change. . . . [R]acist speech management," he concludes, "effectively conspires with the established order by demanding cosmetic change rather than a reshuffling of the cards of power."

And that, in the end, delivers the most telling blow to the new advocates of speech restrictions. They are certainly no friends of free speech; ironically, they aren't effective warriors for equality either.

1. War of Words: Critical Race Theory and the First Amendment

Henry Louis Gates, Jr.

As a thumbnail summary of the last two or three decades of speech issues in the Supreme Court, we may come to see the Negro as winning back for us the freedoms the Communists seemed to have lost for us.

—Harry Kalven, Jr., *The Negro and the First Amendment* (1965)

Writing in the heyday of the civil rights era, the great First Amendment scholar Harry Kalven, Jr., was confident that civil rights and civil liberties were marching in unison; that their mutual expansion represented, for a nation in a time of tumult, an intertwined destiny. He might have been surprised had he lived to witness the shifting nature of their relations. For today, the partnership named in the title of his classic study seems in hopeless disrepair: civil liberties are regarded by many as a chief obstacle to civil rights. To be sure, blacks are still on the front lines of First Amendment jurisprudence, only this time we soldier on the other side. The byword among many black activists and intellectuals is no longer the political imperative to protect free speech, but the moral imperative to suppress hate speech. And therein hangs a tale.

Like phrases such as "pro-choice" and "pro-life," the phrase "hate speech" is ideology in spansule form. It is the term-of-art of a movement—most active on college campuses and liberal municipalities—that has caused many civil rights activists to rethink their allegiance to the First Amendment, the amendment that licensed the protests, rallies, organization, and agitation that so galvanized the nation in a bygone era. Addressing the concerns of a very different era, the "hate speech" movement has enlisted the energies of some of our most engaged and interesting legal scholars. The result has been the proliferation of campus

speech codes as well as municipal statutes enhancing penalties for bias crimes. Equally important, however, the movement has also provided an opportunity for those of us outside it to clarify and rethink the meaning of our commitment to freedom of expression.

It is an opportunity we have miserably bungled. Because we are content with soundbites and one-liners, our political deliberation on the subject has had all the heft of a Jay Leno monologue. Free speech? Perhaps you get what you pay for.

What makes this ironic is that if America has a civic religion today, the First Amendment may be its central credo. "It's a free country," we shrug, and what we usually mean is: you can say what you please. "Sticks and stones can break my bones," we are taught to chant as children, "but words can never hurt me." Americans "are taught this view by about the fourth grade, and continue to absorb it through osmosis from everything around them for the rest of their lives," Catharine MacKinnon writes with no little asperity in *Only Words,* her latest and most accessible book, "to the point that those who embrace it think it is their own personal faith, their own original view, and trot it out like something learned from their own personal lives every time a problem is denominated one of 'speech,' whether it really fits or not."

The strongest argument for regulating hate speech is the unreflective stupidity of most of the arguments you hear on the other side. I do not refer to the debate as it has proceeded in the law reviews: there you find a quality of caution, clarity, and tentativeness that has made few inroads into the larger public discourse. Regrettably enough, those law professors who offer the best analysis of public discourse exert very little influence *within* public discourse. And that leaves us with a now familiar stalemate. On the one hand are those who speak of "hate speech," a phrase that alludes to an argument without revealing anything much about it; to insist on probing further is to admit, fearsomely, that you just "don't get it." On the other hand are their opponents who invoke the First Amendment like a mantra and seem immediately to fall into a trance, so oblivious are they to further argumentation and evidence. A small number of anecdotes, either about racism on campus or about "politically correct" (PC) inquisitions on campus, are endlessly recycled: and a University of Pennsylvania undergraduate named Eden Jacobowitz—yes, he of "water buffalo" fame—becomes a Dreyfuss *de nos jours.*

There's a practical reason to worry about how impoverished the

national discourse on free speech has become. For if we keep losing the arguments, in time we may lose our grip on the liberties they were meant to defend. We may come to think that our bad arguments are the only arguments to be made, and when someone finally disabuses us of them, we may switch sides without ever considering other and better arguments for staying put.

To get an appreciation of these arguments, though, we must be prepared to go beyond where the water buffalo roam. For all the pleasures of demonology, the burgeoning literature urging the regulation of racist speech has a serious claim on our attention. The time has come to accord these arguments the full consideration they deserve.

Conveniently enough, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* collects the three most widely cited and influential papers to make the case for the regulation of racist speech. (The collection also reprints a provocative essay by UCLA's Kimberlè Williams Crenshaw, though one whose principal concerns—about the conflicting allegiances posed by race and gender—place it beyond the ambit of this discussion.) Gathered together for the first time, these three papers—which originally appeared in law reviews over the past several years, only to circulate even more widely through the samizdat of the photocopier—complement each other surprisingly well. Though each makes larger arguments as well, one proposal focuses on criminal law, another focuses on civil law, and a third focuses on campus speech codes.

The authors of these proposals are "minority" law professors who teach at mainstream institutions—Mari J. Matsuda and Charles R. Lawrence III at Georgetown, Richard Delgado at the University of Colorado—and who write vigorous and accessible prose; their collected contributions cannot but elevate the level of discourse on the topic. They are, one can fairly say, the legal eagles of the crusade against racist hate speech.

But they are also, as the subtitle of the collections suggests, the principal architects of "critical race theory," one of the most widely discussed trends in the contemporary legal academy; and their jointly written introduction to the volume serves as the clearest manifesto it has yet received. Here the "social origins" of critical race theory are traced to a 1981 student boycott of a Harvard Law School course on "Race, Racism, and American Law." Organizing an informal alternative course,

students invited lawyers and law professors of color to lecture weekly on the topic. Crenshaw was one of the student organizers of the alternative course, Matsuda one of its participants; Delgado and Lawrence were among its guest lecturers. And thus was formed the nucleus of "a small but growing group of scholars committed to finding new ways to think about and act in pursuit of racial justice."

The intellectual ancestry of the movement is complex, but its two main progenitors are, on the one hand, the particular brand of feminist theory associated with Catharine MacKinnon (like that of Marx, the name of MacKinnon designates a body of argument that can no longer be distinguished from a political movement) and, on the other, the radical skepticism toward traditional black-letter pieties associated with "critical legal studies." Almost invariably, the literature arguing for hate speech regulation cites MacKinnon as an authority and model; almost invariably, the literature takes on one or more of the traditional legal distinctions (such as that between "private" and "public") whose dismantling—though often pioneered by the legal realists—is a repertory staple in critical legal studies.

So it is no surprise that conservative pundits like George Will denounce these theorists of hate speech as faddish foes of freedom. In fact, we would more accurately describe their approach as neotraditional. And those conservatives who dream of turning the cultural clock back to the fifties should realize that the First Amendment law of those years is just what these supposedly faddish scholars wish to revive. That much should suggest something amiss about our rhetoric concerning our First Amendment "traditions." And therein hangs another tale.

The conventional defense of free speech absolutism—the kind your uncle bangs on about—rests upon three pillars, all pretty thoroughly rotted through. Dr. Johnson thought he could refute Bishop Berkeley by kicking a stone, and armchair absolutists, to begin with, often think they can win debates through the self-evident authority of the First Amendment itself. The invocation is generally folded together with a vague sort of historical argument. The First Amendment, we are told, has stood us in good stead through the more than two centuries of this great republic; quite possibly, our greatness depends on it. The framers knew what they were doing, and—this directed to those inclined to

bog down in interpretative quibbles—at the end of the day, *the First Amendment means what it says.*

This is a dependable and well-rehearsed argument whose only flaw is that it happens to be entirely false and nobody ever believed it anyway. Indeed, the notion that the First Amendment has been a historical mainstay of American liberty is a paradigm instance of invented tradition. To begin with, the First Amendment, conceived as protecting the free speech of citizens, did not exist until 1931.[1] Before then, the Court took the amendment at its word: "*Congress* shall make no law . . ." Congress couldn't; but states and municipalities could do what they liked. Given this background, it shouldn't surprise us that even once the Supreme Court recognized freedom of expression as a right held by citizens, the interpretation of its scope remained quite narrow (notwithstanding such landmark cases as Learned Hand's opinion in *Masses Publishing* in 1917 and the Supreme Court's 1937 decision in *DeJonge v. Oregon*) until after World War II, when the Warren Court gradually ushered in a more generous vision of civil liberties. So the expansive First Amendment that people either celebrate or bemoan is really only a few decades old.

And even the Court's most expansive interpretation of First Amendment protection has always come with a list of exceptions, such as libel, invasion of privacy, and obscenity. "Categorization" is the legal buzzword for deciding whether expression is protected by determining which category the expression falls into—having first determined whether it qualifies as expression at all. While speech may be a species of conduct, much in case law still hangs on whether conduct (say, nude dancing in South Bend, Indiana, to allude to a case the Supreme Court decided a couple of years ago) will be allowed to count as expression for First Amendment purposes. Various refinements on the test have been proposed. To John Hart Ely, for example, the question for judicial scrutiny shouldn't be whether something is expression or conduct, for everything is both, but whether it is the expressive dimension of the speech-conduct amalgam that has provoked its prosecution. One may suspect that this refinement merely defers the difficulty of distinguishing. At the very least, Catharine MacKinnon's position—which extends no particular protection to "expression" over "conduct"—has the advantage of coherence. (More proof that in the real world, theoretical coherence is an overrated virtue.)

In their categorizing mode, the courts have also respected a general hierarchy of protected speech, such that political speech is deemed worthy of significant protection while commercial speech is highly subject to regulation. But even political speech is subject to the old clear-and-present danger exemption and a cluster of variants. To venture into murkier waters, the issue of speech management arises in the highly contested matter of "public forum": where may one exercise these supposedly valuable rights of free speech? How much (if any) access to these forums will we enjoy? And this isn't even to consider the unbounded array of criminal and civil offenses that are enacted through expression. As Frederick Schauer, Stanton Professor of the First Amendment at Harvard University, has observed, absolute protection would make unconstitutional "all of contract law, most of antitrust law, and much of criminal law." In view of this brambly legal landscape, to invoke the First Amendment as if it settled anything by itself can sound very much like know-nothingism.

When the myth of the self-justifying First Amendment is put aside, armchair absolutists are left with two fallback arguments. Dredging up childhood memories, they come up with that playground chant about sticks and stones. Offensive expression should be protected because it is costless, "only words." But if words really were inert, we wouldn't invest so much in their protection; it is a vacuous conception of expressive liberty that is predicated upon the innocuousness of its exercise. "Every idea is an incitement," Justice Holmes famously wrote, albeit in dissent. In his recent history of obscenity law, Edward de Grazia tells of an especially sad and instructive example of the power of words to cause harm. Evidently the heated rhetoric of Catharine MacKinnon's 1984 campaign for an anti-pornography ordinance in Minneapolis moved one young supporter to douse herself with gasoline and set herself afire. Porno for pyros indeed.

This leaves us with the armchair absolutists' Old Reliable: the slippery-slope argument. Perhaps racist speech is hurtful and without value, they will concede, but tolerating it is the price we must pay to ensure the protection of other, beneficial, and valuable speech. The picture here is that if we take one step down from the mountain peak of expressive freedom, we'll slide down to the valley of expressive tyranny. But a more accurate account of where we currently stand is somewhere halfway up the side of the mountain; we already are, and always were, on that

slippery slope. And its very slipperiness is why First Amendment jurisprudence is so strenuous, why the struggle for traction is so demanding.

I should be clear. Slippery-slopism isn't worthless as a consideration: because the terrain is slippery we *ought* to step carefully. And there are many example of "wedge" cases that have led to progressive restrictions in civil liberties. (For example, *Bowers v. Hardwick,* the 1986 case in which the Supreme Court affirmed the constitutionality of statutes prohibiting private, consensual sex between men, has since been invoked in over one hundred state and federal court decisions denying the right to privacy.) Even so, slippery-slopism sounds better in the abstract than in the particular. For one thing, courts often must balance conflicting rights—as with "hostile environment" cases of work-place harassment. For another, we do not always know immediately if the step taken will ultimately lead us downhill or up—as with William Brennan's decision in *Roth v. United States,* which affirmed Stanley Roth's conviction for publishing an Aubrey Beardsley book and declared obscenity to be utterly without redeeming value. The wording of that decision, however unpromising at first glance, turned out to be a boon for the civil libertarian position.

But the hate speech movement hasn't been content with exposing the sort of weaknesses I've just rehearsed. It has also aligned itself with earlier traditions of jurisprudence—and it's here that the movement's seeming atavism is most clearly displayed—by showing that the sort of speech it wishes to restrict falls into two expressive categories that the Supreme Court has previously held (and, they argue, correctly so) to be undeserving of First Amendment protection. The categories are those of fighting words and group defamation, as exemplified by two cases decided in 1942 and 1952.

It is out of respect for the prerogative of "categorization" that critical race theorists root their model of assaultive speech in the Supreme Court opinion of *Chaplinsky v. New Hampshire* (1942), which bequeathed us the "fighting words" doctrine. Chaplinsky was a Jehovah's Witness who was convicted for calling a city marshall a "God damned racketeer" and "a damned Fascist." The statute he violated forbade one to address "any offensive, derisive or annoying word to any other person" in a public place.

Affirming the conviction, the Court held that "there are certain well-

defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." Among them were "the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." "Such utterances are no essential part of any exposition of ideas," Justice Murphy wrote for the majority, "and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

The Court's reference to those words "which by their very utterance inflict injury" is especially cherished by the hate-speech movement, for it seems to presage its account of "assaultive speech," or words that wound. In accord with *Chaplinsky,* critical race theorists emphasize the immediate and visceral harms incurred by hate speech. "Many victims of hate propaganda have experienced physiological and emotional symptoms, such as rapid pulse rate and difficulty in breathing," Charles R. Lawrence writes. Mari J. Matsuda has even more alarming findings to report: "Victims of vicious hate propaganda experience physiological symptoms and emotional distress ranging from fear in the gut to rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide." And Richard Delgado further notes that the psychic injuries incurred by racist speech have additional costs down the road: "The person who is timid, withdrawn, bitter, hypertense, or psychotic will almost certainly fare poorly in employment settings." (As a member of the Harvard faculty, I would venture there are exceptions to this rule.)

But *Chaplinsky* has other useful elements, too. Thus the approach entailed by the Court's conclusion that such words as the Jehovah's Witness uttered "are no essential part of any exposition of ideas" has also been pressed into service. It shows up in the insistence that racist speech has no content, that it is more like a blunt instrument than a vehicle of thought. "The racial invective is experienced as a blow, not a proffered idea," Lawrence writes.

By contrast, the "fighting words" prong of the Chaplinsky test—specifying words likely to incite an immediate breach of the peace—has been widely condemned for bias: why should those persons (women, for example) who are less likely to strike back physically be less protected from abuse? For this reason, Lawrence in effect urges an expansion of the fighting words doctrine, arguing that racist speech (which may silence its victims, rather than provoking them to violence) should be understood as the "functional equivalent of fighting words," and thus equally unworthy of First Amendment protection.

The hate speech movement's deployment of *Chaplinsky* is certainly within the pale of standard legal argument; indeed, the carefully drafted speech code adopted by Stanford University explicitly extends only to "fighting words" or symbols, thus wearing its claim to constitutionality on its face. So if *Chaplinsky* can shoulder the legal and ethical burdens placed upon it, the regulationists have a powerful weapon on their side. Can it?

Probably not. To begin with, it's an open question whether *Chaplinsky* remains, as they say, "good law," given that in the fifty years since its promulgation the Supreme Court would never once affirm a conviction for uttering either "fighting words" or words that "by their very utterance inflict injury." Indeed, in part because of its functional desuetude, in part because of the male bias of the "breach of the peace" prong, the editors of the *Harvard Law Review* have recently issued a call for the doctrine's explicit interment. So much for the doctrine's judicial value.

But they also note, as others have, that statutes prohibiting "fighting words" have had discriminatory effects. An apparently not atypical conviction—upheld by the Louisiana state court—was occasioned by the following exchange between a white police officer and the black mother of a young suspect. He: "Get your black ass in the goddamned car." She: "You god damn mother fucking police—I am going to [the Superintendent of Police] about this." No prize for guessing which one was convicted for uttering "fighting words." As the legal scholar Kenneth Karst reports, "[S]tatues proscribing abusive words are applied to members of racial and political minorities more frequently than can be wholly explained by any special proclivity of those people to speak abusively." So much for the doctrine's political value.

Nor, finally, does the *Chaplinsky*-derived description of assaultive speech as being devoid of political or other ideational content—"experienced as a blow, not a proffered idea," in Lawrence's compelling formulation—survive closer inspection. Consider the incident that, Lawrence tells us, moved him to take up the hate speech cause in the first place. Two white Stanford freshmen had an argument with a black student

about Beethoven's ancestry: he claimed, and they denied, that the Flemish-German composer was really of African descent. The next evening, apparently as a satirical commentary, the white students acquired a poster of Beethoven, colored it in with Sambo-like features, and posted it on the door of the student's dorm room at Ujamaa, Stanford's black theme house. Lawrence "experienced the defacement as representative of the university community's racism and not as an exceptional incident in a community in which the absence of racism is the rule"—and the rest is critical-race-theory history.

Now then, is Lawrence's paradigm example of racist hate speech in fact devoid of ideational or political content, as his analysis would suggest? Evidently not, for in their jointly written manifesto for critical race theory, the authors of *Words That Wound* spell out what they believe its message to have been: "The message said, 'This is you. This is you and all of your African-American brothers and sisters. You are all Sambos. It's a joke to think that you could ever be a Beethoven. It's ridiculous to believe that you could ever be anything other than a caricature of real genius.' " The defaced poster would also inspire a lengthy and passionate essay by the legal theorist Patricia J. Williams, an essay that extracts an even more elaborated account of its meaning. This was one picture, clearly, that really was worth a thousand words.

The same paradox surfaces in Richard Delgado's ground-breaking proposal for a tort action to redress racist speech. To define this tort, he must distinguish offensive racist speech from offensive political speech; for in *Cohen v. California* (1971), the Supreme Court decided that a jacket emblazoned with the words "Fuck the Draft" and worn in a courthouse would be protected as political speech, despite its patent offensiveness. Delgado argues that a racial insult, by contrast, "is not political speech; its perpetrator intends not to discover truth or advocate social action, but to injure the victim." It's a curious disjunction, this, between advocacy and injury. For if Delgado and his fellow contributors have a central message to impart, it's that racial insults are profoundly political, part of a larger mechanism of social subordination, and thus in contravention of the spirit of the "equal protection" clause of the Fourteenth Amendment. And the most harmful forms of racist speech are precisely those that combine injury with advocacy—those that are, in short, the most "political."

"Are racial insults ideas?" Lawrence asks. "Do they encourage wide-open debate?" He means the question to be rhetorical, but after reading his work and those of his fellow critical race theorists, who could possibly doubt it?

Even if we finally reject the picture of assaultive speech as empty of political content, along with the other tenets of the *Chaplinsky* doctrine, the hate-speech movement can still link itself to constitutional precedent through the alternative model of defamation. Indeed, I would argue that the defamation model is more central, more weight-bearing in these arguments than the assaultive one. And note that these *are* alternatives, not just different ways of describing the same thing. The "fighting words"/"assaultive speech" paradigm analogizes racist expression to physical assault: at its simplest, it characterizes an act of aggression between two individuals, victim and victimizer. By contrast, the defamation paradigm analogizes racist speech to libel, a dignitary affront. The harm is essentially social: to be defamed is to be defamed in the eyes of other people.

Here, the guiding precedent is Justice Frankfurter's majority opinion in the 1952 case of *Beauharnais v. Illinois,* in which the Court upheld a conviction under an Illinois group libel ordinance. The ordinance was clumsily written, but it essentially prohibited public expression that "portrays depravity, criminality, unchastity, or lack of virtue in a class of citizens of any race, color, creed, or religion," thereby exposing them to "contempt, derision, or obloquy." Mr. Beauharnais ran afoul of the ordinance when he circulated a leaflet that urged whites to unite against the menace posed by their black fellow citizens.

> Preserve and Protect White Neighborhoods! from the constant and continuous invasion, harassment and encroachment by the Negroes. . . . The white people of Chicago must take advantage of the opportunity to be united. If persuasion and the need to prevent the white race from being mongrelized by the Negro will not unite us, then the aggressions, rapes, robberies, knives, guns, and marijuana of the Negro surely will.

So averred Mr. Beauharnais, and it was the last sentence, specifying the Negro's offenses, that was held to violate the law. In Justice Frankfurter's opinion: "If an utterance directed at an individual may be the object of criminal sanctions we cannot deny to a state power to punish

the same utterance directed at a defined group," at least as long as the restriction is related to the peace and well-being of the state.

To be sure, *Beauharnais v. Illinois* has since fallen into judicial disrepute, having been reversed in its particulars by subsequent cases like the celebrated *Sullivan v. New York Times*. Indeed, more widely cited than Justice Frankfurter's opinion is Justice Hugo Black's dissent: "If there be minority groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark: 'Another such victory and I am undone.' " And yet Frankfurter's claim for the congruence of individual and group libel is not, on the face of it, implausible. One could argue (as MacKinnon does) that this precedent is deserving of revival—or, more elaborately (as Lawrence does), that it was never truly reversed, because the notion of group libel tacitly underlies and sponsors more prestigious Supreme Court precedents.

Thus MacKinnon, in *Only Words,* deplores the celebrated *Sullivan* case for undermining the vitality, and superior virtue, of *Beauharnais v. Illinois*. "This arrangement avoids the rather obvious reality that groups are made up of individuals," she writes. "In reality, libel of groups multiplies rather than avoids the very same damage through reputation which the law of individual libel recognizes when done one at a time, as well as inflicting some of its own. . . . The idea seems to be that injury to one person is legally actionable, but the same injury to thousands of people is protected speech." Where's the justice in that? MacKinnon would thus revive the state's winning argument in *Beauharnais:* "[P]etitioner cannot gain constitutional protection from the consequence of libel by multiplying victims and identifying them by a collective term." (A similar argument was elaborated in a classic defense of group defamation laws written by none other than David Riesman during his brief career as a law professor.)

And the plausibility of this simple but powerful idea is what has made it so attractive to theorists of hate speech. As Mari J. Matsuda writes movingly:

> When the legal mind understands that reputational interests . . . must be balanced against first amendment interests, it recognizes the concrete reality of what happens to people who are defamed. Their lives are changed. Their standing in the community, their opportunities, their self-worth, their free enjoyment of life are limited. Their political capital—their ability to speak and be heard—is diminished. To see this, and yet to fail to see that the very same things happen to the victims of racist speech, is selective vision.

The defamation model plays an even more central role in Lawrence's analysis. He argues that *Brown v. Board of Education,* decided just two years after *Beauharnais,* is best interpreted as a "case about group defamation. The message of segregation was stigmatizing to Black children. . . . *Brown* reflects the understanding that racism is a form of subordination that achieves its purpose through group defamation." Indeed, Lawrence seems to move close to the position that *all* racism is essentially to be understood as defamation. And he protests that "there has not yet been a satisfactory retraction of the government-sponsored defamation in the slavery clauses, the Dred Scott decision, the Black codes, the segregation statutes, and countless *other group libels*" (italics are mine).

Let's leave aside for the moment Lawrence's intriguing reinterpretation of legal history. What's wrong with the basic claim here, one endorsed by judges and scholars across the ideological spectrum, that group libel is just individual libel multiplied?

As I say, we should grant that the claim has prima facie plausibility. And yet the very case of *Beauharnais* illustrates the attendant difficulties. For while Mr. Beauharnais's racism is everywhere in evidence, it's actually unclear what charge is being made in the one sentence of his leaflet that was found to be libelous. That is, the accusation about the "aggressions" and so forth of the Negro need not obtain about any particular Negro; and nobody claimed that *no* Negro was guilty of such misdeeds as he enumerated. Since the Sedition Act of 1798, truth has been allowed as a defense in American libel law. But the Illinois ordinance nowhere mentions the question of truth or falsity, and we might think it odd, even insulting, if it did. (At his trial, Mr. Beauharnais offered to prove the truth of his allegations by introducing evidence about the higher incidence of crime in black districts; his offer was declined.) And this points us toward the significant disanalogy between group and individual libel.

Start with the notion that individual libel involves the publication of information about someone that is both damaging and false. Charles Lawrence inadvertently directs us to the source of the problem. The

racial epithet, he writes, "is invoked as an assault, not as a statement of fact that may be proven true or false." But that suggests that the evaluative judgments that are characteristic of racial invective do not lend themselves to factual verification, and here the comparison with individual libel breaks down. The same problem emerges when MacKinnon identifies pornography as group defamation whose message is (roughly) that it would be nice if women were available for sexual exploitation; for a proposition of that form may be right or wrong, but it cannot be true or false. The conclusion Lawrence draws is that racist speech is a form of defamation immune from the *Sullivan* rule protecting statements of fact that are later discovered to be erroneous. A more obvious conclusion to reach would be that racist invective isn't best understood as an extension of individual libel at all. You cannot libel someone by saying "I despise you," which seems to be the essential message common to most racial epithets.

Delgado himself, whose essay was published earliest, offers further reasons to reject the defamation model that colleagues like Lawrence, Matsuda, and MacKinnon find so attractive. As he notes: "A third party who learned that a person was the victim of a racial insult, but did not know the victim, would probably conclude that the victim is a member of a particular racial minority. But if this conclusion is true, the victim cannot recover [under defamation law] because no falsehood has occurred. And whether or not the conclusion is true, it is not desirable that the law view membership in a racial minority as damaging to a person's reputation, even if some members of society consider it so."

I think we may fairly conclude, then, that *Beauharnais* is best left undisturbed in its slumbers, and that the model of group libel founders on the flawed analogy to individual libel. "Nigger" (used in the vocative) is not helpfully treated as group libel for the same reason it is not helpfully treated as individual libel. On the categorization front, at least, civil libertarians need not cede critical race theory an inch.

Critical race theory is at its strongest, however, not when it seeks to establish a bridgehead with constitutional precedent but when it frontally contests what has recently emerged as a central aspect of Supreme Court First Amendment doctrine: the principle of content and viewpoint neutrality.

The principle of content and viewpoint neutrality is meant to serve as

a guideline to how speech can permissibly be regulated, ensuring basic fairness by preventing the law from favoring one partisan interest over another. So, for example, a law forbidding the discussion of race would violate the principle of content neutrality, which is held to be a bad thing; a law that forbade the advocacy of black supremacy would violate the principle of viewpoint neutrality, which is held to be a worse thing. When the Minnesota Supreme Court affirmed the content-sensitive hate speech ordinance at issue in *R.A.V. v. St. Paul,* it cited Mari J. Matsuda's work in reaching its conclusions. When Justice Scalia reversed and invalidated the ordinance on the grounds of viewpoint discrimination, he was implicitly writing against Matsuda's argument. So what we saw was no merely academic conflict of vision; these are arguments with judicial consequences.

In my view, Matsuda's rejection of what she calls the "neutrality trap" is probably the most powerful element of her argument. Rather than trying to fashion neutral laws to further our social objectives, why not put our cards on the table and acknowledge what we know? As an example of where the neutrality trap leads, she cites the anti-mask statutes that many states passed "in a barely disguised effort to limit Ku Klux Klan activities."

> These statutes purportedly cover the wearing of masks in general, with no specific mention of the intent to control the Klan. Neutral reasons, such as the need to prevent pickpockets from moving unidentified through crowds or the need to unmask burglars or bank robbers are proffered for such statutes. The result of forgetting—or pretending to forget—the real reason for antimask legislation is farcical. Masks are used in protest against terrorist regimes for reasons both of symbolism and personal safety. Iranian students wearing masks and opposing human rights violations by the Shah of Iran, for example, were prosecuted under a California antimask statute.
>
> I call here for an end of such unknowing. We know why state legislatures—those quirkily populist institutions—have passed antimask statutes. It is more honest, and less cynically manipulative of legal doctrine, to legislate openly against the worst forms of racist speech, allowing ourselves to know what we know.

What makes her position particularly attractive is that she offers a pragmatic, pro-civil-liberties argument for such content specificity. "The alternative to recognizing racist speech as qualitatively different because of its content is to continue to stretch existing first amendment exceptions, such as the 'fighting words' doctrine and the 'content/conduct'

distinction," she writes. "This stretching ultimately weakens the first amendment fabric, creating neutral holes that remove protection for many forms of speech. Setting aside the worst forms of racist speech for special treatment is a non-neutral, value-laden approach that will better preserve free speech."

Another cogent argument against the notion of neutral principles is the fact that facially neutral principles are often anything but in practice. "The law, in its infinite majesty, forbids rich and poor alike from sleeping under bridges," Anatole France famously observed. If neutrality is, in the end, a masquerade, why bother with it? Why not abandon neutral principles and permit what Matsuda calls "expanded relevance," allowing courts to take into account the experience of racism, the victim group's consciousness, in assessing the harm of racist speech? At the very least, this approach would promise a quick solution to the sorts of abuses of "fighting words" ordinances we saw. To see how, consider Matsuda's own approach to legal sanctions for racist speech.

By way of distinguishing "the worst, paradigm example of racist hate messages from other forms of racist and nonracist speech," she offers three identifying characteristics:

1. The message is of racial inferiority.
2. The message is directed against a historically oppressed group.
3. The message is persecutory, hateful, and degrading.

The third element, she says, is "related to the 'fighting words' idea"; and the first "is the primary identifier of racist speech"; but it is the second element that "attempts to further define racism by recognizing the connection of racism to power and subordination." And it is the second element that most radically departs from the current requirement that law be neutral as to content and viewpoint. Still, it would seem to forestall some of the abuses to which earlier speech ordinances have been put, simply by requiring the victim of the penalized speech to be a member of a "historically oppressed group." And there's something refreshingly straightforward about her call for "an end to unknowing." Is Matsuda on to something?

Curiously enough, what trips up the content-specific approach is that it can never be content-specific enough.

Take a second look at her three identifying characteristics of paradigm hate speech. First, recall, the message is of racial inferiority. Now,

Matsuda makes clear that she wants her definition to encompass, inter alia, anti-Semitic and anti-Asian prejudice: but anti-Semitism—as the (black, Jewish) philosopher Laurence Thomas observes—traditionally imputes to its target not inferiority but iniquity. And anti-Asian prejudice often more closely resembles anti-Semitic prejudice than it does anti-black prejudice. Surely anti-Asian prejudice that depicts Asians as menacingly superior, and therefore a threat to "us," is just as likely, perhaps more likely, to arouse the sort of violence that notoriously claimed the life of Vincent Chin ten years ago in Detroit. More obviously, the test of membership in a "historically oppressed" group is in danger of being either too narrow (just blacks?) or too broad (just about everybody). Are poor Appalachians—a group I knew well from growing up in a West Virginia mill town—"historically oppressed" or "dominant group members"?

Once we had adopted the "historically oppressed" proviso, I suspect it would just be a matter of time before a group of black women in Chicago are arraigned for calling a policeman a "dumb Polack." Evidence that Poles are a historically oppressed group in Chicago will be in plentiful supply; the policeman's grandmother will offer poignant firsthand testimony to that. Of course, we might—ever mindful that minority groups have been especially vulnerable to statutes forbidding abusive speech—amend the criminal code by exempting members of historically oppressed groups from its sanctions. This would circumvent the risk of authorities employing the rules, perversely, against the very minority groups they were designed to empower. But then the white male student facing disciplinary procedures for calling a black classmate a "nigger" will always have the option of declaring himself to be gay, raising what the military calls a rebuttable presumption. The disciplinary committee would have to decide if it will be satisfied with the defendant's sexual self-ascription, or, more rigorously, require evidence of actual conduct. Matsuda rightly observes that "the legal imagination is a fruitful one," but might we not wish to see it employed at more useful tasks?

My point is one that some recent pragmatists have been fond of making, since Matsuda wants to abandon not principles or rules but only "neutral" principles and rules; and the sort of complications she decries (the imperfect "fit" between a rule and the cases it must govern) is the sort those pragmatists find with all principles and rules, neutral or not. Rather than rescuing us from the legal game of Twister, her ap-

proach merely provides a differently colored mat. And that mars the practical appeal of her position. Why abandon the notion of content neutrality—which has a decent, if flawed, track record—if doing so just replaces one set of problems with another?

It's also important to distinguish between a position that advocates abandoning our adherence to general rules and principles and one that says there is nothing to abandon, for we never really had them in the first place: both are plausible positions, but to confuse them is like confusing Satanism and atheism. As we saw, Matsuda is no skeptic about rules: what worries her about neutral principles is that they detach themselves from original context and acquire a sometimes destructive measure of autonomy—as when the antimask statute was used against the Iranian protestor. From a pragmatist perspective, a more thoroughgoing skepticism about rule-based accounts of First Amendment law has been offered by my friend and colleague Stanley Fish, in a now notorious essay entitled "There's No Such Thing as Free Speech, and It's a Good Thing, Too." First, though, a caveat. Despite the arresting title (and some arresting turns of argument), Fish turns out to be no foe of free speech as it is conventionally understood. Indeed, he essentially endorses the balancing approach to First Amendment cases proposed by Judge Learned Hand (in *Dennis v. United States*), and in the scheme of history, Judge Learned Hand has come to be regarded as one of the best friends the First Amendment ever had. "My rule of thumb is, 'don't regulate unless you have to,' " Fish writes, though, as he recognizes, that simply defers the question about when you have to.

Fish's central claim is that there are no final principles that will adjudicate First Amendment disputes, and that there is no avoiding a somewhat ad hoc balancing of interests. This is so because, despite our disclaimers, free speech is always justified in reference to goals (the only alternative would be to refuse to justify it at all), and so we will end up deciding hard cases by an assessment as to how well the contested speech subserves those goals. Moreover, this is so even for those theorists, like Ronald Dworkin, who justify freedom of expression not by its possible long-term benefits (which Dworkin considers to be too much a matter of conjecture to support our firm commitment to expressive freedom), but by a view of these rights (along with, say, the subsuming ideal of moral autonomy) as a constitutive element of a liberal society. Even

"deontological" theories like Dworkin's—in which conformity to rules or rights, not good consequences, is what justifies action—are consequentialist, too, Fish argues: so long as they make exceptions to their vaunted rights for familiar consequentialist reasons (as in the event of clear and present danger), they are as fallen as the rest of us.

You will notice that Fish's argument essentially has the same form as the old and undoubtedly sexist joke (a joke recently adapted into a film starring Demi Moore and Robert Redford) about the man who asks a woman if she would sleep with him for a million dollars. She allows that she probably would. In that case, the man presses, would you sleep with me for $10? "What kind of a woman do you think I am?" she asks, indignant. "We've already established what kind of a woman you are," the retort comes. "Now we're just negotiating over the price."

So, yes, if you up the stakes enough, it turns out that we are all whores—even the most chaste among us, even Demi Moore. And if you up the stakes enough, we are all consequentialists, too—even the most deontological among us, even Ronald Dworkin. Once Fish has exposed us, he won't allow us to keep our pretensions to chastity, or deontology, for pretensions are all they are. I am less demanding than he. I would allow that rights needn't be infinitely stringent, for they may conflict with other rights, and so in practice the whole affair will, as Fish does not miss, have an air of the ad hoc about it. But that doesn't mean that our principles and rules do no work, that they are merely subterfuge. Maybe there's a useful sense in which we are *not* all whores. Besides, isn't that all-or-nothing rhetoric at odds with the whatever-works eclecticism of pragmatism at its best? The fact that First Amendment jurisprudence represents a hodgepodge of approaches, some of them at odds with each other, isn't necessarily a weakness.

Fish quotes Frederick Schauer criticizing the First Amendment for being an "ideology." But what's wrong with, and what's the alternative to, ideology? Granted, "ideology" is a pejorative term, somebody else's politics, as another old joke has it; but it's precisely as an ideology, which is only to say as an ideal that commands our public loyalties, that it has the beneficial effect that Fish himself commends: the effect it has as a brake on the overregulation of speech, even if it cannot present a permanent obstacle to it.

Where legal pragmatists, mainstream scholars, and critical race theo-

rists converge is in their affirmation of the balancing approach toward the First Amendment, and their corresponding skepticism toward what could be labeled the "Skokie school" of jurisprudence.

When the American Civil Liberties Union defended the right of neo-Nazis to march in Skokie, a predominantly Jewish suburb of Chicago where a number of Holocaust survivors lived, they did so to protect and fortify the constitutional right at issue. Indeed, they may have reasoned, if a civil liberty can be tested and upheld in so odious an exercise of it, the precedent will make it that much stronger in all the less obnoxious cases where it may be disputed in the future. Hard cases harden laws.

But the strategy of the "Skokie school" relies on a number of presuppositions that critical legal theorists and others regard as doubtful. Most importantly, it revolves around the neutral operation of principle in judicial decision-making. But what if judges really decided matters in a political, unprincipled way, and invoked principles only by way of window dressing? In cases close-run enough to require the Supreme Court to decide them, precedent and principle are elastic enough, or complex enough, that justices can often decide either way without brazenly contradicting themselves. And even if the justices want to make principled decisions, it may turn out that the facts of the case—in the real-world cases that come before them—are too various and complicated ever to be overdetermined by the rule of precedent, *stare decisis*. In either event, it could turn out that defending neo-Nazis was just . . . defending neo-Nazis.

Moreover, it may be that the sort of formal liberties vouchsafed by this process aren't the sort of liberties we need most. Maybe we've been overly impressed by the frisson of defending bad people for good causes, when the good consequences may be at best conjectural and the bad ones are real and immediate. Maybe, these critics conclude, it's time to give up the pursuit of abstract principles and defend victims against victimizers, achieving your results in the here-and-now, not the sweet hereafter.

Now, there's something to this position, but like the position it is meant to rebuff, it is overstated. Nadine Strossen, a general counsel to the American Civil Liberties Union, can show, for example, that the organization's winning First Amendment defense of the racist Father Terminiello in 1949 bore Fourteenth Amendment fruit when it was able to use the landmark *Terminiello* decision to defend the free speech rights

of civil rights protestors in the sixties and seventies. Granted, this may not constitute proof, an elusive thing in historical argument, but such cases provide good prima facie reason to think that the "Skokie school" has pragmatic justification, not just blind faith, on its side.

Another problem with the abandonment of principled adjudication is what it leaves in its wake: which is the case-by-case balancing of interests. My point isn't that "normal" First Amendment jurisprudence can or should completely eschew balancing; but there's a difference between resorting to it *in extremis* and employing it as the first and only approach. Now, in the case of racist invective, a balancing approach may be especially tempting, because the class of expression to be restricted seems so confined, while the harms with which it is associated can be vividly evoked. As the Berkeley law professor Robert C. Post argues, however, this invitation to balance is best declined, because of what he terms "the fallacy of immaculate isolation."

> The effect on public discourse is acceptable only if it is de minimis, and it is arguably de minimis only when a specific claim is evaluated in isolation from other, similar claims. But no claim is in practice immaculately isolated in this manner . . . there is no shortage of powerful groups contending that uncivil speech within public discourse ought to be 'minimally' regulated for highly pressing symbolic reasons. . . . In a large heterogeneous country populated by assertive and conflicting groups, the logic of circumscribing public discourse to reduce political estrangement is virtually unstoppable.

But there are other reasons to be chary about the reign of balancing. For an unfettered regime of balancing simply admits too much to judicial inspection. What we miss when we dwell on the rarefied workings of high-court decision-making is the way in which laws exert their effects far lower down the legal food chain. It's been pointed out that when police arrest somebody for loitering or disorderly conduct, the experience of arrest—being hauled off to the station and fingerprinted before being released—very often *is* the punishment. "Fighting words" ordinances have lent themselves to similar abuse. Anthony D'Amato, a law professor at Northwestern, makes a crucial and often overlooked point when he argues: "In some areas of law we do not want judges to decide cases at all—not justly or any other way. In these areas, the mere possibility of judicial decisionmaking exerts a chilling effect that can undermine what we want the law to achieve."

But what if that chilling effect is precisely what the law is designed

for? After all, one person's chill is another person's civility. In any event, it's clear that all manner of punitive speech regulations are meant to have effects far beyond the classic triad of deterrence, reform, and retribution.

In fact, the main appeal of speech codes usually turns out to be primarily expressive or symbolic rather than consequential in nature. That is, their advocates do not depend on the claim that the statute will spare victim groups some foreseeable amount of psychic trauma. They say, rather, that by adopting such a statute, the university *expresses* its opposition to hate speech and bigotry. More positively, the statute *symbolizes* our commitment to tolerance, to the creation of an educational environment where mutual colloquy and comity are preserved. (Of course, the symbolic dimension may be valued because of *its* consequences. Indeed, the conservative sociologist James Q. Wilson has made the parallel argument for the case of obscenity regulation when he writes of his "belief that human character is, in the long run, affected less by occasional furtive experiences than by whether society does or does not state that there is an important distinction between the loathsome and the decent.")

It is in this spirit that Matsuda writes, "[A] legal response to racist speech is a *statement* that victims of racism are valued members of our polity," and that "in a society that *expresses* its moral judgments through the law," the "absence of laws against racist speech is telling." It is in this spirit that Delgado suggests that a tort action for racist speech will have the effect of "*communicating* to the perpetrator and to society that such abuse will not be tolerated either by its victims or by the courts" (italics mine). And it is in this spirit that Thomas Grey, the Stanford law professor who helped draft the campus speech regulations, counsels: "Authorities make the most effective statement when they are honestly concerned to do something *beyond* making a statement," thus "putting their money where their mouth is." The punitive function of speech codes are thus enlisted to expressive means, as a means of bolstering the credibility of the anti-racist statement.

And yet once we have admitted that the regulation of racist speech is, in part or whole, a symbolic act, we must register the force of the other symbolic considerations that may come into play. So, even if you think that the notion of free speech contains logical inconsistencies, you need

to register the symbolic force of its further abridgement. And it is this level of scrutiny that may tip the balance in the other direction. The controversy over flag burning is a good illustration of the two-edged nature of symbolic arguments. Perhaps safeguarding the flag symbolized something nice, but for many of us, safeguarding our freedom to burn the flag symbolized something nicer.

Note, too, the contradiction in the expressivist position I just reviewed: a university administration that merely condemns hate speech, without mobilizing punitive sanctions, is held to have done little, offering "mere words." Yet this skepticism about the potency of "mere words" comports oddly with the attempt to regulate "mere words" that, since they are spoken by those not in a position of authority, would seem to have even less symbolic force. Why is it "mere words" when a university condemns racist speech, but not when the student utters the abusive words in the first place? Whose words are "only words"? Why are racist words deeds, but anti-racist words just lip service?

Further, is the verbal situation as asymmetric as it first appears? Does the rebuke "racist" have no power to wound on a college campus? One of the cases that arose under the University of Michigan speech code involved a group discussion at the beginning of a dentistry class, in which the teacher, a black woman, sought to "identify concerns of students." A student reported that he had heard, from his roommate, who was a minority, that minority students had a hard time in the class and were not treated fairly. In response, the outraged teacher lodged a complaint against the student for having accused her (as she perceived it) of racism. For this black woman, at least, even an indirect accusation of racism apparently had the brunt of racial stigmatization.

Still, I would insist that there is nothing unusual about the movement's emphasis on the expressive aspect of the law. "To listen to something on the assumption of the speaker's right to say it is to legitimate it," the conservative legal philosopher Alexander Bickel told us. "Where nothing is unspeakable, nothing is undoable." And I think there's an important point of convergence there: Bickel's precept that to "listen to something on the assumption of the speaker's right to say it is to legitimate it" underlies much of the contemporary resistance to unregulated expression on campus and elsewhere. For the flip side of the view that hate speech ordinances are necessary to express sincere opposition to hate speech is the view—which recurs in much of the

literature on the subject—that to tolerate racist expression is effectively to endorse it: the Bickel principle. Thus, "Government protection of the right of the Klan to exist publicly and to spread a racist message promotes the role of the Klan as a legitimizer of racism," Matsuda writes. For his part, Charles Lawrence seems to suggest that merely to defend civil liberties on campus may be to "valorize bigotry."

Like many other positions identified with the hate speech movement, the thesis that toleration equals endorsement is not as radical as first appears. In fact, this is precisely the position elaborated by Lord Patrick Devlin in 1965, in his famous attack on the Wolfenden Report's recommendation to decriminalize homosexual behavior in Britain. "If society has the right to make a judgment," he wrote, "then society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence." On this basis, he argues, "society has a prima facie right to legislate against immorality as such." In Lord Devlin's account, as in Matsuda's, the law expresses the moral judgment of society; to countenance things that affront public morality is thus a betrayal of its purpose.

Of course, Matsuda's belief that the government that protects the rights of the Klan has promoted its views would have many surprising consequences. One might conclude that the government that provided civic services to the March on Washington this past March was solidly behind the cause of gay rights. Or that, in giving police protection to several of the Reverend Al Sharpton's marches in New York, it was lending its moral support to the cause of black resistance. Or that, in providing services to the Wigstock festivities in Tompkins Square Park, it was plumping for transvestitism. Or that, in policing both rallies in favor of abortion and those opposed, it was somehow supporting both positions. One might, but of course one wouldn't. And since, in the scheme of things, policing Klan marches commands a tiny fraction of the state's resources—less, I would surmise, than do such African-American events as Caribbean Day parades—our worries on this score seem misplaced.

One final paradox fissures the hate speech movement. Because these scholars wish to show that substantial restrictions on racist speech are consistent with the Constitution, they must make the case that racist speech is *sui generis* among offensive or injurious utterances; otherwise

the domain of unprotected speech would mushroom beyond the point of constitutional and political plausibility. The title of Delgado's trailblazing essay, and of the collection, *Words That Wound,* designates a category that includes but is scarcely exhausted by racist speech. Nor could we maintain that racist insults, which tend to be generic, are necessarily more wounding than an insult tailor-made to hurt someone: being jeered at for your acne, or obesity, may be far more hurtful than being jeered at for your race or religion.

So clearly the level of emotional distress associated with racist abuse cannot be its distinguishing characteristic; what must be distinguishing is its connection to systemic patterns of subordination. (Even so, there are other such patterns of subordination. "Racism is a breach of the ideal of egalitarianism, that 'all men are created equal' and each person is an equal moral agent, an ideal that is a cornerstone of the American moral and legal system," writes Richard Delgado. "A society in which some members regularly are subjected to degradation because of their race hardly exemplifies this ideal." But racism isn't the only reason people are subjected to degradation: what about shortcomings in appearance or intelligence, traits that, like race, we can do little about?)

Scholars like Mari Matsuda, Charles Lawrence, and Richard Delgado argue that racist speech is peculiarly deserving of curtailment precisely because it participates in (and is at least partly constitutive of) the larger structures of racism hegemonic in our society. "Black folks know that no racial incident is 'isolated' in the United States," writes Lawrence. "That is what makes the incidents so horrible, so scary. It is the knowledge that they are *not* the isolated unpopular speech of a dissident few that makes them so frightening. These incidents are manifestations of a ubiquitous and deeply ingrained cultural belief system, an American way of life."

What Matsuda annexes to this consideration is the further argument that what distinguishes racist speech from other forms of unpopular speech is "the universal acceptance of the wrongness of the doctrine of racial supremacy." Unlike Marxist speech, say, racist speech is "universally condemned." At first blush, this is a surprising claim. After all, if it *were* universally rejected, hate speech ordinances would be an exercise in antiquarianism.

And yet there is something in what Matsuda says: at the very least, it bespeaks a shared conviction about the weight of the anti-racist consen-

sus, the conviction that at least overt racists are an unpopular minority, and that authority is likely to side with *us* against *them*. In truth, this conviction provides the hidden foundation for the hate speech movement. Why would you entrust authority with enlarged powers of regulating the speech of unpopular minorities unless you were confident the unpopular minorities would be racists, not blacks? Lawrence may know that racial incidents are never "isolated," but he must also believe them to be less than wholly systemic. You don't go to the teacher to complain about the school bully unless you know that the teacher is on your side.

Critical race theory's implicit confidence in the anti-racist consensus also enables its critique of neutral principles, as becomes clear when one considers the best arguments in favor of such principles. Thus, David Coles, a law professor at Georgetown University, suggests that "in a democratic society the only speech government is likely to succeed in regulating will be that of the politically marginalized. If an idea is sufficiently popular, a representative government will lack the political wherewithal to suppress it, irrespective of the First Amendment. But if an idea is unpopular, the only thing that may protect it from the majority is a strong constitutional norm of content neutrality." Reverse his assumptions about whose speech is marginalized and you can stand this argument on its head. If blatantly racist speech is unpopular and stigmatized, a strong constitutional norm of content neutrality may be its best hope for protection: and for critical race theory, that's a damning argument *against* content neutrality.

Here, then, is the political ambiguity that haunts the new academic activism. "Our colleagues of color, struggling to carry the multiple burdens of token representative, role model, and change agent in increasingly hostile environments, needed to know that the institutions in which they worked stood behind them," the critical race theory manifesto informs us. *Needed to know that the institutions in which they worked stood behind them:* I have difficulty imagining that this sentiment could have been expressed by their activist counterparts in the sixties, who defined themselves through their adversarial relation to authority and its institutions. And that is the crucial difference this time around. Today, the aim is not to resist power, but to enlist power.

"Critical race theory challenges ahistoricism and insists on a contextual/historical analysis of the law," the critical race theory manifesto instructs us. It is not a bad principle. But what it suggests to me is that we get down to cases and consider, as they do not, the actual results of various regimes of hate speech regulation.

Matsuda, surveying United Nations conventions urging the criminalization of racist hate speech, bemoans the fact that the United States, out of First Amendment scruple, has declined fully to endorse such resolutions. By contrast, she commends to our attention states such as Canada and the United Kingdom. Canada's appeal to the hate speech movement is obvious. After all, the new Canadian Bill of Rights has not (as she observes) been allowed to interfere with its national statutes governing hate propaganda. What's more, Canada's Supreme Court has recently adopted MacKinnon's statutory definition of pornography as law of the land.

What you don't hear from the hate speech theorists is that the first casualty of the MacKinnonite anti-obscenity ruling was a gay and lesbian bookshop in Toronto, which was raided by the police because of a lesbian magazine it carried. (Homosexual literature is a frequent target of Canada's restrictions on free expression.) Nor are they likely to mention that as recently as June 1993, copies of a book widely assigned in women's studies courses, *Black Looks: Race and Representation* by the well-known black feminist scholar bell hooks, was confiscated by Canadian authorities as possible "hate literature." Is the Canadian system really our beacon of hope?

Even more perplexing—especially given the stated imperative to challenge ahistoricism and attend to context—is the nomination of Britain as an exemplar of a more enlightened free-speech jurisprudence. Does anyone believe that racism has subsided in Britain since the adoption of the 1965 Race Relations Act forbidding racial defamation? Or that the legal climate in that country is more conducive to searching political debate? Ask any British newspaperman about that. When Harry Evans, then editor of the London *Times,* famously proclaimed that the British press was, by comparison to ours, only "half-free," he was not exaggerating by much. The result of Britain's judicial climate is to make the country a net importer of libel suits launched by tycoons who are displeased with their biographers. By now, everyone knows that a British libel suit offers all the conveniences of a Reno divorce.

Is the British approach to the regulation and punishment of speech really an advance on ours? Ask the editors of the *New Statesman &*

Observer, whose continued existence was put in jeopardy after Prime Minister John Major sued the publication for mentioning, though not endorsing, the rumor that he was having an affair with a caterer. (Depending on how you interpret the facts in the case, it may be that I, in this publication, have just repeated the tortious offense.) Nor (in line with the Canadian example) has the British penchant for singling out gay publications for punishment escaped notice. Ask the editors of *Oz,* who discovered that the lesbian imagery on their cover represented a punishable offense. Ask the editors of the magazine *Gay News,* who were convicted for "blasphemous libel" when they published a poem involving a homosexual fantasy about Christ, and received jail sentences (later suspended). Ask the owner of Gay's the Word book shop in London, found guilty of "conspiring to import indecent and obscene material" in 1984. For that matter, ask Jenny White, who was prosecuted for privately purchasing lesbian videos from the United States in 1991.

The mordant irony is that American progressives should propose Britain, and its underdeveloped protection of expression, as a model to emulate at a time when many progressives in Britain are agitating for a bill of rights and broader First Amendment-style protections. To be sure, Britain has its attractions—scones, tea, cucumber sandwiches. But the jurisprudence of free speech isn't among them.

Nor is the record of U.K. student groups to be preferred. Nadine Strossen has pointed out the ironic history of a resolution adopted by the British National Union of Students in 1974, to the effect that representatives of "openly racist and fascist organizations" were to be kept from speaking on college campuses by "whatever means necessary (including disruption of the meeting)." It was a measure taken against groups like the National Front. But when, in the wake of the U.N. resolution, some British students designated Zionism a form of racism, the rule was invoked against Israelis, including Israel's ambassador to the United Kingdom—a turn of events that came much to the delight of the National Front.

To her credit, Mari Matsuda is up front about the sort of difficulties likely to arise in her regime of criminalization. In a section called "Hard Cases," she considers the hard case of Zionism and decides that some forms of Zionist expression—those expressed in "reaction to historical persecution"—is to receive protection, while other forms, which participate in the sort of "white supremacy" that some identify as intrinsic to the Middle East conflict, will not. She adds that "the various subordinated communities" are best equipped to identify such victimizing hate speech. In other words, the Palestinian is best equipped to decide whether and when the Zionist's speech should be criminalized. (It is unclear whether the Zionist can return the favor.)

And what of speech codes on American campuses? The record may surprise some advocates of hate speech regulations. "When the ACLU enters the debate by challenging the University of Michigan's efforts to provide a safe harbor for its Black, Latino, and Asian students," Lawrence writes, "we should not be surprised that nonwhite students feel abandoned." In light of the actual record of enforcement, you may view the situation differently.

During the year in which Michigan's speech code was enforced, more than twenty blacks were charged—by whites—with racist speech. As Nadine Strossen notes, not a single instance of racist speech by whites was punished. (Lawrence's talk of a "safe harbor" sounds more wishful than informed.) A full disciplinary hearing was conducted only in the case of a black social work student who was charged with saying, in a class discussion of research projects, that he believed that homosexuality was an illness, and that he was developing a social work approach to move homosexuals toward heterosexuality. ("These charges will haunt me for the rest of my life," the black student claimed in a court affidavit.)

By my lights, this is a good example of how speech codes kill critique. I think that the student's views about homosexuality (which may or may not have been well intentioned) are both widespread and unlikely to survive close intellectual scrutiny. Regrettably, we have not yet achieved a public consensus in this country on the moral legitimacy (or, more precisely, moral indifference) of homosexuality. Yet it may well be that a class on social work is not an inappropriate forum for a rational discussion of why the "disease" model of sexual difference has lost credibility among social scientists. (This isn't PC brainwashing, either; in a class on social work, this is simply education.) But you cannot begin to conduct this conversation when you outlaw the expression of the view you would critique.

Critical race theorists are fond of the ideal of conversation. "This chapter attempts to begin a conversation about the first amendment," Matsuda writes toward the end of her contribution. "Most important,

we must continue this conversation," Lawrence writes toward the end of his. It is too easy to lose sight of the fact that the conversation to which they're devoted is aimed at limiting conversation; and that if there are costs to speech, there are costs, as well, to curtailing speech, often unpredictable ones.

Our homophobic social work student may have been one of its casualties. As the legal philosopher David A. J. Richards contends: "It is a vicious political fallacy of the right and the left to assume that our contempt for false evaluative opinions may justly be transferred to contempt for the persons who conscientiously hold and express such views. Such persons are not, as it were, beyond the civilizing community of humane discourse." Or as Samuel Johnson, who crafted an art out of words that wound, admonishes, "punishment is able only to silence, not to confute."

We should be clear that speech codes may be far more narrowly tailored, and the Stanford rules—carefully drafted by scholars, like the Stanford law professor Thomas Grey, with civil libertarian sympathies—have, justly, been taken as a model of such careful delimitation. For rather than following the arguments against racist speech to their natural conclusion, the Stanford rules prohibit only insulting expression that conveys "direct and visceral hatred or contempt" for people on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin, and that is "addressed directly to the individual or individuals whom it insults or stigmatizes."

Chances are that the Stanford rule won't do much harm, if any. The chances are, too, that it won't do much good, if any. As long as the eminently reasonable Professor Grey is drafting and enforcing the restrictions, I won't lose much sleep over it either way. But we should also be clear how inadequate the code is as a response to the powerful arguments that were marshalled to support it.

Contrast the following two statements addressed to a black freshman at Stanford.

(A) LeVon, if you find yourself struggling in your classes here, you should realize it isn't your fault. It's simply that you're the beneficiary of a disruptive policy of affirmative action that places underqualified, underprepared, and often undertalented black students in demanding educational environments like this one. The policy's egalitarian aims may be well intentioned, but given the fact that aptitude tests place African-Americans almost a full standard deviation below the mean, even controlling for socioeconomic disparities, they are also profoundly misguided. The truth is, you probably don't belong here, and your college experience will be a long downhill slide.

(B) Out of my face, jungle bunny.

Surely there is no doubt which is likely to be more "wounding" and alienating to its intended audience. Under the Stanford speech regulations, however, the first is protected speech; the second may well not be: a result that makes a mockery of the words-that-wound rationale. If you really want to penalize such wounding words, it makes no sense to single out gutter epithets—which, on many college campuses, to be candid, are more likely to stigmatize the speaker than their intended victim—and leave the far more painful disquisition alone.

Taking the expressivist tack, Thomas Grey argues that punitive sanctions are useful because they shore up salutary symbolism: "When a university administration backs its anti-racist pronouncements with action, it puts its money where its mouth is." It's a punchy metaphor, and the implication is that by adopting these regulations his university has put itself on the line, taken measures that may extract real costs from it. In fact, this is a pretty costless trade. It's safe to say that Stanford's faculty and administration, however benighted or enlightened they may be on racial matters, manage nicely without the face-to-face deployment of naughty epithets. In adopting the regulations, therefore, they sacrifice nothing but the occasional drunken undergraduate. "Putting your money where your mouth is" may bolster your credibility; but whose money is it, really?

A rule of thumb: in American society today, the real power commanded by the racist is likely to vary inversely with the vulgarity with which it is expressed. Black professionals soon learn that it is the socially disenfranchised—the lower class, the homeless—who are most likely to hail them as "niggers." The circles of power have long since switched to a vocabulary of indirection. Unfortunately, those who pit the First Amendment against the Fourteenth invite us to spend more time worrying about speech codes than coded speech.

I suspect that many of those liberals who supported Stanford's restric-

tions on abusive language did so because they thought it was the civil thing to do. Few imagined that, say, the graduation rates or GPAs of Stanford's blacks (or Asians, gays, etc.) are likely to rise significantly as a result. Few imagined, that is, that the restrictions would lead to substantive rights or minority empowerment. They just believed that gutter epithets violate the sort of civility that ought to prevail on campus. In all likelihood, the considerations that prevailed owed more to Emily Post than to Robert Post. In spirit, then, the new regulations were little different from the rules about curfews, drinking, or the after-hours presence of women in male dormitories that once governed America's campuses and preoccupied their disciplinary committees.

Not that civility rules are without value. Charles Lawrence charges that civil libertarians who disagree with him about speech regulations may be "unconscious racists." I don't doubt this is so; I don't doubt that some of those who *support* speech codes are unconscious racists. What I doubt is whether the imputation of racism is the most effective way to advance the debate between civil rights and civil liberties.

"What is ultimately at stake in this debate is our vision for this society," write the authors of *Words That Wound,* and they are quite right. The risk, in parsing the reasoning of the hate speech movement, is of missing the civic forest for the legal trees. For beyond the wrangling over particular statutes and codes lies an encompassing vision of state and civil society. Moreover, it is one whose wellsprings are to be found not in legal scholarship or theory, but in the much more powerful cultural currents identified with the "recovery movement." At the vital center of the hate speech movement is the seductive vision of the therapeutic state.

We can see this vision clearly presaged in the critical race theory manifesto itself:

> Too often victims of hate speech find themselves without the words to articulate what they see, feel, and know. In the absence of theory and analysis that give them a diagnosis and a name for the injury they have suffered, they internalize the injury done them and are rendered silent in the fact of continuing injury. Critical race theory names the injury and identifies its origins.

This sounds, of course, like a popular primer on how psychotherapy is supposed to work, and with a few changes, the passage might be from a book addressed to survivors of toxic parenting. Indeed, "alexa-

thymia"—the inability to name and articulate one's feelings—is a faddish diagnosis within psychiatry these days. Nor is the affinity that critical race theory shares with the currently booming recovery industry a matter of fortuity: for at present, the recovery movement is perhaps the principal countertrend to an older, and now much-beleaguered American tradition of individualism.

"When the ideology is deconstructed and injury is named, subordinated victims find their voices," we are told in the manifesto. "They discover they are not alone in their subordination. They are empowered." Here the recovery/survivor-group paradigm does lead to a puzzling contradiction: we are told that victims of racist speech are cured—that is, empowered—when they learn they are "not alone" in their subordination, but subordinated as a group. Elsewhere we are told that what makes racist speech peculiarly wounding is that it conveys precisely that content, that you are a member of a subordinated group. How can the message of group subordination be both poison and antidote?

The therapeutic claims made for critical race theory cut against the hate speech offensive in more important ways. For if we took these claims at face value, critical race theory would not buttress speech regulations, but obviate the need for them. The problem Lawrence worries about—that racist speech "silenc[es] members of those groups who are its targets"—would naturally be addressed not through bureaucratic regulations, but through the sort of deconstruction and critique that critical race theory promises will enable victims to "find their voices." Another painful irony: this all sounds very much like Justice Brandeis's hoary and much-scorned prescription for redressing harmful speech: "more speech."

Yet while scholars like Delgado and Matsuda emphasize the adverse psychological effects of racial abuse, the proposed therapeutic regime is no mere talking cure. Richard Delgado writes: "Because they constantly hear racist messages, minority children, not surprisingly, come to question their competence, intelligence, and worth." But in the Republic of Self-Esteem, we are invited to conceive the lawsuit as therapy. "When victimized by racist language, victims must be able to threaten and institute legal action, thereby relieving the sense of helplessness that leads to psychological harm."

A similar therapeutic function could be played by criminal proceedings, in Matsuda's view. When the government does nothing about racist

speech, she argues, it actually causes a second injury. "The second injury is the pain of knowing that the government provides no remedy and offers no recognition of the dehumanizing experience that victims of hate propaganda are subjected to." Indeed, "[T]he government's denial of personhood through its denial of legal recourse may even be more painful than the initial act of hatred." Of course, what this grievance presupposes is that the state is there, *in loco parentis,* to confer personhood in the first place.

What Matsuda has recourse to, finally, is not an instrumental conception of the state, but rather a conception of it as the "official embodiment of the society we live in," and as such rather remote and abstracted from the realities of our heterogeneous populace, with its conflicting norms and values. Perhaps that is only to say that psychotherapy cannot do the hard work of politics. But a similar therapeutic vision animates the more broad-gauged campus regulations, like those adopted in the late 1980s at the University of Connecticut. Its rules sought to proscribe such behavior as, inter alia:

> Treating people differently solely because they are in some way different from the majority. . . .
> Imitating stereotypes in speech or mannerisms. . . .
> Attributing objections to any of the above actions to "hypersensitivity" of the targeted individual or group.

The last provision was especially cunning. It meant that even if you believed a complainant was overreacting to an innocuous remark, to try to defend yourself in this way would only serve as proof of your guilt. But the rationale of the university's rules was made explicit in its general prohibition on actions that undermined the "security or self-esteem" of persons or groups. (Would awarding low grades count?) Not surprisingly, the university's expressed objective was to provide "a positive environment in which everyone feels comfortable working or living." It was unclear whether any provisions were to be made for those who did not feel "comfortable" working or living under such restrictive regulations; in any event, they were later dropped under threat of legal action.

Still, perhaps the widespread skepticism about any real divide between public and private made it inevitable that the recovery movement

would translate into a politics, and that this politics would center on a vocabulary of trauma and abuse, one in which their verbal and physical varieties are seen as equivalent. Perhaps it was inevitable that the Citizen at the center of classical Enlightenment political theory would be replaced by the Infant at the center of modern depth psychology and its popular therapeutic variants. The inner child may hurt and grieve, as we have been advised; is it also to vote?

But there are older ideas of civil society in conflict within the hate speech debate. To oversimplify, critical race theory sees a society composed of groups; moral primacy is conferred upon those collectivities whose equal treatment and protection ought to be guaranteed under law. The classic civil libertarian view, by contrast, sees a society composed of individuals who possess rights only as public citizens, whatever other collective allegiances they may entertain privately.

Individualism has its weaknesses, to be sure. Part of what we value most about ourselves as individuals often turns out to be a collective attribute—our religious or racial identity, say. And when we are discriminated against, it is as a member of a group. Nor does the implicit model of voluntarism work well for ethnic, sexual, racial, or religious identities, identities about which we may have little say. There is something unsatisfactory in a legal approach that treats being a black woman as analogous to being a stamp collector.

And yet the very importance of these social identities underscores one of the most potent arguments for an individualist approach toward the First Amendment. In a series of novella-length articles published over the past several year, Robert C. Post has examined just such issues as they relate to an emerging conception of public discourse. "One is not born a woman," Simone de Beauvoir famously avowed, and her point can be extended: the meaning of all our social identities is mutable and constantly evolving, the product of articulation, contestation, and negotiation.

Indeed, these are circumstances to which critical race theorists ought to be more attuned than most. Thus Lawrence approvingly quotes MacKinnon's observation that "to the extent that pornography succeeds in constructing social reality, it becomes invisible as harm." He concludes: "This truth about gender discrimination is equally true of rac-

ism." And yet to speak of the social construction of reality is already to give up the very idea of "getting it right." When Lawrence refers to "the continuing real-life struggle through which we define the community in which we live," he identifies a major function of unfettered debate, but does so, incongruously, by way of proposing to shrink its domain. To remove the very formation of our identities from the messy realm of contestation and debate is an elemental, not incidental, truncation of the ideal of public discourse. And so we must return to Catharine MacKinnon's correct insistence on "the rather obvious reality that groups are made up of individuals."

Now, as Post (citing the work of Charles Taylor) has observed, the neutrality of individualism is only relative. The autonomous moral agent of liberal society requires the entrenchment of a political culture conducive to that identity. Even though the strong tendency in legal culture is to overcriminalize and overregulate, the preservation of a broadly democratic polity entails that there will be, and must be, limits, and establishing them will involve political considerations. Thus Post writes, in a penetrating analysis of the Supreme Court decision in *Falwell v. Hustler:* "The ultimate fact of ideological regulation . . . cannot be blinked. In the end, therefore, there can be no final account of the boundaries of the domain of public discourse."

So perhaps the most powerful arguments of all for the regulation of hate speech come from those who maintain that such regulation will really enhance the diversity and range of public discourse. At their boldest, these argument pit free speech and hate speech as antagonists, such that public discourse is robbed and weakened by the silencing and exclusionary effects of racist speech. Restricting hate speech actually increases the circulation of speech, the argument runs, by defending the speech rights of victim-groups whom such abuse would otherwise silence. And so the purging of racist speech from the body politic is proposed as a curative technique akin to the suction cups and leeches of eighteenth-century medicine, which were meant to strengthen the patient by draining off excessive toxins.

Needless to say, the question of the safety and effectivity of the treatment is an open one. And, as Post points out, the "question of whether public discourse is irretrievably damaged by racist speech must itself ultimately be addressed through the medium of public discourse."

Because those participating in public discourse will not themselves have been silenced (almost by definition), a heavy, frustrating burden is de facto placed on those who would truncate public discourse in order to save it. They must represent themselves as "speaking for" those who have been deprived of their voice. But the negative space of that silence reigns inscrutable, neither confirming nor denying this claim. And the more eloquent the appeal, the less compelling the claim, for the more accessible public discourse will then appear to be to exactly the perspectives racist speech is said to repress.

The larger question—the political question—is how we came to decide that our energies were best directed not at strengthening our position in the field of public discourse, but at trying to move its boundary posts.

So I want to return to the puzzling disalignment with which I began. The struggle with racism has traditionally been waged through language, not against it; the tumult of the civil rights era was sponsored by an expansive vision of the First Amendment, a vision to which the struggle against racism in turn lent its moral prestige. And it is this concrete history and context that make it so perplexing that a new generation of activists—avowedly sensitive to history and context—should choose the First Amendment as a battlefield in their fight for Fourteenth Amendment guarantees.

I detect two motivations for the shift, one that relates to the academy, and one that relates to the world outside it.

In a trend we've already touched upon, there has been increased attention on the formative power of language in the creation of our social reality; on language as "performative," as itself constituting a "speech act." While these are phrases and ideas that the ordinary language philosopher J. L. Austin developed in the midcentury, Catharine MacKinnon adds them to her argumentative arsenal in her latest book. The notion of the speech act has new force when the act in question is rape.

Now, MacKinnon's emphasis on the realness, the actlike nature, of expression receives an interesting twist in the attempt by some hate speech theorists to "textualize" the Fourteenth Amendment. For if expression is act, than act must be expression. If the First Amendment is about speech, so, too, is the Fourteenth Amendment.

Following this reasoning, Charles Lawrence has proposed—in an

influential and admired reinterpretation of legal history—that *Brown v. Board* and, on analogy, all subsequent civil rights decisions and legislation, are in fact prohibitions on expressive behavior, forbidding not racism in se but the expression of racism. In line with this argument, he tells us that "discriminatory conduct is not racist unless it also conveys the message of white supremacy," thus contributing to the social construction of racism.

This is a bold and unsettling claim, which commits Lawrence to the view that where discriminatory conduct is concerned, the only crime is to get caught. By this logic, racial redlining by bankers isn't racist unless people find out about it. And the crusading district attorney who uncovers previously hidden evidence of their discrimination isn't to be hailed as a friend of justice, after all: by bringing it to light, he was only activating the racist potential of those misdeeds.

Lawrence's analysis of segregation reaches the same surprising conclusion: "The nonspeech elements are by-products of the main message rather than the message being simply a by-product of unlawful conduct." By this logic, poverty is really about the *message* of class inequality, rather than material deprivation. We might conclude, then, that the problem of economic inequality would most naturally be redressed by promulgating a self-affirmative lower-class identity along the lines of Poverty Is Beautiful. Words may not be cheap, but they must be less costly than AFDC and job training programs.

Something, let us agree, has gone very wrong here. In arguments of this sort, the pendulum has swung from the absurd position that words don't matter to the equally absurd position that *only* words matter. Critical race theory, it appears, has fallen under the sway of a species of academic nominalism. Yes, speech is a species of action. Yes, there are some acts that only speech can perform. But there are some acts that speech alone cannot accomplish. You cannot heal the sick by pronouncing them well. You cannot uplift the poor by declaring them to be rich.

In their joint manifesto, the authors of *Words That Wound* identify theirs as "a fight for a constitutional community where 'freedom' does not implicate a right to degrade and humiliate another human being." These are heady words, but like much sweepingly utopian rhetoric, they would also signal a regime so heavily policed as to be incompatible with

democracy. Once we are forbidden verbally to degrade and humiliate, will we retain the moral autonomy to elevate and affirm?

In the end, the preference for the substantive liberties supposedly vouchsafed by the Fourteenth Amendment to the exclusion of the formal ones enshrined in the First Amendment rehearses the classic disjunction that Sir Isaiah Berlin analyzed in his "Two Conceptions of Liberty" without having learned from it. His words have aged little since 1958. "Negative" liberty, the simple freedom from external coercion, seemed to him "a truer and more humane ideal than the goals of those who seek in the great, disciplined, authoritarian structures the ideal of 'positive' self-mastery by classes, or peoples, or the whole of mankind. It is truer, because it recognizes the fact that human goals are many, not all of them commensurable, and in perpetual rivalry with one another." More to the point, to suggest, as Lawrence and his fellow critical race theorists do, that equality must precede liberty is simply to jettison the latter without securing the former. The First Amendment will not, true enough, secure us substantive liberties, but neither will its abrogation. No one has come close to showing that First Amendment liberties are so costly that they significantly impede our chance of securing the equal protection guarantees of the Fourteenth Amendment. You cannot get the Fourteenth Amendment through the First, to be sure; but no one has persuaded me yet that you cannot have both. Still, it isn't hard to explain the disenchantment among minority critics with such liberal mainstays as the "marketplace of ideas" and the ideal of public discourse. In the end, I take it to be an extension of a larger crisis of faith. The civil rights era witnessed the development of a national consensus—something hammered out noisily, and against significant resistance, to be sure—that racism, at least overt racism, was wrong. Amazingly enough, things like reason, argumentation, and moral suasion *did* play a significant role in changing attitudes toward "race relations." But what have they done for us lately?

For all his robust good sense, Harry Kalven, Jr., was spectacularly wrong when he wrote: "One is tempted to say that it will be a sign that the Negro problem has basically been solved when the Negro begins to worry about group-libel protection." On the contrary, the disillusionment with liberal ideology rampant among many minority scholars and activists stems from the lack of progress in the struggle for racial equality

over the past fifteen years. Liberalism's core principle of formal equity seems to have led us so far, but no farther. It "put the vampire back in its coffin but it was no silver stake," as Patricia J. Williams notes. The problem may be that the continuing economic and material inequality between black and white America—and, more pointedly, the continuing immiseration of large segments of black America—cannot be erased simply through better racial attitudes. The problem, further, may be that in some ways we intellectuals have not yet caught up to this changing reality. It isn't only generals who are prone to fight the last war.

As analysts on the left and the right alike have shown, poverty, white and black, can take on a life of its own, to the point that removing the conditions that caused it can do little to alleviate it. The eighties may have been the "Cosby Decade," as some declared, but you wouldn't know it from the South Bronx. What's become clear is that the political economy of race and poverty can no longer be reduced to a mirror of what whites think of blacks. But rather than responding by forging new and subtler modes of socioeconomic analysis, we have finessed the gap between rhetoric and reality by coming up with new and subtler definitions of the word "racism." Hence the new model of institutional racism—often just called racism—is one that can operate in the absence of actual racists. By progressively redefining our terms, we could always say of the economic gap between black and white America: the problem is still racism . . . and, by stipulation, it would be true.

But the grip of this vocabulary has tended to foreclose the more sophisticated and multivariate models of political economy we so desperately need. I cannot otherwise explain why some of our brightest legal minds believe that substantive liberties can be vouchsafed and substantive inequities redressed by punishing rude remarks. Or why their analysis of racism owes more to the totalizing theory of Catharine MacKinnon than to the work of scholar-investigators like Douglas Massey or William Julius Wilson or Gary Orfield: people who, whatever their disagreements, at least attempt to find out how things work in the real world, never confusing the empirical with the merely anecdotal.

Instead, critical theory is often allowed to serve as a labor-saving device. For if racism can be fully textualized, if its real existence is in its articulation, then racial inequity can be prized free from the moss and soil of political economy. "Gender is sexual," MacKinnon told us in *Toward a Feminist Theory of the State*. "Pornography constitutes the meaning of that sexuality." By extension, racist speech must prove to be the real content of racial subordination: banish it, and you banish subordination. The perverse result is a see-no-evil, hear-no-evil approach toward racial inequality. Alas, even if hate did disappear, aggregative patterns of segregation and segmentation in housing and employment would not. Conversely, in the absence of this material and economic gap, no one would much care about racist speech.

Beliefs cannot prosper that go untested and unchallenged. The critical race theorists must be credited with helping to reinvigorate the debate about freedom of expression; even if not ultimately persuaded to join them, the civil libertarian will be much further along for having listened to their arguments and examples. The intelligence, innovation, and thoughtfulness of their best work ask for and deserve a reasoned response: not, as so often happens, demonization and dismissal. And yet for all the passion and scholarship the critical race theorists have expended upon the hate speech movement, I cannot believe it will capture their attention for very much longer.

"It is strange how rapidly things change," Harry Kalven, Jr., wrote in 1965. "Just a little more than a decade ago we were all concerned with devising legal controls for the libeling of groups. . . . Ironically, once the victory was won, the momentum for such legal measures seemed to dissipate, and the problem has all but disappeared from view." It *is* strange how rapidly things change—and change back. Still, I suspect the results will be similar this time around: advocates of speech restrictions will grow disenchanted not with their failures, but their victories, and the movement will come to seem just another curious byway in the long history of our racial desperation.

And yet it will not have been without its political costs. I cannot put it better than Charles Lawrence himself, who writes: "I fear that by framing the debate as we have—as one in which the liberty of free speech is in conflict with the elimination of racism—we have advanced the cause of racial oppression and placed the bigot on the moral high ground, fanning the rising flames of racism." Though he does not intend it as such, I can only read this a harsh rebuke to the hate-speech movement itself. As the critical race theory manifesto acknowledges, "this debate has deeply divided the liberal civil rights/civil liberties community"; and so it has. It has created hostility between old and fast allies and fissured longtime coalitions.