonate with prejudices some jurors already have about Colombian drug dealers but could be reasonably interpreted by those jurors as the judge giving them permission to draw on those prejudices in coming to a decision about a Colombian defendant.[[132]](#footnote-132)

In other cases, a judge’s use of hate speech might target the very same group that the defendant themselves have targeted in a case involving allegations of unlawful hate speech. Recall from Part IV the British case of Judge McKinnon. In summing up a trial involving a leader of a far-right political party who was charged with the criminal offence of stirring up racial hatred, Judge McKinnon took the opportunity, amongst other things, to expound some of his own personal views on the state of race-relations and immigration in the country, including stereotypes and false narratives or myths about immigrants from former British colonies—views which very closely mirrored those of the defendant. The judge also applauded the defendant for having “had the guts to come forward in the past and stand up in public for the things that he believes in.” It is highly likely that Judge McKinnon’s words would have tapped into any racist and xenophobic sentiments latent in the jury, if indeed there were any such sentiments to be so tapped, and, what is more, could potentially have been read or interpreted by the jury as McKinnon giving them permission to rely on their own racist and xenophobic sentiments in coming to the conclusion that a defendant cannot, and should not, be found guilty of a criminal offence of stirring up hatred simply for standing up in public for the things that he believes in, and that the judge and they as jurors might also believe in.

However, even if a judge’s use of hate speech does not implicitly give jurors permission to give full effect to their own bias or prejudice in coming to their decisions, there could be other ways in which judicial hate speech might give others permission to be bigots. At the very least, judicial hate speech might have the undesirable effect of legitimizing, normalizing, or setting a bad example with regards to other people also using hate speech, whether in the courtroom or in wider society. I have previously argued elsewhere that the use (or abuse) of hate speech by politicians can be especially egregious because it can legitimize, normalize, or set a bad example with regards to other people’s use of hate speech.[[133]](#footnote-133) This is due to the special authority, power, and influence many politicians have.[[134]](#footnote-134) I believe something similar could be said about judges, specifically that due to a combination of their formal authority and informal social authority or influence, especially within the courtroom setting, judges who use hate speech might end up legitimizing, normalizing, or setting a bad example with regards to other people’s use of hate speech.

That a judge could end up leading others down the path of using hate speech seems especially likely given the fact that the judge is also the arbiter of courtroom decorum and decides on contempt of court. So, if a judge makes misogynistic or sexist remarks about women, for instance, other people in court might be forgiven for assuming that such remarks are fair game. Consider the following example of judicial misconduct reported in testimony given by an attorney to a study into court gender bias commissioned by the Florida Supreme Court.

Debate got fairly heated, and the circuit judge said there was nothing worse than two women arguing. It gets better because then the bailiff commented, ‘Meow’.[[135]](#footnote-135)

It is one thing for a bailiff to take their lead from a judge, but what if the prosecutor or defense attorney also falls into using hate speech based on an assessment, conscious or unconscious, that the judge has given the green light for such speech by using it themselves? This could in turn make the court experience that much harder, and fair trial proceedings and outcomes that much more a distant hope, from the perspective of others in court, whether the defendant, the plaintiff, or the witness, who find themselves on the receiving end of hate-filled cross-examination.

Ironically, some people have argued that certain codes of ethics for lawyers are not needed because “the more neutral role of judge is arguably better suited to squelching manifestations of ‘bias or prejudice’.”[[136]](#footnote-136) But this argument falls flat if it turns out that some judges are themselves responsible for manifestations of bias or prejudice, and if lawyers are taking lessons about courtroom decorum from those judges.

Lawyers are not the only ones who might be taking lessons from what judges say, whether in court or online. Judicial hate speech might also legitimize, normalize, or miseducate the general public about the practice of hate speech. Judges can be many things to many people, including symbols of power, role models, exemplars, and even minor celebrities. Thus, for judges to engage in hate speech could provide a sort of implied rubber stamp or seal of approval of other people’s practices of hate-speaking. (This might be similar to the way a legislature failing to enact a hate speech law, or a judge striking down a hate speech law, or police officers failing to apply a hate speech law or simply being unable to intervene because there are no hate speech laws, might serve as an implicit official legitimation or endorsement of the act of hate-speaking in the eyes of the public, and perhaps also of the content of what they are saying, on top of making it legal.[[137]](#footnote-137))

In addition, when a judge uses hate speech in court or chambers, and this is picked up on social media, then it could send out an implicit message that engaging in hate speech is a valid option to choose, a perfectly normal activity, or within the spectrum of regular speech. As such, it may lead people to consider their own hate-speaking as normal or not out of the ordinary. It might even affirm a kind of institutional or ‘insider’ approval of hate speech as being legal. ‘If judges do it, then it must be legal’, a person might think to themselves, even if mistakenly. Being exposed to online stories about judicial hate speech could cause people to get lazy and stop reflecting on the legality or illegality, as well as the moral rights and wrongs, of the hate speech they use. They might assume that judges have some sort of epistemic authority on the issue. And so, whether intentionally or unintentionally, a judge who uses hate speech might wind up miseducating people about what the law of the land is. Of course, judges are not the only sources of wisdom about unlawful hate speech; there are also lawyers, legislators, public prosecutors, citizens’ advice organizations, the police, the media, legal scholars, and so on. But who is to say which ‘voice’ will be the loudest or will be most carefully listened to? If people are already engaged in certain behaviors, they may be likely to listen to whichever person tells them what they want to hear, namely that what they are doing is legitimate, normal, and legal. Judges operate in a marketplace of ideas of sorts, but sometimes a judge might be “mis-selling” or “falsely advertising,” so to speak, certain words or assumptions, such as derogatory, defamatory, or threatening words about certain groups of people and connected assumptions that these words are not hate speech and/or not unlawful hate speech. And most stable, well-regulated marketplaces restrict such things as mis-selling and false advertising.

E. *Lending Authority to Ordinary Hate Speakers*

My final normative justification of the two policy recommendations set out in Part V has to do once again with harmful or wrongful acts, and with how speakers obtain the capacity, power, or authority to do those acts. I have argued elsewhere that when politicians use (or misuse) hate speech, they can be in effect lending or giving informal social authority to ordinary hate speakers who are as a result themselves able to perform prototypical hate speech acts such as those discussed in Part VI.B, namely subordination, degradation, and humiliation.[[138]](#footnote-138) The list is not exhaustive, other acts could include pigeon-holing, marginalizing, defaming, threatening, or inciting hatred against, for example.[[139]](#footnote-139) Once again, I believe that similar things can be said about judicial hate speech, specifically that when a judge uses hate speech this might lend or give an informal social authority to ordinary hate speakers, to be able to perform prototypical hate speech acts such as those listed above.

To clarify, this lending or giving of authority is not the same as a U.S. marshal deputizing someone, for example, as the marshal example involves a kind of transferal or devolution of formal authority. Instead, I am talking about a process by which other people in a judge’s ambit might end up with an informal social authority in virtue of the judge’s own use of hate speech. One might say they acquire a kind of imperfect facsimile of the judge’s formal authority. The conditions for this acquisition might be that when the judge hate-speaks it is done in front of a group of people, and subsequently some of those people hate-speak against others in the group, whilst shooting glances at the judge. If the judge then remains silent and does not intervene to correct or admonish them, then a lending of authority may occur. This could also require mutual understanding among the parties that this is what is going on, as in, mutual understanding that by dint of the judge’s conduct (i.e. the judge hate-speaking and then remaining silent when others copy this) the judge is indeed lending authority to other people. However, when a judge takes to social media to do their hate-speaking, the ambiguous nature of the online interaction may be such that there is no mutual understanding and the cues are not easily readable, and so online judicial hate speech might not be a reliable means of lending authority to others.[[140]](#footnote-140)

By way of further clarification, I am not seeking to make the (implausible) claim that judicial hate speech—or the sum of hate speech performed by all public employees and political figures—is the sole source of authority granted to ordinary hate speakers. On the contrary, hate speakers can obtain the requisite capacities, powers, or authorities in a multitude of different ways.[[141]](#footnote-141) To take one example, Abigail Levin identifies state institutions, and particularly the decisions that legislatures and courts reach and communicate over the prohibition or non-prohibition of hate speech, as one important source of authority devolved to, or assumed by, ordinary hate speakers in being able to subordinate their targets (i.e. ranking them as inferior, legitimating discrimination, and depriving them of rights and powers).[[142]](#footnote-142) Nonetheless, what I am suggesting is that judicial hate speech is one additional way in which ordinary hate speakers located in courtrooms and chambers can end up with authority to perform prototypical hate speech acts, even if this lending of authority is done in an implicit and unintentional way. I also believe that my two policy recommendations serve a legitimate state interest in blocking this lending of authority, and thereby potentially also blocking the sorts of acts that ordinary hate speakers might perform if they were lent this authority.

VII. *Scrutiny*

I now wish to address an objection that could be levelled at my two policy recommendations, namely that they are not the least restrictive available means of achieving the pressing state interest in protecting public confidence in the judiciary, for example. After all, authorities could seek to rely on better systems of legal education and training, and on existing laws and rules on mistrials, recusals, and reversals that might pertain to judicial misconduct including judicial hate speech. These would be less restrictive (so the objection runs) than a policy of revising judicial codes of conduct and imposing administrative sanctions on judges, and a policy of disapplying judicial privilege immunity in the face of civil rights and criminal liability for judicial hate speech.

I make two responses to this objection. The first is to point out once again that there are potentially several normative justifications for adopting these policies. So, the question is not simply whether the policies are an over-the-top restriction with regards to the pressing state interest in protecting public confidence in the judiciary; the question is whether the policies are necessary given the full range of legitimate state interests in play. Perhaps other measures alone cannot serve all the legitimate state interests, in which case these other measures may be less restrictive but they are not just as effective. In other words, they are not proper alternatives. Why not? For one thing, if better judicial education and training were a magic pill, then the undoubted increase in such education and training that has occurred over many decades could and should have yielded better results. This measure continues to not ‘reach’ certain judges or is simply not taken seriously by them or in some cases even resented or mocked, making it potentially counter-productive. Some judges, perhaps those most likely to use hate speech, may even be ideologically resistant to things like unconscious bias training and critical race theory, which they reject as “political correctness gone mad” or “Woke fascism.”

Of course, there are at least three other measures already in place that can be used to deal with manifestations of bias or prejudice in the form of judicial hate speech, but fall short of “sanctions”—or might be “quasi-sanctions”—namely, mistrial, recusal, and reversal. Starting with mistrial, Art. 770(1) of the Louisiana Code of Criminal Procedure, for example, states: “Upon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to: […] Race, religion, color or national origin, if the remark or comment is not material and relevant and might create prejudice against the defendant in the mind of the jury […].”[[143]](#footnote-143) Yet the obvious problem with mistrial as a device for combating judicial hate speech is the fact that it is the judge who makes the decision about whether or not to accept a motion for mistrial. It is likely a judge may be biased in judging the nature of their own language, on top of any manifestation or appearance of bias or prejudice upon which a motion for mistrial may be based. Even if a judge accepted the general principle that if any judge used language that was so rooted in negative stereotypes and false narratives or myths about a group of people identified by a protected characteristic such as to reveal a high degree of bias and prejudice sufficient to make a fair judgment impossible, but simply fail to see or understand how their own remarks about women, for instance, could be construed as peddling stereotypes and myths, even after receiving and reflecting on a motion for mistrial to that effect.

Turning next to recusal, a judge could take ownership of their own misconduct by recusing themselves, as they are required to do under Title 28, § 455(a) of the U.S. Code: “Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” If this does occur, it would seem to speak to a judge taking their misconduct seriously. The problem being that once again the recusal measure puts the judge in charge of judging their own conduct and is therefore vulnerable to personal bias.[[144]](#footnote-144) Would a judge who apparently thinks it is acceptable to call women “whores” or Mexican-Americans “animals” in open court have the presence of mind to recuse themselves from a case on the grounds that their use of such language gives the appearance of bias or prejudice?

Finally, consider the judicial measure of an appellate reversal. If a judge were to advise a jury “Please understand that in my experience Black youths tend to fight dirty,” then the defendant’s right to a fair trial has been violated, and would be grounds for reversal. However, critics have argued that using reversal as a symbolic sanction might carry insufficient deterrence effect to change future behavior, especially among recalcitrant judges and truly committed bigots, and, furthermore, that using reversal in this way unwisely blurs the line between ensuring members of the public receive justice and disciplining judicial misconduct.[[145]](#footnote-145)

My second response to the objection is to reject the implicit assumption that my proposed policies must survive a strict scrutiny test simply because the First Amendment is implicated. US courts do not always apply strict scrutiny whenever there is a whiff of First Amendment rights in the air. In fact, very often U.S. courts apply an intermediate scrutiny test in such cases, to such an extent that some scholars as well as judges have interpreted this as the most prevalent and even the default test.[[146]](#footnote-146) Now it is also true that sometimes the courts have applied the intermediate scrutiny test precisely because the restrictions in question are content-neutral, such as restrictions of time, place, and manner imposed on demonstrators, who may happen to be anti-abortion demonstrators but could be any demonstrators.[[147]](#footnote-147) Nevertheless, in other cases, the courts have applied intermediate scrutiny even to content discriminatory restrictions, such as restrictions on commercial speech.[[148]](#footnote-148) Commercial speech is traditionally deemed to have less protection than, say, political speech. Of course, as stated in Part II of this article, some US courts have recognized hate speech as a category of protected speech. But at the same time, this does not mean that any law that happens to restrict hate speech must stand and fall under strict scrutiny. Commercial speech is also protected speech, only it has less protection, and so intermediate scrutiny becomes appropriate. Could it be that hate speech is a category of protected yet simultaneously less protected speech? Indeed, one way to read the wording of *American Booksellers Association v. Hudnut*, *Snyder v. Phelps*, and *Matal v. Tam*, is to describe these courts as making clear that hate speech is not a category of unprotected speech. Read in this way, it is easier to see how hate speech could be both not unprotected speech and less protected speech. Ironically, in *Snyder v. Phelps*, one complicating factor is that for all intents and purposes the U.S. Supreme Court treated the speech in question not as hate speech at all, but as political speech, which traditionally attracts greater protection under settled First Amendment doctrine. It was essentially declaring not so much that hate speech is protected speech but rather that political speech is protected speech.

Interestingly, in *United States v. Stevens*,[[149]](#footnote-149) the U.S. Supreme Court clarified that the test for which categories are unprotected speech is not balancing tests, much less judicial invention, but solid historical precedent. It is a matter of identifying “previously recognized, long-established” categories of unprotected speech by pointing to previous court decisions identifying them as such. But should not the same historical test apply, *mutatis mutandis*, to categories of protected speech (e.g. political speech) and to categories of protected yet less protected speech (e.g. commercial speech)? Arguably, prior to relatively recent history, as in, prior to *Hudnut*, hate speech was *not* a previously recognized, long-established category of protected speech. This can be evidenced with the following important detail about the judgment in *Hudnut*. Here the U.S. Court of Appeals for the Seventh Circuit proffered the dictum that “[o]ne of the things that separates our society from [societies ruled by totalitarian governments] is our absolute right to propagate opinions that the government finds wrong or even hateful.”[[150]](#footnote-150) The term “hateful,” given its plain or ordinary meaning, is ambiguous between speech that is itself deserving of hatred, which could be almost any speech, and speech which is filled with hatred, for example, racist speech which is filled with hatred towards people of a certain race, ethnicity, or skin color.[[151]](#footnote-151) So, it is simply unclear whether the Seventh Circuit in *Hudnut* was even using the *same concept* as the U.S. Supreme Court later invoked in *Matal v. Tam* when it declared “[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful.”[[152]](#footnote-152) At any rate, in the paragraph following the “even hateful” dictum in *Hudnut*, the Seventh Circuit cited several cases presumably meant as evidence of historical precedent regarding “even hateful” speech as a category of protected speech.[[153]](#footnote-153) Yet in fact only one of those cited cases involved what would be generally recognized as “restrictions on hate speech,” “hate speech law,” or “group defamation laws” (which would have been the operative label at that time). The cited case was *Collin v. Smith II*,[[154]](#footnote-154) which concerned several village ordinances, some of which addressed procedures for obtaining permits for marches and one of which explicitly prohibited “the dissemination of any materials within the Village of Skokie which promotes and incites hatred against persons by reason of their race, national origin, or religion, and is intended to do so.” It is also worth noting that the lower court in *Collin v. Smith I*,[[155]](#footnote-155) interpreted the Nazi uniforms and racist speech as “political speech,” and correctly explained that political speech receives higher protection.[[156]](#footnote-156) This gives the impression that the U.S. District Court was essentially declaring, not so much that hate speech is protected speech, but rather that political speech is protected speech, much like the U.S. Supreme Court did in *Snyder v. Phelps*.[[157]](#footnote-157) Furthermore, all the other cases cited by the Seventh Circuit in *Hudnut*[[158]](#footnote-158)—by way of historical precedent for its “even hateful” dictum—touched on various types of restrictions that are in fact unrecognizable as either “hate speech laws” or “group defamation laws.”

Furthermore, arguably, going back to the first half of the twentieth century, hate speech in the specific form of group defamation was in fact recognized by the U.S. Supreme Court as a category of unprotected (or less protected) speech, as shown by its decision in *Beauharnais v. Illinois*.[[159]](#footnote-159) This case concerned what is a clearly recognizable “hate speech law” or “group defamation law” and, in a majority decision, the Court upheld the restriction as constitutional (albeit with dissenting opinions). While some First Amendment scholars regard *Beauharnais* as no longer good law,[[160]](#footnote-160) other scholars have described *Beauharnais* as falling within a broader historical tradition of carving out limits to free speech when it comes to seditious libel and group defamation,[[161]](#footnote-161) as having a legacy in more recent court decisions,[[162]](#footnote-162) and as being more relevant and needed today than ever before, socially speaking.[[163]](#footnote-163)

In fact, many U.S. states still have laws on the books that could be interpreted as falling under the general category of “hate speech laws” because they directly or indirectly restrict recognized forms of hate speech.[[164]](#footnote-164) Current state hate speech laws include: arousing prejudice statutes;[[165]](#footnote-165) promotion of hatred statutes;[[166]](#footnote-166) group defamation statutes;[[167]](#footnote-167) and commercial advertising group ridicule or contempt statutes.[[168]](#footnote-168) When, in those rare cases, these kinds of laws have come before the relevant state supreme courts, they have sometimes been struck down as unconstitutional on First Amendment grounds, but typically for reasons to do with the way the statutes construct defamation itself (overly broad) rather than for the mere fact of also restricting *group defamation*.[[169]](#footnote-169) However, state hate speech laws have not always been struck down. *Cerame v. Lamont*[[170]](#footnote-170) is a case from 2023 in which the Connecticut Supreme Court ruled on § 53-37 of the Connecticut General Statutes (a commercial advertising group ridicule or contempt statute). The statute states: ‘Any person who, by his advertisement, ridicules or holds up to contempt any person or class of persons, on account of the creed, religion, color, denomination, nationality or race of such person or class of persons, shall be guilty of a class D misdemeanor.’[[171]](#footnote-171) The Court confirmed that statute §53-37 only applies to commercial advertisements—as per its plain or ordinary meaning combined with meaning based on legislative intent—and rejected the plaintiff’s argument that the statute violated his First Amendment rights and declined to permanently enjoin the enforcement of the statute. The case is especially interesting because it involves the restriction of a subset of commercial speech, to wit, commercial speech-hate speech. This case suggests that, at least in the eyes of the Connecticut Supreme Court, commercial speech is less protected speech and does not magically become more protected when statutes restrict only a subset of commercial speech, specifically commercial speech-hate speech, and, by implication, that hate speech is likewise less protected speech.

Nevertheless, because we are in the terrain of First Amendment doctrine, it is not enough for me to show merely that my two policy recommendations are rationally related to a legitimate government interest or plurality of normative justifications. The standard of scrutiny must be higher. But the question is: how high? The reasons or grounds upon which courts select strict scrutiny over intermediate scrutiny or vice versa as the appropriate test or standard in given First Amendment cases are of course contested and open to interpretation by judges themselves.[[172]](#footnote-172) Sometimes it is hard to predict which standard of scrutiny a court will employ in a given case simply based on the existing First Amendment jurisprudence; it can appear as though judges first form an instinct as to how they wish to decide a case (be that instinct legal, moral, or political), and then retrofit the choice of standard of scrutiny to achieve the desired outcome.[[173]](#footnote-173)

So, I too will simply offer an argument. It is that because we are in the area of the speech of public employees, it is at best unclear that strict scrutiny ought to apply and potentially clear that intermediate scrutiny should apply instead. Of course, it is important to acknowledge that judges are not like other public employees. Since they enjoy judicial privilege and immunity, it could render any talk of scrutiny moot in some cases, at least with regards to civil actions. But let us set that other issue aside for the moment, and simply focus on the fact that judges are public employees. I believe that given this fact, intermediate scrutiny would suffice.[[174]](#footnote-174) In which case, there need only be a sense in which the policies are narrowly drawn and not substantially more restrictive than is necessary to achieve legitimate state interests, even if they are not in fact the least restrictive available means.[[175]](#footnote-175) In other words, so long as the policies serve legitimate state interests and are not gratuitously restrictive, then all is well; that is to say, provided the policies also represent a reasonable balance between the First Amendment rights of judges as public employees and the legitimate state interests (the Pickering-Connick test). I believe that my two policy recommendations meet the thresholds imposed by both the intermediate scrutiny standard and the Pickering-Connick test.

However, there is one potential constitutional hurdle that could be considered fatal at the very least to my proposal relating to judicial codes of conduct, specifically the fact that by containing the phrase “manifestation or appearance of bias or prejudice towards people on the grounds of race, ethnicity, and so on,” judicial codes of conduct appear to be content discriminatory and even viewpoint discriminatory and, therefore, unconstitutional.[[176]](#footnote-176) After all, the U.S. Supreme Court has held that even unprotected speech should not be molested by laws that involve unjustifiable content and viewpoint discrimination. For example, in *R.A.V. v. City of St. Paul*[[177]](#footnote-177)Justice Scalia set out the Court’s majority opinion that even if categories of speech like fighting words are less protected or even unprotected, it is “not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination.”[[178]](#footnote-178)

Nevertheless, Justice Scalia also articulated certain “valid bases” on which a law might involve content and viewpoint discrimination without posing First Amendment problems. One such valid basis is the following: “[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists.”[[179]](#footnote-179) Suppose one of the main reasons that judicial codes of conduct restrict even the speech of judges is to protect public confidence in the judiciary and the administration of justice, then it might be legitimate for authorities to only restrict particular kinds of problematic judicial speech, such as the manifestation or appearance of bias or prejudice, because such speech poses a substantially great threat to public confidence. Similarly, it might be legitimate for authorities to cite hate speech as an example because it is one of the clearest or most blatant kinds of manifestation or appearance of bias or prejudice. This citation could be made in explanatory comments attached to ethics codes, as I have suggested.

VIII. *Conclusion*

In this article I have defended the principle that judges should avoid using hate speech in court, unless in the course of mentioning or quoting hate speech for legitimate judicial reasons. Legitimate judicial reasons do not include judges using hate speech as part of a soap box speech or diatribe to express their own viewpoint. Judges do not have an unlimited right of free speech. Their speech can be justifiably restricted when it takes the form of online posts as well as when they are speaking to a witness, summarizing a case to the jury, passing sentence to a guilty party, or talking to a prosecutor or defense attorney or barrister in their chambers. Legitimate judicial reasons also do not include judges using hate speech in the process of chastising, disciplining, or directing actors in court or giving judicial decisions on courtroom issues, when the hate speech is irrelevant to the case and decisions.

I have discussed some cases in which judges have used hate speech that constitutes judicial misconduct but might not rise to the level of unlawful hate speech. Nevertheless, there remains the specter of a judge using hate speech in a way that is unlawful whilst in the process of administering the law. It could happen that a judge displays the most egregious hypocrisy in this regard. For example, a U.S. judge could be hearing a civil rights case centered on an employee’s repeated use of hate speech to create a hostile work environment for other employees, and in the course of the proceedings the judge themselves could use (as opposed to mention) hate speech to create a hostile work environment for other legal professionals in the courtroom and chambers. To give another example, a UK judge could be presiding over a case involving a prosecution for the criminal offence of using threatening words or behavior with intent or likelihood of stirring up racial hatred, and during the trial, such as when directing the jury, summing up the case, or passing sentence, the judge could themselves use words or behavior in a manner that places themselves on the wrong side of the very same stirring up hatred statutes. Judge McKinnon may have come dangerously close to this (see Part IV supra), even though he would have found this suggestion as preposterous as the accusation that the defendant in the relevant case had broken the law.

For these reasons, I have made two policy recommendations, namely a specific judicial code of conduct rule that disallows the manifestation or appearance of bias or prejudice including but not limited to in the form of judicial hate speech, and the continued non-application (U.K.) and henceforth disapplication (U.S.) of judicial privilege and immunity to civil rights and criminal laws which directly or indirectly restrict the use of hate speech, provided those laws are not overbroad. I have also argued that there is a legitimate state interest in combating judicial hate speech because it risks damaging public confidence in the judiciary and the administration of justice; undermines assurance of civic dignity; harms or wrongs the individuals who are exposed to it; implicitly gives others permission to be bigots; and lends authority to ordinary hate speakers. Furthermore, I defended First Amendment intermediate scrutiny for restrictions on judicial hate speech.

Why offer plural normative justifications rather than simply focusing on one? Here are two good reasons. One is that it is a way of arguing in the alternative, itself a strategy of argument commonplace in the law. Let us assume I am offering up normative justifications for my two policy recommendations to people who are at best skeptical and at worst opposed to these proposals, or to people who are simply on the fence. Offering up multiple normative justifications could be a good strategy because if my interlocutors reject one of them, I always have another to fall back on; and because offering up multiple justifications could help to tip the weight of arguments in my favor if they are finely balanced.

A second, although related reason is that society is marked by ‘reasonable disagreement’ over conceptions of the good, as John Rawls puts it.[[180]](#footnote-180) This means that different people, including different judges, may hold different reasonable comprehensive doctrines about ethics including legal ethics and judicial misconduct.[[181]](#footnote-181) As such, the best chance of reaching an overlapping consensus on an given judicial code of conduct is if judges can be given a range of normative justifications for the code (or ‘public reasons’[[182]](#footnote-182)), so that there might be at least one reason they can embrace. Getting judges to buy into the judicial code of conduct also has practical importance, for they are then more likely to comply with it and over time internalize it such that compliance becomes second nature.

However, I shall bring this article to a conclusion by articulating and replying to two remaining objections to my policy recommendations. The first objection is essentially that the recommendations have undesirable unintended consequences. In particular, if judicial decorum requires judges to conceal underneath their black robes their own biases or prejudices—what the judges themselves might view as simply their own personal opinions or viewpoints about society and the people who live in it—then persons in court and wider society might never get to know what judges really think. Such total discretion might not necessarily be a good thing. By analogy, someone might think it is better to allow politicians free reign to use hate speech so that voters might know what they really think. Indeed, they might even consider it unethical for politicians to falsely deny using hate speech because it is intrinsically deceitful and makes it harder to make informed voting decisions.[[183]](#footnote-183) Similarly, would it not be better to have judicial hate speech out in the open so at least we know what actual bias or prejudice to watch out for in judicial decisions? The approach of imposing judicial codes of conduct and disapplying judicial privilege in relation to judicial hate speech risks making judges even more tight lipped.[[184]](#footnote-184) Is this not tantamount to *ex ante* suppression of evidence of judicial animus? Consider once again the case of Judge McKinnon. Because he used hate speech in court, people came to realize that he harbored bias or prejudice against Black immigrants in Britain and as a result he ended up committing to no longer presiding over cases involving issues of race. If one cares about removing actual bias and prejudice from the administration of justice, surely this was a good outcome (although not as good as Judge McKinnon having an epiphany and internally banishing his bias or prejudice). But could it have happened if Judge McKinnon had been scared into not expressing his views in the first place? If there had been a chilling effect and he had kept silent, then he might have simply carried on presiding over cases involving race, with his bias and prejudice spreading their poison under the surface. How could that be a good thing? Might it have lulled people into a false sense of security that there are no bigoted judges when in truth there are?

However, even if one were to accept these consequences are real and undesirable, it does not automatically follow that the conclusion is right. There are also undesirable consequences that come with not taking measures to combat judicial hate speech.[[185]](#footnote-185) Some of these undesirable consequences are set out in the five normative justifications outlined in Part IV and paraphrased at the start of this Part. So, a relevant question is whether the alleged consequence of pushing judges to be more right lipped is substantially worse than the consequences of not seeking to combat the problem of judicial hate speech using the sorts of measures I have defended in this article. I would argue the greater weight of undesirable consequences clearly pushes the scales down in favor of the measures.

In addition, even if judicial hate speech is one useful bellwether for the bias or prejudice that some judges may harbor for vulnerable minorities and historically oppressed groups, it is surely not the only bellwether. There are also the many judicial decisions they make. For those willing to look, these decisions can demonstrate actual bias or prejudice, and this can then be tracked and combated. Blatant failures to follow due procedures in regulating cross-examination and systematically meting out either harsher or more lenient punishments, all depending on the race of the defendant, displays actual bias or prejudice in judicial decisions, even without linguistic manifestation or appearance of that bias or prejudice, and can tell society what it needs to know about the relevant judges. And so, it is simply not necessary to let judges use hate speech with impunity (with all the harm and damage this does) simply to keep tabs on their bias or prejudice.[[186]](#footnote-186)

Furthermore, arguably, Judge McKinnon ended up stepping back from cases involving issues of race precisely because of the presence of judicial codes of conduct and the intervention of those administering the codes. His meeting with the Lord Chancellor most likely got him to ‘voluntarily’ step back from such cases before he was made to step back. These standards of professional ethics did not make him suppress his true attitudes. These things came out, partly because he would not have recognized them as being manifestations of bias or prejudice in the first place. Part of why such codes are needed is that there exists a hard-core of judges who either simply fail to recognize their own language as manifesting bias or prejudice or who are inclined to stubbornly persist in expressing themselves exactly as they see fit. However, this does not somehow prove that the codes are ineffectual and redundant. Judicial codes of conduct can be useful for the very reason that they work in different ways on different judges, and serve different functions or purposes: they may have a deterrence effect for some judges, a potential educative and reforming role for other judges, and an educative and symbolic value for society in general.

There is one final objection to my two policy proposals I must consider. In Part VII, I asked whether there might be other, less restrictive ways of combating the problem of judicial hate speech than my recommendations concerning a revised judicial code of conduct and the non-application/disapplication judicial privilege or immunity in cases of unlawful hate speech. I discussed measures involving mistrial, recusal, and reversal. But these certainly do not exhaust the possibilities. Rather than impose codes of conduct and associated administrative sanctions, and even apply civil rights laws and criminal laws, to judges who use hate speech, why not instead simply let judges face social criticism in public fora and stand trial in the court of public opinion, so to speak? After all, just because a judge acts as though, or presupposes, that what they are saying is perfectly acceptable, because they assume it is not hate speech or not unlawful hate speech, this does not necessarily mean this will be accepted by the public. Other people can openly challenge the assumption and block the normalization of hate speech. The problem comes when other people remain silent on the matter: this silence allows the presuppositions to stand.[[187]](#footnote-187) Yet as the row over the comments of Judge McKinnon demonstrates, other people did not remain silent. More than 100 MPs and a group of 20 non-White barristers took a stand and engaged in counter-speech against Judge McKinnon. They did not accept his words as legitimate or normal, quite the opposite. It is also at least possible that this public outcry—and what today would probably have led to a mass public shaming event or what is called a ‘pile-on’ in the world of social media—was part of what led Judge McKinnon to state his intention not to hear cases on issues of race going forward.

However, even if one accepted the assumption that the court of public opinion really is less restrictive than the two proposals I have suggested—and this assumption is far from obviously correct or self-evident[[188]](#footnote-188)—there are other major problems with public shaming as a tool of upholding legal ethics. One is the fact that the deployment of this tool is contingent upon journalists or social influencers getting wind of a particular bit of judicial hate speech; upon the story going viral on social media; upon public opinion coming down hard against the judge, as opposed to being evenly divided between supporters and critics; and, most importantly, upon the judge caring about the public criticism. What if Judge McKinnon was a stubborn sort? Maybe it took the Lord Chancellor’s threat of disciplinary action to ‘persuade’ Judge McKinnon to ‘voluntarily’ commit that he shall not preside over any further cases dealing with issues of race. Having in place a set of official policies to deal with judicial hate speech, such as judicial codes of conduct and/or the non-application/disapplication of judicial privilege and immunity, means a more consistent treatment, one that is not contingent upon the perpetrator’s propensity to cow to public opinion or upon public opinion forming in the first place. These policies also embody one of the core values of the rule of law, namely predictability. Provided the policies are clear and made public, a judge could make a reasonable prediction about the administrative and legal consequences of using hate speech. The consequence of being subject to a mass shaming event at the hands of the public is much less predictable by comparison, because it is dependent on unreliable processes.

However, even if public shaming or verdicts delivered in the court of public opinion could be effective as a social sanction against judicial hate speech, this sort of social sanction faces other problems. One major problem is that the sanction is as likely to be biased and unfair as it is unbiased and fair, typically because those doing the criticism and judging are not fully informed and not trained in legal ethics.

Now it might be appropriate if the public criticism were led by other judges as a sort of collegial or peer-based horizontal informal discipline system, but this is unlikely. Judicial codes of conduct include rules against bringing the judiciary into disrepute in the eyes of the public and, as applied, these rules can restrict what judges are allowed to say about other judges in public. In general, if judges are seen to be squabbling or attacking each other in public, this could be classified as bringing the judiciary into disrepute. The assumption among authorities in charge of judicial discipline could be that it is better not to air dirty laundry out in the open. (This assumption may have a predictable chilling effect on judicial whistle blowers. Consider as an illustration, the fallout from comments made by the British Judge Peter Herbert about the judiciary in 2015. Although his comments did not constitute accusing another judge of using hate speech, they did involve an accusation of racism, and what happened to Judge Herbert can be seen as a cautionary tale for what happens when judges speak out against other judges. The controversy began when the High Court found a Bangladesh-born British elected mayor of the London Borough of Tower Hamlets guilty of corrupt and illegal practices relating to an election and declared the election void and disqualified him from holding elected office for five years.[[189]](#footnote-189) At the time, Judge Herbert was chair of the Society of Black Lawyers as well as being a barrister and recorder in Crown Court and immigration and employment tribunal judge. In a speech at a public event in Tower Hamlets in April 2015, Herbert is reported to have strongly condemned the High Court ruling, saying ‘Racism is alive and well and living in Tower Hamlets, in Westminster and, yes, sometimes in the judiciary.’[[190]](#footnote-190) He is also reported to have said ‘There are some occasions in our life when you feel as if you are being treated as a nigger’ and ‘That was what it felt like [now]’.[[191]](#footnote-191) In addition, he is reported to have said that ethnic minorities ‘should not place their faith in a justice system that had not been designed for them’ but should ‘take direct action’.[[192]](#footnote-192) It is reported that Judge Herbert came under ‘pressure’ from other members of the judiciary to henceforth voluntarily refrain from sitting as a judge, because of the inappropriateness of his comments. A formal complaint against Judge Herbert was also made to the JCIO about his comments, which then investigated the matter. In April 2017 the JCIO published a Statement on its website stating that the Lord Chief Justice and the Lord Chancellor had agreed with a disciplinary panel in finding that Herbert’s comments amounted to professional misconduct because they were inappropriate and put the reputation of the judiciary at risk. The statement also explained that the panel had taken the view that ‘[t]o say that a judge is guilty of racism is to make a grave attack on that judge’ and one that was ‘likely to undermine public confidence in the judiciary’.[[193]](#footnote-193) However, the Statement also made clear that Judge Herbert ought not to have come under pressure to refrain from sitting as a judge by other members of the judiciary prior to a legal proceeding in his case, and that for this he was owed an apology.[[194]](#footnote-194))

If judges are disinclined and discouraged from speaking out against other judges, then in practice the social criticism of judicial hate speech will be driven by a potent cocktail of journalists, politicians, activists, social commentators, and ordinary people, most of whom will not be experts on matters of legal ethics. The obvious problem is that the court of public opinion sometimes, and arguably more often than actual courts, gets things wrong, precisely because it is not relying on legal or judicial processes. It is well recognized that social criticism, especially on the Internet, can quickly turn into a witch hunt, in which facts are overlooked or twisted, conspiracy theories treated as gospel truths, and large numbers of the general public jump to incorrect conclusions guided by the opinions of self-appointed ‘experts’ who are typically unqualified and have undeclared interests and implicit biases. Of course, social criticism or public shaming of particular judges can be toxic for the reputation of those judges, with every judicial decision they ever made being called into doubt. But when public attacks on judges become commonplace and take on more generalized forms of antagonistic, defamatory, and threatening discourse towards judges as a social group, this raises the specter of such language constituting anti-judiciary hate speech, if ever profession could be considered a protected characteristic.[[195]](#footnote-195)

An advantage of having a legal process in place to investigate and form judgments about accusations that judges have inappropriately engaged in hate speech, whether this is a judicial ethics committee decision (that can also be appealed in a higher court) or a decision arising out of a court trial or hearing in cases of unlawful hate speech based on civil rights laws or criminal laws, is that a suitably qualified and impartial judicial body will look at the facts of the case, speak to or call witnesses, look at precedents, and so on. Ironically, a judge accused of misconduct will rely on other judges to live up to high standards of professional conduct when hearing their case. This fact might also give judges some pause for thought, and further incentive to weigh their words more carefully in the future. Judges should treat people as they might want other judges to treat them.

Notwithstanding these points, someone who objected to my policy recommendations might insist they are unnecessary because social criticism or shaming by members of the public is not the only available form of social sanction. Another possibility is simply to rely on unofficial or informal boycotts by other legal professionals of judges accused of misconduct involving judicial hate speech. For example, in the British case discussed in Part IV involving comments made by Judge McKinnon, a group of 20 Black barristers are reported to have pledged not to appear in cases presided over by Judge McKinnon unless he apologized.[[196]](#footnote-196) Similarly, in the case of Judge Hollingworth, the prosecutor is reported to have responded to Judge Hollingworth’s comments by telling him she intended to withdraw from the case because of what he had just said.[[197]](#footnote-197)

However, this sort of social sanction suffers from many of the same defects as shaming by the public. One is that the sanction is highly contingent upon a group of legal professionals coming together to organize and take part in the unofficial or informal boycott. If the organization is poor and/or not enough legal professionals take part, then it may have little or no practical impact. Moreover, expecting prosecutors, attorneys, or barristers to take responsibility for disciplining judges may impose an unreasonable burden upon them, such as if refraining from working on cases being heard by certain judges damages their career progression or professional reputation. Ironically, they themselves might even be vulnerable to disciplinary sanctions for refusing to work on cases. In the case of Judge McKinnon, it is reported that a spokesperson for the group of 20 non-White barristers “said they fully realised that they could risk disciplinary action as a result of their actions.”[[198]](#footnote-198) But what if in other cases barristers are not prepared to make substantial personal sacrifices to hold judges to account and uphold standards of legal ethics? What if a judge hate-speaks against gypsy, traveler, or Roma (GRT) people, and there is not a group of GRT barristers willing to boycott the judge’s cases because they are unjustly underrepresented among barristers? What if disciplinary sanctions imposed on some boycotters discourage others from doing the same? It could lead to a kind of sanctions lottery whereby some judges do, while others do not, face boycotts simply based on the luck of the draw. On the other hand, if a boycott does receive buy in, then it could impose an unfair burden on members of the public, such as if court proceedings are cancelled or disrupted. Justice delayed is also justice denied.

Furthermore, unofficial or informal boycotts are, as these labels suggest, things that spring up organically and are not predicated upon official legal proceedings. In the case of boycotts responding to judicial misconduct, they are a case of other legal professionals taking matters into their own hands to hold judges to account for alleged misconduct, even without any professional ethics committee, panel, or any court of law, finding that in fact the judge’s words or behavior did amount to misconduct or did constitute unlawful hate speech under relevant civil rights law or criminal law. As such, these boycotts could amount to a violation of a judge’s right to fair proceedings and might constitute unfair discrimination against the judge. Indeed, a judge exposed to such a boycott could end up making a legal complaint of constructive dismissal against their employer, for allowing other employees to act in this way.

For all of the above reasons, I defend my two policy recommendations as a superior way of handling cases of alleged judicial hate speech. To complete that defense, I shall end the article by circling back to the issue of political legitimacy briefly mentioned in Part VI.A. Here the suggestion was that, like other forms of judicial misconduct, the phenomenon of judicial hate speech could not only bring the judiciary into disrepute but also risk decreasing the legitimacy and authority of the justice system, in the descriptive sense that, for example, people targeted with judicial hate speech could feel less inclined to recognize the right of the judiciary to administer justice and less obligated to comply. However, there is another sense of legitimacy that deserves mention here, namely normative political legitimacy. I have previously argued that a lack of appropriate legal measures or remedies against hate speech in general can render institutions and laws politically illegitimate, in a normative sense.[[199]](#footnote-199) Roughly put, this means that, hypothetically speaking, citizens viewed as free and equal could fairly object to a state’s failure to restrict hate speech on grounds of the harms or wrongs hate speech does to them, where these grounds could be considered as reasons that speak to fundamentals of justice that other free and equal citizens cannot reasonably reject. I believe a lack of appropriate legal measures against judicial hate speech could also diminish the normative legitimacy of the justice system in a similar fashion. If judges were allowed to get away with the manifestation or appearance of bias or prejudice in the form of hate speech (to act with impunity), then those subject to judicial hate speech (and others who are indirectly impacted), could fairly object to this arrangement on the grounds that such misconduct risks damaging public confidence in the judiciary and the administration of justice; undermines assurance of civic dignity; harms or wrongs the individuals who are exposed to it; implicitly gives others permission to be bigots; and implicitly lends authority to ordinary hate speakers. These grounds could also be considered as reasons based on fundamentals of justice that other free and equal citizens cannot reasonably reject. By the same token, however, if judges who were alleged to have used hate speech were solely subject to unofficial or informal social sanctions such as boycotts (as opposed legal or quasi-legal proceedings), then arguably they could also fairly object to this arrangement, on the grounds that it violates their right to fair proceedings, where once again this ground could be considered a reason that implicates fundamentals of justice that other free and equal citizens cannot reasonably reject.

1. Associate Professor of Political and Legal Theory, School of Politics, Philosophy, and Area Studies, University of East Anglia (UEA), UK. [↑](#footnote-ref-1)
2. *See* Albert Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 Tex. Law Rev. 629 (1972); Anthony D'Amato & Edward J. Eberle, *Three Models of Legal Ethics*, 27 St. Louis Univ. Law J. 761 (1983); Lawrence Solum, *Virtue Jurisprudence: A Virtue-Centred Theory of Judging*, 34 Metaphilosophy 178 (2003); Joshua E. Kastenberg, *Evaluating Judicial Standards of Conduct in the Current Political and Social Climate: The Need to Strengthen Impropriety Standards and Removal Remedies to Include Procedural Justice and Community Harm*, 82 Albany Law Rev. 1495 (2018); Laurie L. Levenson, *Judicial Ethics: Lessons from the Chicago Eight Trial*, 50 Loy. Univ. Chicago Law J. 879 (2019); Barrie Lawrence Nathan, *“Ain’t Misbehavin”: Judicial Conduct and Misconduct*, 2 Amicus Curiae 8, (2020); Douglas R. Richmond, *Mandatory Judging*, 54Loy. Univ. Chicago Law J. 989 (2023). [↑](#footnote-ref-2)
3. Gregory C. O’Brien Jr., *Speech May be Free, and Talk Cheap, but Judges Can Pay a Heavy Price for Unguarded Expression*, 28 Loy. of Los Angeles Law Rev. 816 (1995); Jana Stehlíková, *Should Judges be Temperate in their Speech?*, 26 Legal Ethics 276 (2023). [↑](#footnote-ref-3)
4. Stehlíková, *Should Judges be Temperate in their Speech?*, *supra* note 2, at 280. [↑](#footnote-ref-4)
5. *Id*. [↑](#footnote-ref-5)
6. One exception is the following: Alexander Brown, *African American Enslavement, Speech Act Theory, and the Law*, 23 Journal of African American Studies162(2019) (looking at judges’ use of the n-word in a manner capable of officially changing people’s legal status).

   [↑](#footnote-ref-6)
7. Mari Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 Michigan Law Review 2320 (1989); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 Northwestern U. L. Rev. 343 (1991); Suzanna Sherry, *Speaking of Virtue: A Republican Approach to University Regulation of Hate Speech*, 75 Minnesota L. Rev. 933 (1991); Charles Lawrence III, *Cross Burning and the Sound of Silence: Anti-Subordination Theory and the First Amendment*, 37 Villanova Law Review 787 (1992); Andrew Altman, *Liberalism and Campus Hate Speech: A Philosophical Examination*, 103 Ethics 302 (1993); MARI MATSUDA et al. (eds.) WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (Westview Press, 1993); Tariq Modood, *Muslims, Incitement to Hatred and the Law*, in LIBERALISM, MULTICULTURALISM, AND TOLERATION(Macmillan, J. 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[↑](#footnote-ref-7)
8. *See* Eva S. Nilsen, *The Criminal Defense Lawyer’s Reliance on Bias and Prejudice*, 8 Georgetown J. of Legal Ethics 1 (1994); Anthony V. Alfieri, *Race-ing Legal Ethics*, Colum. Law Rev. 800 (1996); Andrew Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession*, 9 Georgetown J. of Legal Ethics 781 (1996); DELGADO & STEFANCIC, UNDERSTANDING WORDS THAT WOUND, *supra* note 6, at ch. 9; Jefferey Ogden Katz & Alexander I. Passo, *Attorneys, the Internet, and Hate Speech: An Argument for an Amended Model Rule 8.4*, 13 Seattle Journal for Social Justice 65 (2014). [↑](#footnote-ref-8)
9. There are numerous instances of this sort of analysis in the literature. First, judicial words can be used to perform decisions to uphold laws that enact discriminatory policies on the grounds of race. For example, when a legislator uses certain formal words to pass a racial segregation law, and then a judge uses other formal words to rule in favor of that law as being constitutional (“I hold this law to be constitutional and so I reject the appeal”), these words indirectly enact rules permitting discriminatory acts and, therefore, these words are on a par with a restaurant owner who puts a sign in the window saying “Whites only,” thereby enacting rules permitting discriminatory acts in his restaurant. Cf. Rae Langton, *Speech Acts and Unspeakable Acts*, 22 Philosophy & Public Affairs 293, 302–3 (1993).

   Second, judicial words can be used to perform decisions that carry or express a cultural meaning that stigmatizes people. For example, a judge could use formal words to uphold a racial segregation law as constitutional (‘I hold this law to be constitutional and so I reject the appeal’), and these words, because of the cultural meaning of the law, could also carry a meaning that signifies the stigmatization of Black people as inferior. Charles Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stanford Law Rev. 317, 380 (1987).

   Third, judicial words can be used to perform decisions that symbolically legitimize hate speech and racism in general. For example, a judge might strike down a hate speech law as unconstitutional partly on the basis of a dismissal of the special harms of hate speech, and these words might be themselves be taken to constitute not only the act of tolerating hate speech but also the act of symbolically legitimizing hate speech and racism in general. ANNA ELISABETTA GALEOTTI, TOLERANCE AS RECOGNITION 156 (Cambridge Univer. Press, 2004).

   Fourth, judicial words can be used to perform decisions that officially pronounce or determine what shall and shall not constitute an injury, thereby denying individuals powers to decide this for themselves. For example, a judge might strike down a hate speech law as unconstitutional partly on the basis of a dismissal of the special harms of hate speech, and these words could constitute the prototypical hate speech act of denying oppressed people power, specifically the power to decide for themselves what is or is not injury. JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE 62 (Routledge, 1997).

   Fifth, judicial words can be used to perform decisions that could themselves constitute a threat or provocation. For example, a judge might strike down a cross-burning statute as unconstitutional because it involves viewpoint discrimination, and thereby perform an act that African Americans might interpret as itself a threat or provocation on a par with the very cross-burning at issue. A good illustration is Charles Lawrence’s response to Justice Scalia’s opinion in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). “When I first read Justice Scalia’s opinion it felt as if another cross had just been set ablaze. This cross was burning on the pages of U.S. Reports.” Lawrence, *Cross Burning and the Sound of Silence*, *supra* note 6, at 793.

   Sixth, judicial words can be used to perform decisions that could themselves be seen as acts of gaslighting people or performing a microaggression against them. For example, a judge might uphold a racial segregation law as constitutional and in the process flatly deny that the law stigmatizes Black people as inferior and explicitly ignore or sweep under the carpet the fact that this stigmatization is precisely how Black people experience that law and the wider cultural meaning placed on that law—an act of gaslighting or microaggression exemplified by Judge Brown in *Plessy v. Ferguson*, 163 U.S. 537 (1896), at 551 (“[i]f this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it”). Lawrence, *Cross Burning and the Sound of Silence*, *supra* note 6, at 793. [↑](#footnote-ref-9)
10. Lawrence, *The Id, the Ego, and Equal Protection*, *supra* note 8. [↑](#footnote-ref-10)
11. KEVIN W. SAUNDERS, DEGRADATION: WHAT THE HISTORY OF OBSCENITY TELLS US ABOUT HATE SPEECH 3, 156-7(N.Y. Univ. Press eds., 2011). [↑](#footnote-ref-11)
12. *See* Alexander Brown, *What is So Special About Online (as Compared to Offline) Hate Speech?*, 18 Ethnicities 297 (2018) (discussing what makes online hate speech special or unique in comparison to offline hate speech); *see also* Alexander Brown, *The Internet of Hate: Comparing the Nature, Harms, and Regulatory Challenges of Online and Offline Hate Speech*, 53 GA. J. of Int’l and Compar. Law (forthcoming). [↑](#footnote-ref-12)
13. *See also* Alexander Brown, *What is Hate Speech? Part 1: The Myth of Hate*, 36 Law and Philosophy 419, 421-61(2017); ALEXANDER BROWN & ADRIANA SINCLAIR, HATE SPEECH FRONTIERS: EXPLORING THE LIMITS OF THE ORDINARY AND LEGAL CONCEPTS chs. 1 and 5 (Cambridge Univer. Press, 2023). [↑](#footnote-ref-13)
14. BROWN & SINCLAIR, THE POLITICS OF HATE SPEECH LAWS, *supra* note 6, at ch. 2. [↑](#footnote-ref-14)
15. *See*, e.g., Collin v. Smith II, 578 F.2d 1197, \_\_ (7th Cir. 1978); *see also* Doe v. Univ. of Michigan, 721 F. Supp. 852, \_\_ (E.D. Mich. 1989); *see also* Virginia v. Black, 538 U.S. 343, \_\_ (2003). [↑](#footnote-ref-15)
16. *See* Snyder v. Phelps, 562 U.S. 443, \_\_ (2011). [↑](#footnote-ref-16)
17. *American Booksellers Association v. Hudnut*, 771 F.2d 323 (7th Cir., 1985). [↑](#footnote-ref-17)
18. *Id.* at 327–28. [↑](#footnote-ref-18)
19. *Snyder v. Phelps*, 562 U.S. 443, (2011). [↑](#footnote-ref-19)
20. *Id*. at 458. [↑](#footnote-ref-20)
21. *Matal v. Tam*, 582 U.S. 218, (2017). [↑](#footnote-ref-21)
22. *Id*. at \_. [↑](#footnote-ref-22)
23. *See*, e.g., *R. v. El Faisal* [2004] EWCA Crim 343; *R. v. Abu Hamza* [2006] EWCA Crim 2918; *R. v. Saleem and others* [2007] EWCA Crim 2692; *R. v. Sheppard and Whittle* [2010] EWCA Crim 65; see also *R. v. Burns* [2017] EWCA Crim 1466; *R. v. Bitton* [2019] EWCA Crim 1372. [↑](#footnote-ref-23)
24. *Norwood v. the United Kingdom*, ECtHR, Strasbourg, November 16, 2004, No. 23131/03. [↑](#footnote-ref-24)
25. *See*, e.g., *Glimmerveen and Hagenbeek v. the Netherlands*, ECtHR, Strasbourg, October 11, 1979, Nos. 8348/78 and 8406/78; *Jersild v. Denmark*, ECtHR, Strasbourg, September 23, 1994, No. 15890/89; *Balsyte-Lideikiene v. Lithuania*, ECtHR, Strasbourg, November 4, 2008, No. 72596/01; *Vejdeland and Others v. Sweden*, ECtHR, Strasbourg, February 7, 2012, No. 1813/07; *Lilliendahl v Iceland*, ECtHR, Strasbourg, May 12, 2020, No. 29297/18. [↑](#footnote-ref-25)
26. *See Handyside v. United Kingdom*, ECtHR, Strasbourg, December 7, 1976, No. 5493/72, at para. 49; *Aksu v. Turkey*, ECtHR, Strasbourg, March 15, 2012, Nos. 4149/04 and 41029/04, at para. 64. [↑](#footnote-ref-26)
27. *See* *Erbakan v. Turkey*, ECtHR, Strasbourg, July 6, 2006, No. 59405/00; see also*Stomakhin v. Russia*, ECtHR, Strasbourg, May 9, 2018, No. 52273/07. [↑](#footnote-ref-27)
28. Bangalore Principles of Judicial Conduct, 2018, https://www.unodc.org/documents/ji/training/bangaloreprinciples.pdf. [↑](#footnote-ref-28)
29. *See Pickering v. Board of Education*, 391 U.S. 563, (1968); *Connick v. Myers*, 461 U.S. 138 (1983); *Garcetti v. Ceballos*, 547 U.S. 410 (2006). [↑](#footnote-ref-29)
30. Ofer Raban, *The Free Speech of Public Employees at a Time of Political Polarization: Clarifying the Pickering Balancing Test*, 60 Hous. L. Rev. 653 (2023). [↑](#footnote-ref-30)
31. For a defense of disapplying parliamentary privilege doctrine to unlawful hate speech in parliament, *see* BROWN & SINCLAIR, THE POLITICS OF HATE SPEECH LAWS, *supra* note 6, at ch. 8. [↑](#footnote-ref-31)
32. *Id.* at ch. 2. [↑](#footnote-ref-32)
33. *Nixon v. Sirica*, 487 F.2d 700, 740 (D.C. Cir. 1973),(MacKinnon, J., concurring). [↑](#footnote-ref-33)
34. *Pierson v. Ray*, 386 U.S. 547, 554 (1967). [↑](#footnote-ref-34)
35. *Stump v. Sparkman*, 435 U.S. 349, 359 (1978). [↑](#footnote-ref-35)
36. *Forrester v. White*, 792 F.2d 647, 658 (7th Cir.1986). [↑](#footnote-ref-36)
37. *Sirros v. Moore* [1975] 1 QB 118, 133, 148. *See also* *Re McC* [1985] AC 528. [↑](#footnote-ref-37)
38. *Id*. [↑](#footnote-ref-38)
39. *Scott v. Sandford*, 60 U.S. 393 (1857). [↑](#footnote-ref-39)
40. *Id*. at 407. [↑](#footnote-ref-40)
41. *Downes v. Bidwell*, 182 U.S. 244 (1901). [↑](#footnote-ref-41)
42. *Id*. at 279. [↑](#footnote-ref-42)
43. *Id*. [↑](#footnote-ref-43)
44. *re Chargin*, 2 Cal. 3d 617 (1970). [↑](#footnote-ref-44)
45. *Id*. at 618. [↑](#footnote-ref-45)
46. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges,* *supra* note 1, at 707. [↑](#footnote-ref-46)
47. *re Stevens*, 31 Cal. 3d 403 (Cal. 1982). [↑](#footnote-ref-47)
48. *Id*. [↑](#footnote-ref-48)
49. *Id*. at 404 (Justice Kaus, Concurring). [↑](#footnote-ref-49)
50. *re Agresta*, 64 N.Y.2d 327 (1985). [↑](#footnote-ref-50)
51. *Id*. at 330. [↑](#footnote-ref-51)
52. Press Release, Judicial Discipline and Disability Commission (State of Arkansas), Letter of Suspension and Removal from Office of Judge Maggio (Aug. 6, 2014),, https://www.jddc.arkansas.gov/wp-content/uploads/2020/05/Maggio-8-6-14.pdf. [↑](#footnote-ref-52)
53. *Id*. at 5–6. [↑](#footnote-ref-53)
54. *Id*. at 7. [↑](#footnote-ref-54)
55. Press Release, Commission on Judicial Performance (State of California), In the Matter Concerning Former Commissioner Judge Gianquinto, (Aug. 22, 2018), https://cjp.ca.gov/wp-content/uploads/sites/40/2018/08/Gianquinto\_DO\_Censure\_8-22-18.pdf. [↑](#footnote-ref-55)
56. *Id*. at 19. [↑](#footnote-ref-56)
57. *Id*. at 11. [↑](#footnote-ref-57)
58. N.Y. Comm’n on Jud. Conduct, In the Matter of Judge Robert J. Putorti (Sept. 9, 2022) https://cjc.ny.gov/Determinations/P/Putorti.Robert.J.2022.09.09.DET.pdf. [↑](#footnote-ref-58)
59. N.Y. Comm’n on Jud. Conduct, In the Matter of Judge Robert J. Putorti (Oct. 19, 2023) (No. 61), https://cjc.ny.gov/Determinations/P/Putorti.COA.Decision.2023-10-19.pdf. [↑](#footnote-ref-59)
60. Id, at 8. [↑](#footnote-ref-60)
61. *re Judge Maggio*, *supra* note 51, at 13–14. [↑](#footnote-ref-61)
62. *re Judge Gianquinto*,*supra* note 54, at 19. [↑](#footnote-ref-62)
63. *re Judge Putorti*, *supra* note 57, at 17. [↑](#footnote-ref-63)
64. C. A. Coughlin, *Judge Urges Race Law Caution*, Daily Telegraph, Jan. 7, 1978, at 1. [↑](#footnote-ref-64)
65. *Id*. at 30. [↑](#footnote-ref-65)
66. *Id*. [↑](#footnote-ref-66)
67. *Id*. [↑](#footnote-ref-67)
68. *Id*. [↑](#footnote-ref-68)
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72. ALWYN W. TURNER, CRISIS? WHAT CRISIS? BRITAIN IN THE 1970s 216-17 (Aurum, 2008). [↑](#footnote-ref-72)
73. Staff writers, *British Judge Backs Right to Air Race Views, Stirring Bitter Debate*, New York Times, Jan. 13, 1978,https://www.nytimes.com/1978/01/13/archives/british-judge-backs-right-to-air-race-views-stirring-bitter-debate.html. [↑](#footnote-ref-73)
74. *Id*. [↑](#footnote-ref-74)
75. Staff writer, *Judging the Judiciary*, The Daily Telegraph, Jan. 9, 1978, at 12. [↑](#footnote-ref-75)
76. Staff writers, *British Judge Backs Right to Air Race Views, Stirring Bitter Debate*, *supra* note 72. [↑](#footnote-ref-76)
77. Terence Shaw, *“Gentle Advice” for Judge*, The Daily Telegraph, Jan. 13, 1978, at 19. [↑](#footnote-ref-77)
78. Terence Shaw, *Widgery to Advise in Race Case Row*, The Daily Telegraph, Jan. 11, 1978, at 1. [↑](#footnote-ref-78)
79. Terence Shaw, *Race Cases Bar for McKinnon*, The Daily Telegraph, Jan. 14, 1978, at 1. [↑](#footnote-ref-79)
80. Staff writer, *British Official Refuses to Punish Judge on Racism*, The New York Times, Jan. 14, 1978, https://www.nytimes.com/1978/01/14/archives/british-official-refuses-to-punish-judge-on-racism.html. [↑](#footnote-ref-80)
81. *See* Nigel Bunyan, *Judge Resigns After Making Racist Remark about Victim*, The Guardian, Dec. 7, 2014, http://www.theguardian.com/law/2014/dec/07/judge-resigns-racist-remark-about-victim-richard-hollingworth. *See also* Staff writer, *Immigration Judge Peter Hollingworth Faces Race Remark Investigation*, BBC News, Dec. 7, 2014, https://www.bbc.co.uk/news/uk-england-lancashire-30367010. [↑](#footnote-ref-81)
82. *Id*. [↑](#footnote-ref-82)
83. *Id*. [↑](#footnote-ref-83)
84. Judicial Conduct Investigations Office, <https://www.complaints.judicialconduct.gov.uk/disciplinarystatements/> (last visited Mar. \_\_ 2025) [↑](#footnote-ref-84)
85. Judicial Conduct Investigations Office, Case of Dr Christopher Pearson, No. JCIO 28/23, September 28, 2023, https://www.complaints.judicialconduct.gov.uk/disciplinarystatements/Statement2823/. [↑](#footnote-ref-85)
86. https://www.complaints.judicialconduct.gov.uk/what\_can\_i\_complaint\_about/. [↑](#footnote-ref-86)
87. *Id*. [↑](#footnote-ref-87)
88. Guide to Judicial Conduct, July 2023, at 24, https://www.judiciary.uk/wp-content/uploads/2023/06/Guide-to-Judicial-Conduct-2023.pdf. [↑](#footnote-ref-88)
89. *See also* Section 100.3 (B) (4) of the Rules Governing Judicial Conduct (New York State), https://ww2.nycourts.gov/rules/chiefadmin/100.shtml#01; Rule 2.3 (B) of the Model Code of Judicial Conduct (American Bar Association), https://www.americanbar.org/groups/professional\_responsibility/publications/model\_code\_of\_judicial\_conduct/; principle 5.2 of the Bangalore Principles of Judicial Conduct, 2018, https://www.unodc.org/documents/ji/training/bangaloreprinciples.pdf; and the Guide to Judicial Conduct, July 2023, at 24, https://www.judiciary.uk/wp-content/uploads/2023/06/Guide-to-Judicial-Conduct-2023.pdf. [↑](#footnote-ref-89)
90. At first glance, this formulation might appear to be circular because it uses the term “hate speech” in its ordinary sense partly to define a legal norm against judicial hate speech. But in point of fact, there is nothing circular about this formulation precisely because the legal concept of hate speech is distinct from the ordinary concept. Even though the term ‘hate speech’ is being used in this formulation partly to define a legal rule against hate speech, it is explicitly being given its plain or ordinary meaning. [↑](#footnote-ref-90)
91. *See also* Comment on Rule 2.3 of the Model Code of Judicial Conduct (American Bar Association), https://www.americanbar.org/groups/professional\_responsibility/publications/model\_code\_of\_judicial\_conduct/model\_code\_of\_judicial\_conduct\_canon\_2/rule2\_3biasprejudiceandharassment/commentonrule2\_3/. [↑](#footnote-ref-91)
92. In using the qualification “substantially disproportionate,” I am drawing on *United States v. Hansen*, 599 U.S. \_\_\_\_ (2023). [↑](#footnote-ref-92)
93. Parts 3 and 3A of the Public Order Act 1986. [↑](#footnote-ref-93)
94. *See* Case No. 11-792 (W.D. Tex.) (involving a lawsuit brought by the EEOC in relation to African American employees who had been subjected to a hostile work environment which included being called “niggers” and “mother-fucking boys,” being accused of “always stealing and wanting welfare,” and having a noose displayed in the workplace); *see also* Case No. cv-05-BE-1704-E (N.D. Ala.) (involving a lawsuit brought by the EEOC in relation to several Black employees who had been subjected to a hostile work environment in which a “Whites Only” sign had been placed on a bathroom in the maintenance department, the door padlocked, and keys given only to white employees); *see also* *Shanoff v. Illinois Department of Human Services* (2001) 258 F.3d 696 (7th Cir.) (involving a lawsuit brought by a white Jewish employee alleging that his supervisor, a black female, had subjected him to a hostile work environment because of his race and religion, including referring to him as a “haughty Jew”). [↑](#footnote-ref-94)
95. *See*, e.g., Smith v. Ill. Dep’t of Transp., No. 18-2948 (7th Cir. 2019) (“The n-word is an egregious racial epithet. […]. That said, Smith can’t win simply by proving that the word was uttered. He must also demonstrate that Colbert’s use of this word altered the conditions of his employment and created a hostile or abusive working environment”). [↑](#footnote-ref-95)
96. *Boxill v. O’Grady*, No. 2:16-cv-126 (S.D. Ohio, E. Div., March 24, 2021). [↑](#footnote-ref-96)
97. *Id*. at 12–14. [↑](#footnote-ref-97)
98. *Id*. at 11. [↑](#footnote-ref-98)
99. *See* BROWN, HATE SPEECH LAW, *supra* note 6, at 3. [↑](#footnote-ref-99)
100. Felix S. Cohen, *Judicial Ethics*, 12 Ohio St. L.J. 3, 9 (1951). [↑](#footnote-ref-100)
101. *See* Stehlíková, *supra* note 2, at 276. [↑](#footnote-ref-101)
102. *See* David F. Levi et al., *Losing Faith: Why Public Trust in the Judiciary Matters*, 106 Judicature 71 (2022); see also Joseph Copeland, *Favorable Views of Supreme Court Remain Near Historic Low*, Pew Research Center (Aug. 8, 2024), https://www.pewresearch.org/short-reads/2024/08/08/favorable-view

     s-of-supreme-court-remain-near-historic-low/. [↑](#footnote-ref-102)
103. Peter Taylor, *What the McKinnon Row Meant to a Town With Racial Problems*, The Sunday Telegraph, Jan. 15, 1978, at 19. [↑](#footnote-ref-103)
104. EU Referendum Local Results, BBC News, https://www.bbc.co.uk/news/politics/eu\_referendum/

     results/local/b. [↑](#footnote-ref-104)
105. Blackburn General Election Results 2024, BBC News, https://www.bbc.co.uk/news/election/2024/

     uk/constituencies/E14001102. [↑](#footnote-ref-105)
106. Copeland, *Favorable Views of Supreme Court Remain Near Historic Low*, *supra* note 101. [↑](#footnote-ref-106)
107. Jeffrey Fagan, *Legitimacy and Criminal Justice*, 6 Ohio St. J. Crim. L. *123*  (2008). [↑](#footnote-ref-107)
108. Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 Harv. L. Rev. 1596 (2010). [↑](#footnote-ref-108)
109. *Id*. at 1612. [↑](#footnote-ref-109)
110. *Id*. at 1630. [↑](#footnote-ref-110)
111. *Id*. [↑](#footnote-ref-111)
112. *Id*. [↑](#footnote-ref-112)
113. *Id*. [↑](#footnote-ref-113)
114. *Id*. at 1639–1657. *See also* Jeremy Waldron, *The Conditions of Legitimacy: A Response to James Weinstein*, 32 Const. Comment. 697 (2017); *see also* Brown, *Hate Speech Laws, Legitimacy, and Precaution*, *supra* note 6. [↑](#footnote-ref-114)
115. BROWN & SINCLAIR, THE POLITICS OF HATE SPEECH LAWS, *supra* note 6, at 341–2. [↑](#footnote-ref-115)
116. BROWN, HATE SPEECH LAW, *supra* note 6, at ch. 5. [↑](#footnote-ref-116)
117. BROWN & SINCLAIR, THE POLITICS OF HATE SPEECH LAWS, *supra* note 6, at ch. 8. [↑](#footnote-ref-117)
118. Bunyan, *Judge Resigns After Making Racist Remark about Victim*, *supra* note 80. [↑](#footnote-ref-118)
119. Cf. Langton, *Beyond Belief*, *supra* note 6; Langton et al., *Language and Race*, *supra* note 6. [↑](#footnote-ref-119)
120. *See* Brown, *Retheorizing Actionable Injuries in Civil Lawsuits Involving Targeted Hate Speech*, *supra* note 6, at 29–37 (2018); *see also* BROWN & SINCLAIR, THE POLITICS OF HATE SPEECH LAWS, *supra* note 6, at 16. [↑](#footnote-ref-120)
121. Cf. Rae Langton, *Subordination, Silence, and Pornography’s Authority*, in CENSORSHIP AND SILENCING: PRACTICES OF CULTURAL REGULATION *261* (Oxford Univ. Press R. Post ed., 1998); BROWN & SINCLAIR, HATE SPEECH FRONTIERS, *supra* note 12, at 60, 162–3; *see also* Alexander Brown, *Reverse Hate Speech, Pragmatics, and the Authority Problem*, Phil. & Soc. Criticism(forthcoming). [↑](#footnote-ref-121)
122. Cf. Brown, *Retheorizing Actionable Injuries in Civil Lawsuits Involving Targeted Hate Speech*, *supra* note 6, at 37–39. [↑](#footnote-ref-122)
123. *R. v. Keegstra*, [1990] 3 S.C.R. 697 (Can.). [↑](#footnote-ref-123)
124. *Id*. at 714. [↑](#footnote-ref-124)
125. *Id*. at 746. [↑](#footnote-ref-125)
126. *Boxill v. O’Grady*, at 14. [↑](#footnote-ref-126)
127. *See* Brown, *Retheorizing Actionable Injuries in Civil Lawsuits Involving Targeted Hate Speech*, *supra* note 6. [↑](#footnote-ref-127)
128. See, e.g., Nadine Strossen, *Interview*, in THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES 277 (Cambridge Univ. Press, M. Herz & P. Molnar eds., 2012). [↑](#footnote-ref-128)
129. Cf. KATHARINE GELBER, SPEAKING BACK: THE FREE SPEECH VERSUS HATE SPEECH DEBATE(John Benjamins Publ’g Co. 2002); Rae Langton, *Blocking as Counter-Speech*, in NEW WORK ON SPEECH ACTS 144 (Oxford Univ. Press D. Harris et al. eds., 2018). [↑](#footnote-ref-129)
130. *See* BROWN & SINCLAIR, HATE SPEECH FRONTIERS, *supra* note 12, at 166–194; Maxime Lepoutre, Hateful Counterspeech, 26 Ethical Theory and Moral Prac. 533, 533–54 (2023). [↑](#footnote-ref-130)
131. STANLEY FISH, THERE’S NO SUCH THING AS FREE SPEECH: AND IT’S A GOOD THING, TOO109(Oxford Univ. Press 1994). [↑](#footnote-ref-131)
132. Cf. *Commonwealth v. Gallego*, 27 Mass. App. Ct. 714 (1989) (an appellate case involving an action for retrial due to similar remarks made by a prosecutor). [↑](#footnote-ref-132)
133. BROWN & SINCLAIR, THE POLITICS OF HATE SPEECH LAWS, *supra* note 6, at 358–368. [↑](#footnote-ref-133)
134. Today politicians are not merely legislators, they are increasingly “celebrities, agenda setters and leaders or influencers of public discourse and popular opinion, especially among their supporters.” *Id*. at 360. [↑](#footnote-ref-134)
135. Supreme Court of Florida, Report of the Supreme Court of Florida Gender Bias Study Commission (1990), at 202, https://www.ojp.gov/ncjrs/virtual-library/abstracts/report-florida-supreme-court-gender-bias-study-commission. [↑](#footnote-ref-135)
136. Taslitz and Styles-Anderson, *Still Officers of the Court*, *supra* note 7, at 827n.250. [↑](#footnote-ref-136)
137. *See also* Matsuda, *Public Response to Racist Speech*, *supra* note 6, at 2378; Parekh, *Hate Speech: Is There a Case for Banning?*, *supra* note 6, at 217; Marie-France Major, *Sexual-Orientation Hate Propaganda: Time to Regroup*, 11 Canadian Journal of Law and Society 221, 231n.42 (1996). [↑](#footnote-ref-137)
138. BROWN & SINCLAIR, THE POLITICS OF HATE SPEECH LAWS, *supra* note 6, at 363–4. [↑](#footnote-ref-138)
139. A fuller list can be found in BROWN & SINCLAIR, HATE SPEECH FRONTIERS, *supra* note 12, at 58–59. [↑](#footnote-ref-139)
140. *Cf*. Alexander Brown, *The Meaning of Silence in Cyberspace: The Authority Problem and Online Hate Speech*, in FREE SPEECH IN THE DIGITAL AGE (Oxford Univ. Press, K. Gelber and S. Brison eds., 2019). [↑](#footnote-ref-140)
141. BROWN & SINCLAIR, HATE SPEECH FRONTIERS, *supra* note 12, at 60. [↑](#footnote-ref-141)
142. ABIGAIL LEVIN, THE COST OF FREE SPEECH: PORNOGRAPHY, HATE SPEECH, AND THEIR CHALLENGE TO LIBERALISM 115, chs. 6 and 7 (Palgrave Macmillan, 2010). [↑](#footnote-ref-142)
143. LA Code Crim Pro Art. 770(1) (2023). [↑](#footnote-ref-143)
144. GRANT HAMMOND, JUDICIAL RECUSAL: PRINCIPLES, PROCESS AND PROBLEMS ch. 15 (Hart, 2009). [↑](#footnote-ref-144)
145. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, *supra* note 1, at 645. [↑](#footnote-ref-145)
146. *See* Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, U of Ill. L. Rev. 783 (2007). [↑](#footnote-ref-146)
147. *McGuire v. Reilly*, 260 F.3d 36 (1st Cir. 2001). [↑](#footnote-ref-147)
148. *See Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 564–65 (1980) (holding that a law must be ‘narrowly drawn’ to advance a ‘substantial’ state interest but not necessarily the least restrictive means). [↑](#footnote-ref-148)
149. *United States v Stevens*, 559 U.S. 460 (2010). [↑](#footnote-ref-149)
150. *American Booksellers Association v. Hudnut*, at 327–8. [↑](#footnote-ref-150)
151. *See* Brown, *What is Hate Speech? Part 1*, *supra* note 12. [↑](#footnote-ref-151)
152. *Matal v. Tam*, at 246. [↑](#footnote-ref-152)
153. *American Booksellers Association v. Hudnut*, at 328. [↑](#footnote-ref-153)
154. *Collin v. Smith II*, 578 F.2d 1197 (7th Cir. 1978). [↑](#footnote-ref-154)
155. *Collin v. Smith I*, 447 F. Supp. 676 (N.D. Ill. 1978). [↑](#footnote-ref-155)
156. *Id.* at 688, 700. [↑](#footnote-ref-156)
157. For a critique of the tendency of U.S. courts to rebrand racist speech as hate speech so as to justify treating it as highly protected speech, *see* Alon Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech*, 65 S. Cal. L. Rev. 1887 (1992). [↑](#footnote-ref-157)
158. *American Booksellers Association v. Hudnut*, at 328. [↑](#footnote-ref-158)
159. *Beauharnais v. Illinois*, 343 U.S. 250 (1952). [↑](#footnote-ref-159)
160. *See* Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. Rev. 333, 382 (1991). [↑](#footnote-ref-160)
161. *See* Samantha Barbas, *The Rise and Fall of Group Libel: The Forgotten Campaign for Hate Speech Laws*, 54 Loy. U. Chi. L. J. 297 (2023). [↑](#footnote-ref-161)
162. *See* Alexander Tsesis, *Inflammatory Speech: Offense Versus Incitement*, 97 Minnesota L. Rev. 1145, 1179–87 (2013); TSESIS, FREE SPEECH IN THE BALANCE, supra note 6, at 15–17. [↑](#footnote-ref-162)
163. Steven A. Ramirez, *Race in America 2021: A Time to Embrace Beauharnais v. Illinois?*, 52 Loy. U. Chi. L. J. 1001 (2021). [↑](#footnote-ref-163)
164. *See* BROWN, HATE SPEECH LAW, *supra* note 6, at ch. 2. [↑](#footnote-ref-164)
165. W. Va. Code § 61-10-16 (2023). [↑](#footnote-ref-165)
166. Mass. Gen. Laws ch. 272, § 98C (2023). [↑](#footnote-ref-166)
167. *See* Mont. Code § 45-8-212 (2023); Minn. Stat. § 609.765 (2021); Nev. Rev. Stat. § 200.510 (2022). [↑](#footnote-ref-167)
168. Conn. Gen. Stat. § 53-37 (2023). [↑](#footnote-ref-168)
169. *See State v. Turner*, 864 N.W. 2d 204 (Minn. App. 2015); *Myers v. Fulbright*, 367 F. Supp. 3d 1171 (D. Mont. 2019). [↑](#footnote-ref-169)
170. Cerame v. Lamont, 346 Conn. 422 (Conn. 2023). [↑](#footnote-ref-170)
171. Conn. Gen. Stat. § 53-37. (2023). [↑](#footnote-ref-171)
172. See *Madsen v. Women’s Health Ltd.*, 512 U.S. 753, 792 (1994) (Scalia. J., calling into doubt the reasoning behind the majority’s decision to employ an intermediate plus standard of scrutiny or ‘intermediate-intermediate scrutiny’). [↑](#footnote-ref-172)
173. *See also* Clay Calvert, *Curing the First Amendment Scrutiny Muddle Through a Breyer-Based Blend Up? Toward a Less Categorical, More Values-Oriented Approach for Selecting Standards of Judicial Review*, 65 Wash. U. J. L. Pol’y 1, 1 (2021). [↑](#footnote-ref-173)
174. Cf. Chaz Weber, *Picking on Pickering: Proposing Intermediate Scrutiny in Public- Employee Religious - Speech Cases Via Berry v. Department of Social Service*s, 58 Case W. Rsrv L. Rev. 513-41 (2007)(applying the intermediate scrutiny standards to government restrictions of public employee’s religious speech). [↑](#footnote-ref-174)
175. *Ward v. Rock Against Racism*, 491 U.S. 781, 798–800 (1989). [↑](#footnote-ref-175)
176. For a discussion of whether other kinds of hate speech laws involve unjustifiable content discrimination, specifically the England and Wales stirring up hatred offences, see Alexander Brown, *Words of Hate, Streets of Rage: Reforming the England and Wales Stirring Up Hatred Offences*, Tulane J. Int’l & Compar L. (forthcoming). [↑](#footnote-ref-176)
177. *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992). [↑](#footnote-ref-177)
178. *Id,* at 383–4. [↑](#footnote-ref-178)
179. *R.A.V. v. City of St. Paul*, at 388. [↑](#footnote-ref-179)
180. JOHN RAWLS, POLITICAL LIBERALISM (Columbia Univ. Press, 1996). [↑](#footnote-ref-180)
181. *See also* Stehlíková, *Should Judges be Temperate in their Speech?*, *supra* note 2, at 277. [↑](#footnote-ref-181)
182. *See* RAWLS, POLITICAL LIBERALISM, *supra* note 179. [↑](#footnote-ref-182)
183. *See* ALEXANDER BROWN, AN ETHICS OF POLITICAL COMMUNICATIONch. 5 (Routledge, 2022). [↑](#footnote-ref-183)
184. Some scholars have argued in a similar vein that hate speech laws in general could have the undesirable unintended consequence of pushing bigots underground making it harder to track and combat their activities and more difficult to rationally confront their underlying biases and prejudices. *See* Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence?*, *supra* note 159, at 392; *see also* Strossen, *Interview*, at 38. [↑](#footnote-ref-184)
185. *See also* BROWN & SINCLAIR, THE POLITICS OF HATE SPEECH LAWS, *supra* note 6, at 394. [↑](#footnote-ref-185)
186. *Id.* [↑](#footnote-ref-186)
187. *See also* Rae Langton, *The Authority of Hate Speech*, in OXFORD STUDIES IN PHILOSOPHY OF LAW, VOL. 3 (Oxford Univ. Press, L. Green & B. Leiter eds., 2018). [↑](#footnote-ref-187)
188. *See also* BROWN, HATE SPEECH LAW, *supra* note 6, at 254–7. [↑](#footnote-ref-188)
189. *Erlam and others v. Rahman and another*,[2015] EWHC 1215 (QB), Judgment (April 23). [↑](#footnote-ref-189)
190. Diane Taylor, *Black Judge Claims He Was Discriminated Against by Disciplinary Panel*, The Guardian, Jan. 8, 2017, https://www.theguardian.com/law/2017/jan/08/black-judge-in-racial-discrimination-furore. [↑](#footnote-ref-190)
191. *Id*. [↑](#footnote-ref-191)
192. *Id*. [↑](#footnote-ref-192)
193. *Id*. [↑](#footnote-ref-193)
194. *Id*. [↑](#footnote-ref-194)
195. For discussion of what can, and should, count as a protected characteristic for the purposes of defining hate speech in both the ordinary and legal senses of that term, *see* Alexander Brown, *The “Who?” Question in the Hate Speech Debate, Part 1: Consistency, Practical, and Formal Approaches*, 29 Canadian Journal of Law and Jurisprudence 275 (2016); *see also* Alexander Brown, *The “Who?” Question in the Hate Speech Debate, Part 2: Functional and Democratic Approaches*, 30 Canadian Journal of Law and Jurisprudence 23 (2017); *see also* BROWN & SINCLAIR, HATE SPEECH FRONTIERS, *supra* note 12. [↑](#footnote-ref-195)
196. Shaw, *Widgery to Advise in Race Case Row*, *supra* note 77, at 1. [↑](#footnote-ref-196)
197. Bunyan, *Judge Resigns After Making Racist Remark about Victim*, *supra* note 80. [↑](#footnote-ref-197)
198. Shaw, *Widgery to Advise in Race Case Row*, *supra* note 77, at 1. [↑](#footnote-ref-198)
199. *See* Brown, *Hate Speech Laws, Legitimacy, and Precaution*, *supra* note 6. *See also* Parekh, *Hate Speech: Is There a Case for Banning?*, *supra* note 6, at 217. [↑](#footnote-ref-199)