

THE LIMITS OF EXPRESSION  
IN AMERICAN  
INTELLECTUAL LIFE

Kathryn Abrams  
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American Council of Learned Societies

ACLS OCCASIONAL PAPER, No.22  
ISSN 1041-536X



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*The Annual Meeting of ACLS is built around a single public forum devoted to an issue which the Executive Committee of the Delegates to ACLS has determined to be of particular salience to the larger humanities community. For the April 1993 forum, the Executive Committee (chaired by Milton Mc. Gatch) decided to focus on the problem of freedom of expression in American intellectual life. Four speakers were invited to address this issue: Kathryn Abrams of Cornell University, W. B. Carnochan of Stanford University, Henry Louis Gates, Jr. of Harvard University, and Robert M. O'Neil of the University of Virginia, Charlottesville.*

*The question of intellectual free speech has never been far from the center of national debate in the United States, and it has been particularly contested over the past several years. The controversy over "political correctness" has been about the (in)appropriateness of particular subjects and forms of speech on academic campuses. Similarly, the debate over the propriety of the regulation of "hate speech" has been one of the most sensitive college and university issues.*

*On a more national scale, several other speech issues have been bitterly fought over. The possibility of restrictions on the publication of pornography has been pushed to the center of debate by feminist scholars. The extent of the freedom of federally-funded artistic expression has been tested in Congressional opposition to National Endowment for the Arts grants to exhibitions of the photography of Robert Mapplethorpe and Andres Serrano. Most recently, the public, the Congress, and the President of the United States have challenged the freedom of the television and motion picture industries to portray violence in TV shows and movies.*

*The panelists in the April 23, 1993 forum on "The Limits on Freedom of Expression in American Intellectual Life" were asked to express their own views on the question of whether limits on freedom of expression are permissible and/or desirable in artistic and intellectual discourse. As you will see in reading their remarks, the panelists put forward a variety of views, ranging from Professor Abrams' call for principled limitations on expression to the more traditional civil libertarian responses of Professors Gates and O'Neil. We hope that this publication will contribute to public reflection on the subject, and wish to thank the panelists for their thoughtful contributions to the debates.*



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Creeping Absolutism and Moral Impoverishment:  
The Case for Limits on Free Expression

*Kathryn Abrams*  
*Cornell University*

In my comments today, I want to do two things: First, explain why we need limits on free expression in intellectual life; and second, talk about how we should argue for them, both as a general matter and in at least one individual case. I offer my comments from the perspective of a legal scholar looking at the law, and seeing how its principles are mirrored and amplified in social institutions, such as institutions of higher learning. My argument is that the absolutist tendencies of the First Amendment legal regime have contributed to a climate where expression is overprotected, and members of the intellectual community are deterred from thinking systematically about how to reconcile expression with other norms—for example, respect for and recognition of politically marginalized groups. Our task should be to identify and transform the assumptions that have produced this tendency in law, and its counterpart in liberal theory. This transformation should produce forms of decision-making that are contextual and multi-factorial, but it won't entail the descent into analytic and normative chaos that many of its opponents suggest.

I start with the proposition that the current First Amendment regime has absolutist tendencies. By this I don't mean to say that First Amendment doctrine requires absolute protection for speech. As a practical matter, several categories of limitations on expression have been approved by the courts. There are certain types of expression—commercial speech—which receive more limited protection. There are areas—obscenity and defamation—where expression is limited to satisfy other values or interests. There are even circumstances where it is possible to argue—as my colleague Steve Shiffrin, for example, has argued<sup>1</sup>—that the courts have implemented restrictions on expression that are not content neutral. But I would argue that the current First Amendment regime tends in the direction of absolute protection for expression. There are two reasons for this. First, the rhetoric, if not the practice of the courts tends toward absolutism. Departures from absolutism are treated as *sui generis* exceptions or hidden beneath subterfuges that preserve the more absolute statements of principle. What is left on the face of the courts pronouncements are a series of descriptive and normative principles that make arguing in favor of limited, contextually-based restrictions very difficult. Second, because

of their resonance with certain precepts of liberalism, these principles have been taken up by broad segments of the public in ways that extend the scope of their application beyond that required by legal doctrine. The result, I would argue, has been overprotection of expression and an impoverishment of moral discourse about how to respect and recognize particularity in intellectual life.

In what ways do the assumptions or principles of First Amendment doctrine tend toward absolute protection of expression? First, the framework for defining speech and assessing the harms that flow from it is rigid and dichotomous. What we have in a given case is either speech or (in a very few contexts) action; this speech either produces imminent, specifically targeted harm (in which case the law can intervene) or it produces no harm of which the law can take cognizance. This dichotomizing has proved remarkably resistant to the ambiguities presented by expressive practices such as pornography, or to harms distinct from “yelling fire in a crowded theatre”—harms that go to dignity or the formation of self-conception.

Second, First Amendment law declares that governmental decisions regarding expression must be neutral as between groups. This is embodied in the general ban on content-based restrictions on speech. As the recent decision on the St. Paul “hate speech” ordinance makes clear, this principle is subject to numerous exceptions. But the fact that the First Amendment has turned to marginalized groups—both the varied groups covered in the St. Paul case and the women protected by Indianapolis’ anti-pornography ordinance—has reflected agnosticism about the content of speech, and studied disinterest in the political and material circumstances of the contending parties.

The most frequently cited reason for this position goes beyond content agnosticism, or the tendency of the courts to view rights-bearers as individuals without social location; it constitutes the third factor pointing First Amendment doctrine in the direction of absolutism. The courts suggest that any break with this posture of governmental neutrality towards groups threatens uncabinable chaos. In the legal realm this argument is known as the “slippery slope”—available in a range of contexts but never more vigorous in its hold than here. The slippery slope arises from radical doubt about the possibility of distinguishing one group’s claim from the next. If we prevent the Nazis from marching on Skokie, there’ll be no way to distinguish them from the next group that comes along, and before we know it there’ll be no protection of speech. This form of reasoning is strongly anti-contextual. It arises from an inexperience with—and therefore an anxiety about—claims about the specificity of context or group affiliation, which is born

of the constitutional habit of considering rights-bearers as unaffiliated individuals. I should add that group-related neutrality and the invocation of the slippery slope are not unique to First Amendment law. They have become a depressing staple in areas that have nothing to do with expression, and a lot to do with material inequalities relating to, for example, race. Both of these premises play a prominent role in the Court's rejection of race-conscious remedies—both in the academic area and in the area of government set-asides.

So these are the principles or premises that move First Amendment doctrine in the direction of absolutism. Now, however, the plot thickens: This absolutism has been amplified by non-legal actors making decisions in academic settings. The basic problem is that the principles outlined above are applied in settings where the First Amendment does not require their application. I don't simply mean they've been applied by private universities: the public/private distinction is not something I want to emphasize in any unqualified way. First Amendment absolutism is being applied in contexts where the object of protection is not expression *per se*, but rather choice in the establishment of a curriculum, or of a topic for a university forum. More importantly, First Amendment rhetoric and principles are being applied in contexts where incursions on expression are accomplished *not* by legal restrictions or sanctions, but by protests, condemnations or requests for inclusion. Last spring, while I was teaching at Harvard Law School, some members of the *Law Review* published a vicious parody of an article by a recently-murdered feminist scholar. When the campus erupted in protests and condemnations, one well-known law faculty member derided this outcome by describing it as a left-wing or "PC" attempt to restrict the free expression of unpopular sentiments by other students.

As my reference to the comments of a law professor should make clear, my point is not that laypeople are misunderstanding the scope of the First Amendment. The rhetoric or principles of First Amendment doctrine are easily amenable to expansion beyond governmental decision-makers, conventional expression, or official sanctions imposed on speech, because they resonate so strongly with certain precepts of liberalism. The principle that rules should not treat one group differently from another resonates with the liberal tenet that our claim to equality and recognition arises from our shared human nature and our potential, rather than the qualities that differentiate us or our current position in the social structure. The slippery slope resonates with liberal theory as well, particularly as relates to questions of power. The habit of considering people as undifferentiated residuaries of

potential, and seeking equality of opportunity rather than equality of result, has made us uneasy about the possibility of containing arguments that invoke inequalities in power. A good example of this is the discomfort even many progressives feel about using arguments related to power inequalities in shaping the curriculum. The frequently advanced argument that groups advocating multiculturalism seek to reduce all curricular discussions to disputes about power (a claim that seems facially incorrect) reflects, instead, a fear that this reduction will be their inevitable effect: that it will be impossible to contain power arguments, and to reconcile them with aesthetic and other claims once they are admitted to the discussion.

So the subtle expansion of the domain of free expression beyond the requirements of the First Amendment is one problem, and it is a serious one. When protests and condemnation are grouped with prior restraints and penalties on speech, people may be deterred from thinking more systematically about how to object to speech short of penalties—how to signal through words what Amy Gutmann has called the difference between speech “that is worthy of respect” and speech that “must be tolerated.” There is a second, related problem, which is potentially more serious. As the requirements for protecting free speech interests become more and more extensive, they begin to occlude consideration of other values that should shape decisions about potentially injurious expression. This is certainly true for those within universities, for example, who seek to discourage hate speech or sexual harassment. The time that must be spent satisfying real and imagined First Amendment difficulties often restricts the opportunity to explore equally important questions. In January I met with a subcommittee of the American Association of Law Schools to recommend a harassment code to its member schools. I can report that we spent one quarter of our time talking about how to satisfy potential free speech objections—twice as much time as we spent talking about the nature of the violation or what groups should be covered. How to weigh the claims of different groups seeking coverage, for example, is rarely a straightforward matter, and we are unlikely to develop the criteria for doing it when we have neither the time nor the incentive to consider the circumstances of particular groups.

Perhaps more importantly, potential speakers may begin to develop a similarly narrow habit of mind, permitting an inquiry into the likelihood of their First Amendment protection to constitute the sum total of their deliberation on whether to undertake potentially injurious speech. In this context, it’s worth mentioning an incident at another law school, where a student circulated a list of mock law review articles, one

of which was ascribed to a student known to be feminist, and concerned her enthusiasm for, let us say, emasculatory sexual practices. I mention this not as the ultimate example of man's inhumanity to woman; it was hurtful and it shouldn't have happened, but I have certainly heard of more injurious incidents. I mention it because of what it reveals about the judgment of the perpetrator. When questioned by the Dean of Students about why he had circulated such a thing, the student quickly dropped his half-hearted suggestion that he didn't think the woman would mind it, and asserted that circulating it was within his First Amendment rights. When our legal and cultural reluctance to place other values in the balance with expression begins replicating itself in the moral deliberations of potential speakers, I think we have a real problem.

How can we reintegrate other norms into deliberations about expression? We should focus on the absolutist norms of the First Amendment regime, and demonstrate that their analytic hold, both in law and in liberal theory, is not nearly so secure as the face of doctrine suggests.

The insistence on a temporally imminent, physically oriented and specifically targeted harm hangs on in First Amendment law, but it hangs by a thread. Increasingly persuasive within legal academic circles are notions of temporally extended, group-based oppressive harms, such as those described by Catherine MacKinnon in the area of pornography,<sup>2</sup> or by Charles Lawrence in the area of racial hate speech. Some elements of this vision, including a more extended temporal frame for "imminence," have already been accepted in other areas of law such as battered women's self-defense. Developments in political and social theory give an assist here as well. Liberal communitarian and post-structural social theories which emphasize the social construction of the self help explain why expression which distorts or undermines ones self-conception can be a serious social problem. Continuing efforts to inject these notions into First Amendment calculus should ultimately be successful at the legal level. But elaborating them outside the context of any legal restrictions on speech can also inform the moral imagination of potential speakers and offer them an alternate way to reflect on injurious speech.

The next challenge lies in contesting the requirement of governmental neutrality among groups. This effort has the largest potential pay-off, because it could affect areas such as race-conscious remedies as well. The strategy here should be to demonstrate that it is plausible, even in the realm of constitutional law, to make government take account of group particularity or inequality. The critique of objectivity,

increasingly prominent in law and other fields, has helped to demonstrate that “neutrality” is not always neutral, and may be a means of perpetuating current power inequalities. There have also been more specific applications. Jack Balkin, for example, has pointed out that the legal realists in the twenties and thirties were able successfully to challenge governmental neutrality with respect to another critical constitutional right: the right to contract.<sup>3</sup> By showing that terms like “liberty,” “will,” and “contract” didn’t represent some determinate state of affairs, and that governmental action contributed to inequalities in bargaining power that defined the extent of “will” or “liberty,” the legal realists ultimately persuaded the courts that insistence on formal equality in contracting should give way to attention to context, including economic inequalities. A similar emphasis on the role of the government in effecting political power or marginality, in creating the captivity of certain audiences or facilitating their ability to respond to harmful speech with more speech may succeed here as well. In addition, new arguments in the realm of political theory may problematize the conventional liberal insistence that democratic governments must recognize their citizens only as equals in human nature and potential. Charles Taylor has argued, for example, that a dissonant demand that governments recognize citizens for their cultural or material particularity has important roots in many of the same texts that ground our usual emphasis on formal equality.

Finally, we have to challenge the premise that breaching neutrality, by permitting decision-makers to notice particularity or acknowledge power inequalities, will lead to chaos. Part of this task involves demonstrating that multi-factoral, contextual decision-making has been part of legal decision-making since English common law. But since this slippery slope argument applies to moral and political decision-making as well, transformation requires not just legal precedent but practical demonstration. If we can develop flexible yet articulable criteria for more contextual decision-making, we can formulate new answers and combat old assumptions at the same time. To conclude my remarks I will examine one set of criteria for balancing interests in expression against harm to politically oppressed groups, one that might be used as a prototype for other contexts as well.

These criteria come from the area of sexual harassment—an issue that has emerged in, but is hardly specific to, academic contexts. Sexual harassment is an interesting area in the discussion of expressive interests, because, unlike the area of hate speech, the understanding of the harm emerged and was legally recognized before anyone realized that enforcement might implicate the speech interests of harassers. By

that time the harms to women were sufficiently well established that only a few unqualified First Amendment advocates argued that free speech claims should prevail in an unqualified way. Instead most lawyers began working toward a system of balancing that provided for restriction of expressive interests in a number of delineated contexts. These efforts to strike a balance have focused on a number of factors, including: 1) the nature of the environment; 2) the captivity of the victims—both within those areas of the workplace where harassing literature was posted, and within this particular workplace in general; and 3) the nature of the harassment—including its severity, its pervasiveness, and the extent to which it was addressed to, or targeted, the particular victims. The social or political characteristics of the victim were not a criterion in this context, as protected groups in the area of sexual harassment are established by statute. But they might be in other contexts.

These criteria do three things. First, they permit decision-makers to recognize contexts, such as educational institutions, where expression has a particularly important status. Second, they focus on characteristics such as “captivity” (the “captive audience”) or “targeting” (used in “fighting words”), which exist as narrow exceptions within First Amendment doctrine, yet they offer them more expansive interpretation. Third, they permit decision-makers to focus on and develop distinctions regarding important issues such as the circumstances of the victim and the nature of the harm, which can’t be fully analyzed under the current regime.

Such criteria pave the way to a system where a speech interest will be neither an icon nor a ground for avoiding moral judgment, but one factor to be placed in the balance with other, socially valued goals.

#### Notes

1. See Shiffrin, “Comment on *RAV v. City of Saint Paul*” (unpublished draft on file with author); Shiffrin, “The First Amendment and the Meaning of America” (unpublished draft on file with author).
2. See generally, C. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987).
3. Balkin, “Some Realism About Pluralism: Legal Realist Approaches to the First Amendment”, 1990 *Duke Law Journal* 375.



## Art, Transgression, Shock, and the First Amendment

*W. B. Carnochan*  
*Stanford University*

I had thought of beginning with an anecdote, even at risk of being thought an apostle of new historicism. But when I read an article in the *Sunday Times* quoting Camille Paglia on “the anecdotal, microchip manner of New Historicism,” I realized I was at greater risk than I had known: “The anecdotal, microchip manner of New Historicism is yuppie grazing, cuisine minceur in a quiche-and-fern bistro.” Having considered the danger, I decided to begin not with one anecdote but with two, hoping thus to approach somewhat closer, in 20 minutes, to the standards of haute cuisine.

In fact they aren't exactly anecdotes but reports of two recent events: one an appearance at Stanford by the rap singer Ice-T, whose song “Cop Killer” put him in the national spotlight; the other, an interview with the visual artist Jenny Holzer published in the latest issue of *The Progressive*. Both Ice-T and Holzer had something to say about the First Amendment and about obscenity or, as I'd prefer, “obscenity,” which is what I will mostly talk about, leaving aside “hate speech” until the end. What interests me are the ways in which Ice-T and Holzer, taken as a contrasting pair, illustrate the ambiguous psychological climate that surrounds the exercise of First Amendment rights. No one could mistake me for an expert in jurisprudence, and with that as an excuse, I am going to speculate briefly in areas where scholars of the law seldom tread. What is it actually like, I want to ask, to live in American society under the aegis of First Amendment rights, as now interpreted, particularly as they relate to art and to the “obscene”? How important is the First Amendment, not as a measure by which speech is judged after its utterance, but as a determinant of behavior? And how does the existence of the First Amendment intersect with “the American character”—which has been nicely described (in a recent review that, with apologies to its author, I have not managed to relocate) as blending equally the prudish and the indiscreet?

A quick preview of an answer: the First Amendment has consequences that can only be called paradoxical since legitimization of dissent or of the “obscene” amounts to saying that dissent is really mainstream and obscenity isn't really obscene. Another way to put it: the First Amendment, insofar as it has come to influence the habits of art, accepts the reality of prudishness while at the same time sponsoring adventures in the indiscreet. Thus construed, it may be thought to

encourage a certain neglectfulness of consequences and to sanction the sort of naughtiness that the perpetrator believes will be treated indulgently. If so, the First Amendment—in which I hope it goes without saying that I do believe—may not be quite the unqualified good that we sometimes automatically take it to be.

With these questions in mind and with the premonition of an answer, I go on to the anecdotes. This past February, Ice-T addressed some 500 students at Stanford on subjects that the student newspaper reported as being “racism, violence, and the First Amendment.” At the start of his talk, he announced that he intended to use expletives freely because he had “yet to find anyone who can define profanity”; and using expletives freely is what he did, regularly larding his utterances with what has been helpfully called the word that won the war. Nothing very unusual or surprising about that. Rather more surprising is what he said about the First Amendment: “Ice-T said he sings controversial lyrics not because of the First Amendment, but because it is his God-given right. ‘Fuck the First Amendment,’ he said. ‘I do not need a law to tell me what I can and cannot say....As soon as you have a law telling you what you can say, the same law will tell you what you cannot say.’” A summary, not altogether off the mark, of ongoing interpretation of the First Amendment; we know that we may not shout “fire” in a crowded theater. I will comment on Ice-T’s philosophical position after a look at the different case of Jenny Holzer.

Between Holzer and Ice-T you find antithetical aspects of ourselves, when it comes, speaking generally, to artistic expression and, more specifically, when it comes to the word that won the war: on the one hand, the absolutism of the indiscreet; on the other, the liberalism of the prudish. As you probably know, Holzer’s work consists of verbal texts, aphoristic in nature, often displayed electronically on moving screens. Some years ago she had an exhibition at the Guggenheim Museum, in which her text was displayed on the outside of the spiral walkway, moving continuously on an electronic screen, disappearing at one end and re-emerging simultaneously at the other. Some of her aphorisms are “ABUSE OF POWER SHOULD COME AS NO SURPRISE”; and “MONEY CREATES TASTE”; and “STARVATION IS NATURE’S WAY.” And so on. Ice-T she is not—though her instinct for protest is no less strong. Asked whether her work had ever been censored, she answered: “Not often. Once in a bank, and that was because of the subject, money. I suppose with the public pieces I steer clear of obscenities. I only use the occasional one, and usually that’s in a museum situation.” To which the interviewer responded—I don’t know in what tonality—“So it’s a form of self-censorship.” And Holzer answered: “Yes. A gratuitous ‘fuck’—if it doesn’t serve any particular

purpose—won't go in the work, especially if it would prevent the work from being distributed in public. I might be prone to do it in art proper if I think the language needs to be as shocking as the subject, but usually I don't." From here the interviewer went on to mention Mapplethorpe, Hannah Wilke, and Andres Serrano, all of them artists who have succeeded in offending against what used to be called public decency. Should they be subject to censorship? Of course, no. But pornography? Holzer's answer: "It's very complicated," although—"obviously"—"the First Amendment is extremely important and you can't mess around with freedom of speech." Whether you're for it, like Holzer, or in some sense against it, like Ice-T, the First Amendment has become a kind of talisman, regarded on the one hand as having magic powers and on the other as falsely believed to have such powers. It's up there with motherhood and apple pie as an emblem of essential American virtue, but insofar as it relates to art and obscenity I think it needs to be (as the neologism has it) anthropologized—that is, to be considered as a cultural phenomenon with psychological and social consequences rather than as merely a matter of law.

Between Ice-T and Jenny Holzer, both of whom gesture toward the First Amendment and both of whom fasten in contrasting ways on one immensely common yet still loaded word, are poles of difference from which to deduce not only certain "limits of expression in American intellectual life" but some of the ways by which the First Amendment affects us day by day. On the one hand, I think we have probably grown to believe, with Ice-T, that we have a natural right to say what we feel like, First Amendment or no First Amendment. Ice-T is thus far an exponent of natural law. He expresses, if in less formal language, the 18th-century belief, as the constitutional scholar Edward Corwin once put it, that private rights "precede the constitution" and therefore "gain nothing of authoritativeness from being enumerated in it"; Ice-T merely goes farther than this by arguing that private rights not only gain nothing by being written down, they also lose something because the inscribing of rights implies an imperative to define their limits. Thus construed, his argument is one more instance in the American tradition of anarchist thought. And, when it comes to speech, we are tempted to anarchy with at least half our hearts. Why should I not, for example, be able to say out loud whatever comes into my head? But that is the point at which convention and self-censorship usually take over. Whatever might be my right to do so, I am not addressing this gathering in the vernacular of Ice-T.

Compared to Ice-T, Holzer is decisively more prudish—and more representative, too, as her comments about shunning the gratuitous "fuck" make clear: "I might be prone to do it in art proper if I think the

language needs to be as shocking as the subject, but usually I don't." This is a surprising statement in some ways. "I might be prone to do it in art proper"—which implies a kind of formal decorum in matching the word up with true art—"if I think the language needs to be as shocking as the subject"—which comes right out and says that the word that won the war, despite its routine frequency in everyday speech, retains its capacity to shock. As Holzer's interviewer put it, "so it's a form of self-censorship."

What does all this tell us about how the First Amendment functions at present—which could be defined as the time of "post-Lenny Bruce"—as a cultural influence? Again, it functions paradoxically. In the first place, it affords Ice-T, in its liberalism, a standard against which he proposes an alternative absolutism, in this case an absolutism of God-given rights. It assures him freedom to attack as coercive and in whatever language he pleases the version of freedom that it assures—and thus traps him within its benign, protective coils. In the second place, the First Amendment encourages and legitimates what is accepted as transgressive and shocking—the hypothetical "fuck" that Holzer regards as more appropriate to museum settings, the arena of (her words again) "art proper," than, say, to Times Square, where some of her work has been shown. This official license, as now given by the First Amendment, effectively announces that the transgressive and the shocking aren't really so transgressive or shocking at all, that they are just legitimate expressions of one's freedom to say what one wants, even if in Holzer's view constrained by the boundaries of museums and "genuine" art. For art and for the artist, this is no doubt a valuable yet also a mixed blessing. It must be satisfying to be applauded as bold, brave, visionary, and so forth, but boldness under these conditions is a relative thing, the boldness of someone who can be fairly certain that retribution will not follow. In this light one can understand the sense of loss that has sometimes been expressed by artists and writers of the former Soviet Union. If you are no longer threatened by incarceration or exile as a result of what you say, the stakes have been decisively lowered. In this country, art that aims for boldness and bravery is, in fact, a comparatively low stakes game.

Contrariwise, art's need to transgress has grown very strong. Thus the artist—and there are many more than Mapplethorpe, Wilke, and Serrano—who aims at such a result has his or her work cut out. To what extent may the friendly presence of the First Amendment, ever more tolerant, contribute to more and more strenuous efforts to transgress? Art everywhere in the West, both where there is and where there is not formal protection of speech, has found itself increasingly hard pressed

to make the sort of dramatic—or melodramatic— impact that has become a normal desideratum. By now urinals, aesthetically considered, are very tame. Measuring the shock quotient of any word or visual artifact is not easy; but it seems fair to think that the art of a culture in which have been recently produced, among the many other available examples, Mapplethorpe's studio-glossy images of homoerotic sadism, Hannah Wilke's small-scale replicas of female genitalia that adorn her body in self-portraits (recalling Man Ray's famous photograph of a woman's face adorned with tears), or Andres Serrano's "Piss Christ" has exhausted its easy ways to transgress—even if it has not, at least in the cases of Wilke and Serrano, altogether lost its sense of humor.

Intersecting with art's need indiscreetly to transgress is the more prudish criterion, not always explicit, of redeeming social merit as a condition of intellectual and certainly of public acceptance. This criterion generates much of the pious critical talk that regularly attaches to commentary on art. Would it not be refreshingly different to read in an exhibition catalog, "this artist above all wants to shock. Of course he [we'll suppose it's he] knows that under the current logic of the First Amendment, it's almost impossible completely to succeed short of outright criminality—but the claims of art require giving it a good try. That is what art is all about. At least we know we can count on Jesse Helms."? Frankly I don't ever expect to read an exhibition catalog that says exactly that, though one can count on intermittent throw-away appearances of the adjective "shocking"—as in, for example, "so-and-so's work is both powerful and shocking."

To summarize: the First Amendment has enhanced benign conditions that probably no one here, least of all myself, would choose to abrogate; yet its consequences in the world of art may not be uncontestably positive—for reasons somewhat other than those that conservative viewers might have for reaching the same conclusion. Perhaps what one might look forward to, whether gladly or apprehensively, is a day when, every transgression having been tried; the First Amendment will no longer intrude in every conversation about art, and Jenny Holzer and Ice-T can go about their business, whatever it may turn out to be, without so much looking over their shoulders. Perhaps, in this scenario, the imprint of the First Amendment on our thinking, at least as it concerns obscenity and art, might just fade away.

But what about "hate speech"? However different the problems of transgressive art and hate speech, the two are not entirely separable, for one reason because art can be inspired by hate; in his talk, Ice-T said, "I didn't think 'Cop Killer' was controversial because I thought everyone hated the police." To prohibit one form of speech may be to endanger

another. Stanford has a speech code but one that is quite narrowly drawn, so much so that in its more than two years of existence, not a single case has been brought. If there needs to be such a code (debatable, of course), then I think its purpose best served if it never has to be invoked, functioning less as an article of law but as the quiet codification of social values that all law is in a sense designed to be. In a commentary on the Mapplethorpe controversy, no less a social arbiter than Judith Martin, a.k.a. Miss Manners, spoke of her preference, which is also mine, to set limits “through social disapproval” rather than through “official limitations.” “But,” she went on, and it is a substantial “but,” “it requires the citizens to do their part by admitting to being shocked.” If in some imaginable future, art and representation lose their power to shock, we need to hope that irrational hate won’t do the same.

## Truth or Consequences: Putting Limits on Limits

*Henry Louis Gates, Jr.*  
*Harvard University*

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 practise 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 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 the 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 morning to be rather more narrowly circumscribed, focusing 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 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, Catherine 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 fallback arguments. Dredging up childhood memories, he comes 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 Catherine 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 absolutist's Old Reliable: the slippery-slope argument. Perhaps racist speech is hurtful and without value, he 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 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 100 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.

Still, it must be said that the salient exceptions to First Amendment protection, however, do 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 shop-worn 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) ascendancy are now, understandably enough, more disposed to explore its limits and failings. And so the rubric of "free speech," in the 1960's 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 it 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 we 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 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,” 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 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 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.

#### 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”—focusing 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 advertisement, television, 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 such 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 social critique of these things. 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, Catherine MacKinnon would observe that we do not find it sufficient to “critique” rape; we punish it. Since for her 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 Brennan clerk) 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 would 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 reign 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, as I say, 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 treat 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 unattractive the degree of paternalism involved in restricting speech on the basis of a few unreasonable even if foreseeable reactions, 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 that were 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, chalked anonymously on the blackboard, the motto: "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 univer-

sity 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. But it is only one of many considerations that must weigh in the balance. One recalls Justice William O. Douglas's 1973 remarks 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. In an old slogan, 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 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 Fieffer'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 Chair John Frohnmyer. For art that robustly challenges the distinction is poorly served by stealthy recourse to it.

I said just now that there's a 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, to consider governmental agencies only, 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 thorough-going 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 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.

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 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—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 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 Catherine 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 of 18th 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 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.

**Erratum**

*[The second-to-last paragraph on page 28 is a direct quotation from Robert C. Post. Please insert this revised page in your copy.]*

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Free Expression in the Academy:  
Three Hard Cases That Test Easy Assumptions

*Robert M. O'Neil*  
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I am delighted to be part of this vibrant panel. This morning's theme recalls the last time I was asked to address an ACLS meeting. It was 1970, when the limits of expression were being severely tested. The immediate concern was to protect learned societies, and their annual meetings, from being politicized to the point of paralysis. Such concerns may sound quaint and remote today, though one hopes the lessons learned back then have endured.

Let me offer this morning a fairly simple thesis with several (I hope apposite) examples. It seems to me our quest for free expression in the academy has of late been distracted by such enticing but elusive issues as speech codes and political correctness. Codes, I would say, are simply misguided, almost certainly ineffectual, and quite possibly counterproductive, even for private universities that may not be directly constrained by the First Amendment. Political correctness I concede to be both serious and odious, but I would suggest it is a phenomenon easily exaggerated in scope and degree.

Because of such diversions and distractions as these, we may have neglected far more substantial issues of free expression and inquiry. Let me cite three—one dealing with research, one with teaching, and a third that affects both. All three are quite real; none has been fully resolved.

The research issue is one on which an outsider would expect to find within the academy a simple answer: May a university ever ban or refuse otherwise valid research because of its content? We all have various policies regulating campus-based research—protecting, for example, human subjects and animal welfare. We require substantial disclosure, in part to control intrusion or bias by corporate grantors. And we impose certain other conditions on sponsored research, up to and including bans on classified projects (which some may find troubling on academic freedom grounds, though I do not). But what we do not do is to ban or reject research on the basis of content.

Now enter the Pioneer Fund, a sponsor of social science research that seems invariably to document race-based differences in intelligence. Two senior faculty at the University of Delaware—established researchers in educational psychology with a conservative bent—seek and obtain Pioneer Fund support for just such studies. The administra-

tion faces an acute dilemma, torn between the insistence of the investigators in content neutrality, and equally fervent demands of others that the university not be used to nurture or validate racist ends. The president asks advice from the faculty research policy committee, which urges rejection of the grant—in part because of the sponsor's intransigence when asked about its research mission and program. The president accepts the committee's advice and declines the grant.

The would-be grantees then seek arbitration through the collective bargaining agreement. The arbitrator rules in favor of the investigators, citing chiefly the university's lack of an established policy that might justify such a rejection. (A few universities, Michigan among them, have such policies on the books, though apparently never invoked.)

The arbitration award only defers the ultimate question: Can (or should) a university ever ban or refuse research on content grounds? The Delaware faculty remains sharply divided, and understandably so given the inordinate difficulty of the case.

Let me offer my own view, which may have only the virtue of simplicity. I can imagine no circumstances under which an otherwise valid research grant should be refused for content reasons—and I speak as one who has approved projects that could threaten tobacco in Virginia or brewing in Wisconsin. One could conceive a grant a decade ago from the South African government to improve police weapons technology; while I would have tried everything in my power to dissuade a colleague from taking the money, and would have welcomed a procedural flaw, there seems to me only one way to resolve the substantive issue consistent with academic freedom and the nature of a university. But I may well be in the minority, even here.

My second case comes out of the classroom—actually two cases closely related in time and in nature. One was the strange saga of Professor Jeffrey Levin at City College of New York, the other that of Professor Philip Bishop at the University of Alabama. Bishop had been warned by his dean to stop religious proselytizing in his physical education classes after students complained, while Levin's philosophy students (who had not complained) were offered alternative sections if they found abhorrent his published views on race and intelligence.

Both professors went to federal court, each claiming abridgment of his academic freedom. Levin prevailed, and Bishop suffered what might be termed a pyrrhic defeat. But the ultimate issue survives: How should a university deal with professorial views that are not only controversial and may reflect on the institution, but may also offend students?

This issue eludes the clarity or response I offered a moment ago on the Pioneer Fund. But there are a few workable principles. Perhaps the clearest is that even outrageous views come within the scope of academic freedom. Thus talk of dismissal (openly hinted at in one of the cases) is irresponsible unless the affront is recurrent and substantial and reflects a departure from professorial mission.

Yet the institution does have a role to play; in fact a university would grievously disserve the cause of academic freedom by pleading paralysis or insisting a critic call the AAUP. Surely if students complain (as Bishop's but not Levin's did), and most clearly if the course is required, some alternative must be offered. If I were the dean, I would probably not ask students why they objected; such an inquiry risks invading their academic freedom. But I would be inclined to limit the offer to students who did complain, and would not (as CCNY did) gratuitously extend the option to all course-registered students.

That leaves us with the least tractable question: What should one do with the proselytizing professor? I suggested earlier that dismissal would be conceivable only if there is recurrent and substantial intrusion of extraneous material—though I recognize it may take a smaller amount of religion than of politics (let alone sports or sex) to invoke that test.

Short of dismissal, there are many creative options that tend to be under-used in the academy—admonition, course reassignment, public refutation, and of course most important and probably most effective, collegial pressure.

In the end, the proselytizer may be incorrigible. It is clear the institution has to tolerate eccentricity and deviance of view, in as well as outside the classroom. But academic freedom and tenure permit no one to escape basic accountability to students, most especially in the content and conduct of essential courses. Thus the time may come when such interests demand formal steps to protect students and the integrity of the classroom.



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1. *A Life of Learning* (1987 Charles Homer Haskins Lecture) by Carl E. Schorske
2. *Perplexing Dreams: Is There a Core Tradition in the Humanities?* by Roger Shattuck
3. *R.M. Lumiansky: Scholar, Teacher, Spokesman for the Humanities*
4. *A Life of Learning* (1988 Charles Homer Haskins Lecture) by John Hope Franklin
5. *Learned Societies and the Evolution of the Disciplines* by Saul B. Cohen, David Bromwich, and George W. Stocking, Jr.
6. *The Humanities in the University: Strategies for the 1990's* by W.R. Connor, Roderick S. French, J. Hillis Miller, Susan Resneck Parr, Merrill D. Peterson, and Margaret B. Wilkerson
7. *Speaking for the Humanities* by George Levine, Peter Brooks, Jonathan Culler, Marjorie Garber, E. Ann Kaplan, and Catharine R. Stimpson
8. *The Agenda for the Humanities and Higher Education for the 21st Century* by Stephen Graubard
9. *A Life of Learning* (1989 Charles Homer Haskins Lecture) by Judith N. Shklar
10. *Viewpoints: Excerpts from the ACLS Conference on The Humanities in the 1990's* by Peter Conn, Thomas Crow, Barbara Jeanne Fields, Ernest S. Frerichs, David Hollinger, Sabine MacCormack, Richard Rorty, and Catharine R. Stimpson
11. *National Task Force on Scholarship and the Public Humanities*
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13. *The ACLS Comparative Constitutionalism Project: Final Report*
14. *Scholars and Research Libraries in the 21st Century*
15. *Culture's New Frontier: Staking a Common Ground* by Naomi F. Collins
16. *The Improvement of Teaching* by Derek Bok; responses by Sylvia Grider, Francis Oakley, and George Rupp
17. *A Life of Learning* (1991 Charles Homer Haskins Lecture) by Milton Babbitt
18. *Fellowships in the Humanities, 1983-1991* by Douglas Greenberg
19. *A Life of Learning* (1992 Charles Homer Haskins Lecture) by D.W. Meinig
20. *The Humanities in the Schools*

(Continued)

21. *A Life of Learning* (1993 Charles Homer Haskins Lecture) by Annemarie Schimmel
22. *The Limits of Expression in American Intellectual Life* by Kathryn Abrams, W.B. Carnochan, Henry Louis Gates, Jr., and Robert M. O'Neil