

Truth or Consequences: Putting Limits on Limits

HENRY LOUIS GATES, JR.

*You're not talking about things about which people are entitled
to disagree.*

Catharine MacKinnon

*It is by the goodness of God that in our country we have those
three unspeakably precious things: freedom of speech, freedom
of conscience, and the prudence never to practice either of them.*

Mark Twain

I

THESE ARE CHALLENGING TIMES for First Amendment sentimentalists. After decades in which the limits of expression were steadily pushed back, the pendulum, to switch metaphors, is beginning to swing the other way. Legal scholars on the left are busily proposing tort approaches toward hate speech. Senator Jesse Helms attaches a rider to a bill funding the National Endowment for the Arts that would prevent it from supporting offensive art—the terms of offense being largely imported from a Wisconsin hate-speech ordinance. What Robin West calls the feminist-conservative alliance has made significant inroads in municipalities across the country, while the Canadian

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Supreme Court has promulgated Catherine MacKinnon's approach toward pornography as law of the land. And the currently fashionable communitarian movement has given the impression that it believes that excessive deference has been given to the creed of free speech. In short, over the past few years, a new suppressionist alliance seemed to betoken the declining significance of liberalism.

I take our topic this evening to be rather more narrowly circumscribed, focussing on the limits of expression in American intellectual life. But intellectual life doesn't exist as a sanctuary aloof from the larger currents that run through our polity. I should also say that First Amendment expansionism has never entailed absolute devotion to free expression; the question has always been where to draw the line. Even the Supreme 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, the armchair absolutist is left with his two fall back arguments. Dredging up childhood memories, he comes up with that playground chant about sticks and stones. Offensive expression should be protected because it is 'only words' and costs nothing. 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 antipornography 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 absolutist's Old Reliable: the slippery-slope argument. Perhaps racist speech is hurtful and without value, he or she 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-slopeism isn't worthless as a consideration: because the terrain is slippery we *ought* to step carefully. And there are many examples 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-slopeism 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.

Still, it must be said that the salient exceptions to First Amendment protection all involve the concrete prospect of significant—and involuntary—exposure to harm: typical examples include speech posing imminent and irreparable threat to public order or the nation; libel and the invasion of privacy; and the regulated domain of 'commercial speech,' encompassing, for instance, 'blue sky' laws governing truth in advertising. (Obscenity is the notable deviation from this norm.) I like to describe myself as a First Amendment sentimentalist, because I believe that the First Amendment should be given a generous benefit of the doubt in

contested cases; but I also know that there are no absolutes in our fallen state.

II

Let me admit, at the same time, that I believe some figures on the academic/cultural left have too quickly adopted the strategies of the political right. Here, I'm thinking principally of that somewhat shopworn debate over 'hate speech' as a variance from protected expression, and it may be a topic worth reviewing briefly.

As Michael Kinsley has pointed out, most college statutes restricting freedom of expression were implemented by conservative forces in the early seventies. Under the banner of 'civility,' their hope was to control campus radicals who seized on free speech as a shield for their own activities. Ironically, however, the very ascent of liberal jurisprudence in the sixties finally made it less appealing for left and oppositional intellectuals who viewed such formal civil liberties as a subterfuge and rationale for larger social inequities. The sort of intellectual contrarians and vanguardists who would have rallied behind the ideology of freedom of expression in the days before its (at least partial) ascendance are now, understandably enough, more disposed to explore its limits and failings. And so the rubric of 'free speech,' in the 1960s an empowering rubric of campus radicals, has today been ceded to their conservative opponents as an ironic instrument of requital. As a result, the existence of speech ordinances used by conservatives in the early seventies can today be cited as evidence of a marauding threat from the thought police on the left. Well, at the very least, I think the convergence of tactics from one era to another ought to give us pause.

Let me be clear on one point. I am very sensitive to the issues raised in the arguments for hate-speech bans. Growing up in a segregated mill town in Appalachia, I thought there was a sign on my back saying 'nigger' because that's what some white folk seemed to think my name was. So I don't deny that the language of racial prejudice can inflict harm. At the same time—as the Sondheim song has it—'I'm still here.'

The strongest arguments for speech bans are, when you examine them more closely, arguments *against* arguments against speech bans. They are often very clever; often persuasive. But what they don't establish is that, all things considered, a ban of hate speech is so indispensable, so essential to avoid some present danger, that it justifies handing their opponents on the right a gift-wrapped, bow-tied, and beribboned rallying point. In the current environment of symbolic politics, the speech ban is a powerful thing: it can turn a garden variety bigot into a First Amendment martyr.

So my concern is, first and foremost, a practical one. The problem with speech codes is that they make it impossible to challenge bigotry without its turning into a debate over the right to speak. And that is too great a price to pay. If someone calls me a nigger, I don't want to have to spend the next five hours debating the fine points of John Stuart Mill. Speech codes kill critique.

III

Given the fact that verbal harassment is already, and pretty uncontroversially, prohibited; given the fact, too, that campus speech bans are rarely enforced, the question arises: do we need them? Their proponents say yes—but they almost always offer *expressive* rather than *consequentialist* arguments for them. That is, they do not say, for instance, that the statute will spare vulnerable students 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. The statute symbolizes our commitment to tolerance, to the creation of an educational environment where mutual colloquy and comity are preserved. (The conservative sociologist James Q. Wilson has made the argument for the case of obscenity when he writes of his 'belief that human character is, in the long run, affected not 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.')

Well, yes, things like tolerance and mutual respect sound like nice things to symbolize. What we forget is that once you have

retreated to the level of symbolic, gestural politics, you have to take into account all the other symbolic considerations. So even if you think that the free-speech position contains logical holes and inconsistency, you need to register *its* symbolic force. And it is this level of scrutiny that tips the balance in the other direction.

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 has told us. 'Where nothing is unspeakable, nothing is undoable.' And I think there's an important point of convergence there: Bickel's precept 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,' as Mari J. Matsuda writes. Her colleague Charles Lawrence III suggests further 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 writes, '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 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 in March 1993, 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 rallies both in favor of abortion and opposed to it, 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.

IV

But there's a larger issue involved: Is the regulation of verbal expression among the laity the right place to begin, if your concern is to redress broad-gauged injustice? Can social inequity be censored out of existence?

As an English professor, I can report that our more powerful 'discourse theories'—focussing on the political dimension of the most innocent seeming texts—can encourage this dream. But social critique allies itself with its natural antagonist, the state apparatus of law enforcement, at its own peril. There are states—and Islamic ones are the most obvious in their vigilance—that do engage in the widespread censorship of public representations, including imagery in advertisements, television, and entertainment. Their task is not, say, to censor misogyny and perpetuate sexual equality but to cover the elbows and ankles of females and discourage blasphemy, prurience, and other illicit thoughts.

A reluctance to embark on any such exercise of massive state coercion does not wed one to the status quo. To defend the free-

speech right (or even, as *Miller v. California* requires, the cultural 'value') of racist or misogynistic material is not to defend racism or misogyny—nor is it to shun, silence, or downgrade their social critique. To insist that expression should be free of state censorship is not to exempt it from critical censure. This is a point that both Kimberlé Crenshaw and I have argued elsewhere in connection with the Broward County prosecution of Luther Campbell and company.

To be sure, the distinction would mean little to some critics of First Amendment expansionism. On the one hand, Catharine MacKinnon would observe that we do not find it sufficient to 'critique' rape; we punish it. Since, for MacKinnon, expression degrading or hostile to women is as much an act of violence as other crimes of violence against women, such expression should be the subject of criminal and civil sanctions aimed at its abolition.

Nor has the literary or cultural realm been held to be exempt from these strictures. Suzanne Kappeler has argued that there are 'no sanctuaries from political reality, no aesthetic or fantastic enclaves, no islands for the play of desire.' It's a charge that Federal Circuit Judge Richard Posner (a former clerk of Justice William T. Brennan, Jr.) has neatly turned on its head. If so, Posner rejoins, 'the vilest pornographic trash is protected.' After all, 'ideological representations are at the center of the expression that the First Amendment protects.' (This also highlights the contradiction between modern obscenity law and MacKinnonism: according to liberal jurisprudence, the obscene has, by stipulation, no significant political content; according to MacKinnonite jurisprudence, it's precisely the significant political content of obscenity that *makes* it obscene.)

Even if social benefits were to result from censorship of representations, moreover, there are reasons not to accede to such a regime. And versions of such content-based restrictions abound in other countries. In Britain, it is illegal to foment racial hatred; literature propagating such attitudes is subject to prosecution and suppression. By custom, only egregious examples are subject to

scrutiny. In this country, I can buy scores of racist tracts. And yet, granted the unhappy condition of our society, perhaps we shouldn't have it any other way: the possibilities of abuse are too clear and present.

As the political philosopher Josh Cohen writes: 'In a society in which there are relatively poor and powerless groups, members of those groups are especially likely to do badly when the regulation of expression proceeds on the basis of vague standards whose implementation depends on the discretion of powerful actors.'

A tort approach toward hate speech, which would allow the recovery of damages in the event of hurtful expression, would be difficult to rein in. In liability law, recklessness is customarily adjudged in terms of the foreseeability of harm. But the foreseeability of harm is, in part, a technological question: risk-assessment techniques are vastly more sophisticated today than they were a few decades ago. Were we to develop similar skill in predicting human behavior, the expressive realm of the permissible would then be increasingly constricted—at least, so long as we treated human action like any other mechanical consequence. If, as the saying goes, talk is cheap, then by the Learned Hand rule, liability would almost always attach to the talker; after all, how much does it cost the talker to be silent? Tort approaches toward hurtful expression propose to allocate costs of communications in a way that assigns the risk to the producer instead of the consumer. How you feel about this, depends on your feelings about freedom of expression *in se* as a moral value or a social good; in general, I would find the degree of paternalism involved in restricting speech on the basis of a few unreasonable, even if foreseeable reactions, unattractive when these do not constitute a significant threat to the social order. Moreover, while these approaches would compel actors to internalize costs of 'risky' speech, we do not allow it to reap the equally fortuitous benefits. The net result of this asymmetry would be to discourage speech.

In addition to this sort of tort approach toward hate speech,

there's the conception of 'group libel' which some feminist theorists have invoked, but which retains unfortunate associations with those seditious libel laws promulgated much earlier in our republic. But there's also the possible model of 'hostile environment.' Thus (to choose a fairly recent example) a student walks into a classroom at the University of Michigan and reads this motto, chalked anonymously on the blackboard: 'A mind is a terrible thing to waste . . . especially on a nigger.' Arguably, remarks of this sort create what civil rights law has called, with respect to sexual harassment, a 'hostile environment'—an environment inimical to the aims and objectives of university education. Similarly, a professor who seems to promulgate racist or anti-Semitic doctrines in the classroom might appear to contravene the educational mission of the university in important ways.

So I want to take the issue of offense seriously, although it is only one of many considerations that must weigh in the balance. It brings to mind Justice William O. Douglas's 1973 remark that: 'One of the most offensive experiences in my life was a visit to a nation where bookstalls were filled only with books on mathematics and books on religion.'

v

There is, however, another plane of analysis, which recognizes not simply formal equity and formal freedom, but also imbalances and inequities of access. As the old slogan goes, freedom of the press belongs to those who own the press. So there are issues about freedom of expression that subtend issues of democracy. Some of these surfaced in the debates over the National Endowment for the Arts (NEA) in the years of Republican control of the White House. The legal scholar Geoffrey Stone has argued to the effect that the disbursement of government funding to the arts, though not constitutionally required, does involve constitutional questions (to do with 'government neutrality in the field of ideas') once implemented. I admit I find Stone's argument more ingenious

than persuasive. At the end of the day, there's a distinction worth preserving between *not supporting* and *suppressing*. And, as many have pointed out, there's something bathetic about the avowed dependence of oppositional art upon subsidy from the executive branch. 'My dance exposes your greed, your hypocrisy, your bigotry, your philistinism, your crass vulgarity,' says one of Jules Feiffer's cartoon monologists. 'Fund me!'

Was the NEA 'politicized?' Of course. But the charge of 'politics' isn't one we can fling with good conscience, save in the spirit of *tu quoque*. If art is political, how can judgment not be? The fig leaf of formalism fools no one, and the tidy distinction between the 'artistic' and 'political' ought to be left for the genteel likes of former NEA chairman John Frohnmayer. For art that robustly challenges the distinction is poorly served by stealthy recourse to it.

I have already noted the useful distinction between not supporting and suppressing. Of course, there is a sense in which the distinction counts for little: if I can't make my film, what does it matter whether I was prevented by poverty or prohibition? But I would say that in that impact-oriented sense, we have no free speech anyway, since access to a mass audience is hardly democratically distributed. In that sense, we should worry more about NBC than NEA. More important than our unendowed National Endowment would be, for example, the Public Broadcasting System or Voice of America.

So beyond formal rights and procedural guarantees are these matters of power and access. 'There is no freedom for the weak,' George Meredith observes: and yet it should be born in mind that formal guarantees and protections are more likely to work in favor of the relatively less empowered, since the less powerful you are, the more dependent upon formal protections. 'Persecution for the expression of opinions seems to me perfectly logical,' Oliver Wendell Holmes opined in 1919. 'If you have no doubt of your premises or your power and want a certain result with all your heart you naturally sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent . . .'

VI

And of course, none of us does; no effective defense of relatively unfettered colloquy can presume the inertness of speech. Nor can any effective defense require a rigid distinction between communication and conduct. And this is part of what gives credence to a more thoroughgoing skepticism about rule-based accounts of First Amendment law that 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 longterm 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 *Indecent Proposal*, 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 ten dollars? 'What kind of a woman do you think I am?' she asks, indignantly. '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 not 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.

Another problem with the abandonment of principled adjudication urged by the skeptical critique 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 University of California at 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.

And while we recognize that speech is not impotent, we should recognize that listeners are not impotent, either; they are not tempest-tossed rag dolls blown about by every evil wind. And any unconscious assumption of the passivity of reception neglects the fact that resistance begins with reaction. That the attempt to filter the environment of offense reeks itself of condescension and paternalism. As the legal scholar David Richard has written, 'It is a contempt of human rationality for any other putative sovereign, democratic or otherwise, to decide to what communications mature people can be exposed.'

VII

But there are older ideas of civil society in conflict within debates over free speech in the academic community. To oversimplify, advocates of regulating hate speech see 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 such as our religious or racial identity. 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 years, 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 racism.' 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 arguments 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 used in eighteenth-century medicine 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.

Freedom of expression may never be free from ideological delimitation, and yet the value it enshrines is too important a value to sacrifice to the vainglory of a professor Tony Martin or Leonard Jeffries or William Shockley. So it's important to remember that obscenity and hate speech alike only *become* free-speech issues when their foes turn from censure to censorship. When pluralism decided to let a thousand flowers bloom, we always knew that some of them would be weeds.

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