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Racist Speech as the Functional Equivalent of Fighting Words

Much recent debate over the efficacy of regulating racist speech has focused on the efforts by colleges and universities to respond to the burgeoning incidents of racial harassment on their campuses. At Stanford, where I teach, there has been considerable controversy over whether racist and other discriminatory verbal harassment should be regulated and what form any regulation should take. Proponents of regulation have been sensitive to the danger of inhibiting expression, and the current regulation (which was drafted by my colleague Tom Grey) manifests that sensitivity. It is drafted somewhat more narrowly than I would have preferred, leaving unregulated hate speech that occurs in settings where there is a captive audience, but I largely agree with this regulation's substance and approach. I include it here as one example of a regulation of racist speech that I would argue violates neither first amendment precedent nor principle. The regulation reads as follows:

Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment

1. Stanford is committed to the principles of free inquiry and free expression. Students have the right to hold and vigorously defend and promote their opinions, thus entering them into the life of the University, there to flourish or wither according to their merits. Respect for this right requires that students tolerate even expression of opinions which they find abhorrent. Intimidation of students by other students in their exercise of this right, by violence or threat of violence, is therefore considered to be a violation of the Fundamental Standard.
2. Stanford is also committed to principles of equal opportunity and non-discrimination. Each student has the right to equal access to a Stanford education, without discrimination on the basis of sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin. Harassment of students on the basis of any of these characteristics tends to create a hostile environment that makes access to education for those subjected to it less than equal. Such discriminatory harassment is therefore considered to be a violation of the Fundamental Standard.
3. This interpretation of the Fundamental Standard is intended to clarify the point at which protected free expression ends and prohibited discriminatory harassment begins. Prohibited harassment includes discriminatory intimidation by threats of violence, and also includes personal vilification of students on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.
4. Speech or other expression constitutes harassment by vilification if it:
 - a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and
 - b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and
 - c) makes use of "fighting" words or non-verbal symbols.

In the context of discriminatory harassment, "fighting" words or non-verbal symbols are words, pictures or symbols that, by virtue of their form, are commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, color, handicap, religion, sexual orientation, and national and ethnic origin.²⁷

This regulation and others like it have been characterized in the press as the work of "thought police," but the rule does nothing more than prohibit intentional face-to-face insults, a form of speech that is unprotected by the first amendment. When racist speech takes the form of face-to-face insults, catcalls, or other assaultive speech aimed at an individual or a small group of persons, then it falls within the "fighting words" exception to first amendment protection. The Supreme Court has held that words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace"²⁸ are not constitutionally protected.

Face-to-face racial insults, like fighting words, are undeserving of first amendment protection for two reasons. The first reason is the immediacy of the injurious impact of racial insults. The experience of being called

"nigger," "spic," "Jap," or "kike" is like receiving a slap in the face. The injury is instantaneous. There is neither an opportunity for intermediary reflection on the idea conveyed nor an opportunity for responsive speech. The harm to be avoided is both clear and present. The second reason that racial insults should not fall under protected speech relates to the purpose underlying the first amendment. The purpose of the first amendment is to foster the greatest amount of speech. Racial insults deserve that purpose. Assaultive racist speech functions as a preemptive strike. The racial invective is experienced as a blow, not a proffered idea, and once the blow is struck, it is unlikely that dialogue will follow. Racial insults are undeserving of first amendment protection because the perpetrator's intention is not to discover truth or initiate dialogue, but to injure the victim.

The fighting words doctrine anticipates that the verbal slap in the face of insulting words will provoke a violent response, resulting in a breach of the peace. When racial insults are hurled at minorities, the response may be silence or flight rather than a fight, but the preemptive effect on further speech is the same. Women and minorities often report that they find themselves speechless in the face of discriminatory verbal attacks. This inability to respond is not the result of oversensitivity among these groups, as some individuals who oppose protective regulation have argued. Rather it is the product of several factors, all of which evidence the nonspeech character of the initial preemptive verbal assault. The first factor is that the visceral emotional response to personal attack precludes speech. Attack produces an instinctive, defensive psychological reaction. Fear, rage, shock, and flight all interfere with any reasoned response. Words like "nigger," "kike," and "faggot" produce physical symptoms that temporarily disable the victim, and the perpetrators often use these words with the intention of producing this effect. Many victims do not find words of response until well after the assault, when the cowardly assaulter has departed.

A second factor that distinguishes racial insults from protected speech is the preemptive nature of such insults—words of response to such verbal attacks may never be forthcoming because speech is usually an inadequate response. When one is personally attacked with words that denote one's sub-human status and untouchability, there is little, if anything, that can be said to redress either the emotional or reputational injury. This is particularly true when the message and meaning of the epithet resonates with beliefs widely held in society. This preservation of widespread beliefs is what makes the face-to-face racial attack more likely to preempt speech than other fighting words do. The racist name caller is accompanied by a cultural chorus of equally demeaning speech and symbols. Segregation and other forms of racist speech injure victims because of their dehumanizing and excluding message. Each individual message gains its power because of the cumulative

and reinforcing effect of countless similar messages that are conveyed in a society where racism is ubiquitous.

The subordinated victims of fighting words also are silenced by their relatively powerless position in society. Because of the significance of power and position, the categorization of racial epithets as fighting words provides an inadequate paradigm; instead one must speak of their functional equivalent. The fighting words doctrine presupposes an encounter between two persons of relatively equal power who have been acculturated to respond to face-to-face insults with violence: The fighting words doctrine is a paradigm based on a white male point of view. It captures the "macho" quality of male discourse. It is accepted, justifiable, and even praiseworthy when "real men" respond to personal insult with violence. (Presidential candidate George Bush effectively emulated the most macho—and not coincidentally most violent—of movie stars, Clint Eastwood, when he repeatedly used the phrase, "Read my lips!" Any teenage boy will tell you the subtext of this message: "I've got nothing else to say about this and if you don't like what I'm saying we can step outside.") The fighting words doctrine's responsiveness to this male stance in the world and its blindness to the cultural experience of women is another example of how neutral principles of law reflect the values of those who are dominant.

Black men also are well aware of the double standard that our culture applies in responding to insult. Part of the culture of racial domination through violence—a culture of dominance manifested historically in thousands of lynchings in the South and more recently in the racial violence at Howard Beach and Bensonhurst—is the paradoxical expectation on the part of whites that Black males will accept insult from whites without protest, yet will become violent without provocation. These expectations combine two assumptions: First, that Blacks as a group—and especially Black men—are more violent; and second, that as inferior persons, Blacks have no right to feel insulted. One can imagine the response of universities if Black men started to respond to racist fighting words by beating up white students.

In most situations, minorities correctly perceive that a violent response to fighting words will result in a risk to their own life and limb. This risk forces targets to remain silent and submissive. This response is most obvious when women submit to sexually assaultive speech or when the racist name caller is in a more powerful position—the boss on the job or a member of a violent racist group. Certainly, we do not expect the Black woman crossing the Wisconsin campus to turn on her tormentors and pummel them. Less obvious, but just as significant, is the effect of pervasive racial and sexual violence and coercion on individual members of subordinated groups, who must learn the survival techniques of suppressing and disguising rage and anger at an early age

One of my students, a white, gay male, related an experience that is quite

instructive in understanding the fighting words doctrine. In response to my request that students describe how they experienced the injury of racist speech, Michael told a story of being called “faggot” by a man on a subway. His description included all of the speech-inhibiting elements I have noted previously. He found himself in a state of semishock, nauseous, dizzy, unable to muster the witty, sarcastic, articulate rejoinder he was accustomed to making. He was instantly aware of the recent spate of gay bashing in San Francisco and that many of these incidents had escalated from verbal encounters. Even hours later when the shock subsided and his facility with words returned, he realized that any response was inadequate to counter the hundreds of years of societal defamation that one word—“faggot”—carried with it. Like the word “nigger” and unlike the word “liar,” it is not sufficient to deny the truth of the word’s application, to say, “I am not a faggot.” One must deny the truth of the word’s meaning, a meaning shouted from the rooftops by the rest of the world a million times a day. The complex response “Yes, I am a member of the group you despise and the degraded meaning of the word you use is one that I reject” is not effective in a subway encounter. Although there are many of us who constantly and in myriad ways seek to counter the lie spoken in the meaning of hateful words like “nigger” and “faggot,” it is a nearly impossible burden to bear when one is ambushed by a sudden, face-to-face hate speech assault.

But there was another part of my discussion with Michael that is equally instructive. I asked if he could remember a situation when he had been verbally attacked with reference to his being a white male. Had he ever been called a “honkey,” a “chauvinist pig,” or “mick”? (Michael is from a working-class Irish family in Boston.) He said that he had been called some version of all three and that although he found the last one more offensive than the first two, he had not experienced—even in that subordinated role—the same disorienting powerlessness he had experienced when attacked for his membership in the gay community. The question of power, of the context of the power relationships within which speech takes place, and the connection to violence must be considered as we decide how best to foster the freest and fullest dialogue within our communities. Regulation of face-to-face verbal assault in the manner contemplated by the proposed Stanford provision will make room for more speech than it chills. The provision is clearly within the spirit, if not the letter, of existing first amendment doctrine.

The proposed Stanford regulation, and indeed regulations with considerably broader reach, can be justified as necessary to protect a captive audience from offensive or injurious speech. Courts have held that offensive speech may not be regulated in public forums such as streets and parks where listeners may avoid the speech by moving on or averting their eyes,²⁹ but the regulation of otherwise protected speech has been permitted when the speech invades the privacy of unwilling listeners’ homes or when unwilling

listeners cannot avoid the speech.³⁰ Racists posters, flyers, and graffiti in dorms, classrooms, bathrooms, and other common living spaces would fall within the reasoning of these cases. Minority students should not be required to remain in their rooms to avoid racial assault. Minimally, they should find a safe haven in their dorms and other common rooms that are a part of their daily routine. I would argue that the university’s responsibility for ensuring these students receive an equal educational opportunity provides a compelling justification for regulations that ensure them safe passage in all common areas. Black, Latino, Asian, or Native American students should not have to risk being the target of racially assaulting speech every time they choose to walk across campus. The regulation of vilifying speech that cannot be anticipated or avoided would not preclude announced speeches and rallies where minorities and their allies would have an opportunity to organize counterdemonstrations or avoid the speech altogether.

Knowing the Injury and Striking the Balance: Understanding What Is at Stake in Racist Speech Cases

I argued in the last section that narrowly drafted regulations of racist speech that prohibit face-to-face vilification and protect captive audiences from verbal and written harassment can be defended within the confines of existing first amendment doctrine. Here I argue that many civil libertarians who urge that the first amendment prohibits any regulation of racist speech have given inadequate attention to the testimony of individuals who have experienced injury from such speech. These civil libertarians fail to comprehend both the nature and extent of the injury inflicted by racist speech. I further urge that understanding the injury requires reconsideration of the balance that must be struck between our concerns for racial equality and freedom of expression.

The arguments most commonly advanced against the regulation of racist speech go something like this: We recognize that minority groups suffer pain and injury as the result of racist speech, but we must allow this hate mongering for the benefit of society as a whole. Freedom of speech is the lifeblood of our democratic system. It is a freedom that enables us to persuade others to our point of view. Free speech is especially important for minorities because often it is their only vehicle for rallying support for redress of their grievances. Even though we do not wish anyone to be persuaded that racist lies are true, we cannot allow the public regulation of racist invective and vilification because any prohibition broad enough to prevent racist speech would catch in the same net forms of speech that are central to a democratic society.

Whenever we argue that racist epithets and vilification must be allowed, not because we would condone them ourselves but because of the potential danger the precedent of regulation would pose for the speech of all dis-

senders, we are balancing our concern for the free flow of ideas and the democratic process with our desire for equality. This kind of categorical balance is struck whenever we frame any rule—even an absolute rule. It is important to be conscious of the nature and extent of injury to both concerns when we engage in this kind of balancing. In this case, we must place on one side of the balance the nature and extent of the injury caused by racism. We must also consider whether the racist speech we propose to regulate is advancing or retarding the values of the first amendment.

Understanding the Injury Inflicted by Racist Speech

There can be no meaningful discussion about how to reconcile our commitment to equality and our commitment to free speech until we acknowledge that racist speech inflicts real harm and that this harm is far from trivial. I should state that more strongly: To engage in a debate about the first amendment and racist speech without a full understanding of the nature and extent of the harm of racist speech risks making the first amendment an instrument of domination rather than a vehicle of liberation. Not everyone has known the experience of being victimized by racist, misogynist, or homophobic speech, and we do not share equally the burden of the societal harm it inflicts. Often we are too quick to say we have heard the victims' cries when we have not; we are too eager to assure ourselves we have experienced the same injury and therefore can make the constitutional balance without danger of mismeasurement. For many of us who have fought for the rights of oppressed minorities, it is difficult to accept that by underestimating the injury from racist speech we too might be implicated in the vicious words we would never utter. Until we have eradicated racism and sexism and no longer share in the fruits of those forms of domination, we cannot legitimately strike the balance without hearing the protest of those who are dominated. My plea is simply that we listen to the victims.

Members of my own family were involved in a recent incident at a private school in Wilmington, Delaware, that taught me much about both the nature of the injury racist speech inflicts and the lack of understanding many whites have of that injury.

A good Quaker school dedicated to a deep commitment to and loving concern for all the members of its community, Wilmington Friends School also became a haven for white families fleeing the court-ordered desegregation of the Wilmington public schools. In recent years, the school strove to meet its commitment to human equality by enrolling a small (but significant) group of minority students and hiring an even smaller number of Black faculty and staff. My sister Paula, a gifted, passionate, and dedicated teacher, was the principal of the lower school. Her sons attended the high school. My brother-in-law, John, teaches geology at the University of Delaware. He is a strong, quiet, loving man, and he is white. My sister's family had moved to

Wilmington, shouldering the extra burdens and anxieties borne by an interracial family moving to a town where, not long ago, the defamatory message of segregation graced the doors of bathrooms and restaurants. Within a year they had made a place as well-loved and respected members of the community, particularly the school community, where Paula was viewed as a godsend and my nephews made many good friends.

In May of their second year in Wilmington, an incident occurred that shook the entire school community, but was particularly painful to my sister's family and others who found themselves the objects of hateful speech. In a letter to the school community explaining a decision to expel four students, the school's headmistress described the incident as follows:

On Sunday evening, May 1, four students in the senior class met by pre-arrangement to paint the soccer kickboard, a flat rectangular structure, approximately 8 ft. by 25 ft., standing in the midst of the Wilmington Friends School playing fields. They worked for approximately one hour under bright moonlight and then went home.

What confronted students and staff the following morning, depicted on the kickboard, were racist and anti-Semitic slogans and, most disturbing of all, threats of violent assault against one clearly identified member of the senior class. The slogans written on the kickboard included "Save the land, join the Klan," and "Down with Jews"; among the drawings were at least twelve hooded Ku Klux Klansmen, Nazi swastikas, and a burning cross. The most frightening and disturbing depictions, however, were those that threatened violence against one of our senior Black students. He was drawn, in a cartoon figure, identified by his name, and his initials, and by the name of his mother. Directly to the right of his head was a bullet, and farther to the right was a gun with its barrel directed toward the head. Under the drawing of the student, three Ku Klux Klansmen were depicted, one of whom was saying that the student "dies." Next to the gun was a drawing of a burning cross under which was written "Kill the Tarbaby."³¹

When I visited my sister's family a few days after this incident, the injury they had suffered was evident. The wounds were fresh. My sister, a care giver by nature and vocation, was clearly in need of care. My nephews were quiet. Their faces betrayed the aftershock of a recently inflicted blow and a newly discovered vulnerability. I knew the pain and scars were no less enduring because the injury had not been physical. And when I talked to my sister, I realized the greatest part of her pain came not from the incident itself, but rather from the reaction of white parents who had come to the school in unprecedented numbers to protest the offending students' expulsion. "It was only a prank." "No one was physically attacked." "How can you punish these kids for mere words, mere drawings." Paula's pain was compounded by the failure of these people with whom she lived and worked to recognize that

she had been hurt, to understand in even the most limited way the reality of her pain and that of her family.

Many people called the incident "isolated." But Black folks know that no racial incident is "isolated" in the United States. That is what makes the incidents so horrible, so scary. It is the knowledge that they are *not* the isolated unpopular speech of a dissident few that makes them so frightening. These incidents are manifestations of an ubiquitous and deeply ingrained cultural belief system, an American way of life. Too often in recent months, as I have debated this issue with friends and colleagues, I have heard people speak of the need to protect "offensive" speech. The word offensive is used as if we were speaking of a difference in taste, as if I should learn to be less sensitive to words that "offend" me. I cannot help but believe that those people who speak of offense—those who argue that this speech must go unchecked—do not understand the great difference between offense and injury. They have not known the injury my sister experienced, have not known the fear, vulnerability, and shame experienced by the Wisconsin students described at the beginning of this chapter. There is a great difference between the offensiveness of words that you would rather not hear because they are labeled dirty, impolite, or personally demeaning and the *injury* inflicted by words that remind the world that you are fair game for physical attack, that evoke in you all of the millions of cultural lessons regarding your inferiority that you have so painstakingly repressed, and that imprint upon you a badge of servitude and subservience for all the world to see. It is instructive that the chief proponents of restricting people who inflict these injuries are women and people of color, and there are few among these groups who take the absolutist position that any regulation of this speech is too much.

Again, *Brown v. Board of Education* is a useful case for our analysis. *Brown* is helpful because it articulates the nature of the injury inflicted by the racist message of segregation. When one considers the injuries identified in the *Brown* decision, it is clear that racist speech causes tangible injury, and it is the kind of injury for which the law commonly provides, and even requires, redress.

Psychic injury is no less an injury than being struck in the face, and it often is far more severe. *Brown* speaks directly to the psychic injury inflicted by racist speech in noting that the symbolic message of segregation affected "the hearts and minds" of Negro children "in a way unlikely ever to be undone."³² Racial epithets and harassment often cause deep emotional scarring and feelings of anxiety and fear that pervade every aspect of a victim's life. Many victims of hate propaganda have experienced physiological and emotional symptoms, such as rapid pulse rate and difficulty in breathing.

A second injury identified in *Brown*, and present in my example, is reputational injury. As Professor Tribe has noted, "Libelous speech was long regarded as a form of personal assault . . . that government could vindicate

. . . without running afoul of the constitution."³³ Although *New York Times v. Sullivan* and its progeny have subjected much defamatory speech to constitutional scrutiny—on the reasoning that "debate on public issues should be uninhibited, robust and wide-open"³⁴ and should not be "chilled" by the possibility of libel suits—these cases also demonstrate a concern for balancing the public's interest in being fully informed with the competing interest of defamed persons in vindicating their reputation.

The interest of defamed persons is even stronger in racial defamation cases than in the *Sullivan* line of cases. The *Sullivan* rule protects statements of fact that are later proven erroneous. But persons who defame a racial group with racial epithets and stereotyped caricatures are not concerned that they may have "guessed wrong" in attempting to ascertain the truth. The racial epithet is the expression of a widely held belief. It is invoked as an assault, not as a statement of fact that may be proven true or false. Moreover, if the *Sullivan* rule protects erroneous speech because of an ultimate concern for the discovery of truth, then the rule's application to racial epithets must be based on an acceptance of the possible "truth" of racism, a position that, happily, most first amendment absolutists are reluctant to embrace. Furthermore, the rationale of *Sullivan* and its progeny is that public issues should be vigorously debated and that, as the Supreme Court held in *Gertz v. Robert Welch, Inc.*, there is "no such thing as a false idea."³⁵ But are racial insults ideas? Do they encourage wide-open debate?

Brown is a case about group defamation. The message of segregation was stigmatizing to Black children. To be labeled unfit to attend school with white children injured the reputation of Black children, thereby foreclosing employment opportunities and the right to be regarded as respected members of the body politic. An extensive discussion on the constitutionality or efficacy of group libel laws is beyond the scope of this chapter, and it must suffice for me to note that although *Beauharnais v. Illinois*,³⁶ which upheld an Illinois group libel statute, has fallen into disfavor with some commentators, *Brown* remains an instructive case. By identifying the inseparability of discriminatory speech and action in the case of segregation, where the injury is inflicted by the meaning of the segregation, *Brown* limits the scope of *Sullivan*. *Brown* reflects the understanding that racism is a form of subordination that achieves its purposes through group defamation.

The third injury identified in *Brown* is the denial of equal educational opportunity. *Brown* recognized that even where segregated facilities are materially equal, Black children did not have an equal opportunity to learn and participate in the school community if they bore the additional burden of being subjected to the humiliation and psychic assault that accompanies the message of segregation. University students bear an analogous burden when they are forced to live and work in an environment where at any moment they may be subjected to denigrating verbal harassment and assault.

The testimony of nonwhite students about the detrimental effect of racial harassment on their academic performance and social integration in the college community is overwhelming. A similar injury is recognized and addressed in the requirement of Title VII of the Civil Rights Act that employers maintain a nondiscriminatory, nonhostile work environment and in federal and state regulations prohibiting sexual harassment on campuses as well as in the workplace.

All three of these very tangible, continuing, and often irreparable forms of injury—psychic, reputational, and the denial of equal educational opportunity—must be recognized, accounted for, and balanced against the claim that a regulation aimed at the prevention of these injuries may lead to restrictions on important first amendment liberties.

[...]

Racism is irrational. Individuals do not embrace or reject racist beliefs as the result of reasoned deliberation. For the most part, we do not even recognize the myriad ways in which the racism that pervades our history and culture influences our beliefs. But racism is ubiquitous. We are all racists. Often we fail to see it because racism is so woven into our culture that it seems normal. In other words, most of our racism is unconscious. So it must have been with the middle-aged, white, male lawyer who thought he was complimenting a Mexican-American law student of mine who had applied for a job with his firm. "You speak very good English," he said. But she was a fourth-generation Californian, not the stereotypical poor immigrant he unconsciously imagined she must be.

The disruptive and disabling effect on the market of an idea that is ubiquitous and irrational, but seldom seen or acknowledged, should be apparent. If the community is considering competing ideas about providing food for children, shelter for the homeless, or abortions for pregnant women, and the choices made among the proposed solutions are influenced by the idea that some children, families, or women are less deserving of our sympathy because they are racially inferior, then the market is not functioning as either John Stuart Mill or Oliver Wendell Holmes envisioned it. In the term used by constitutional theorist John Ely, there is a "process defect."³⁷

Professor Ely coined the term *process defect* in the context of developing

a theory to identify instances in which legislative action should be subjected to heightened judicial scrutiny under the equal protection clause. Ely argued that the courts should interfere with the normal majoritarian political process when the defect of prejudice bars groups subject to widespread vilification from participation in the political process and causes governmental decisionmakers to misapprehend the costs and benefits of their actions. This same process defect that excludes vilified groups and misdirects the government operates in the marketplace of ideas. Mill's vision of truth emerging through competition in the marketplace of ideas relies on the ability of members of the body politic to recognize "truth" as serving their interest and to act on that recognition.³⁸ As such, this vision depends upon the same process that James Madison referred to when he described his vision of a democracy in which the numerous minorities within our society would form coalitions to create majorities with overlapping interests through pluralist wheeling and dealing.³⁹ Just as the defect of prejudice blinds white voters to interests that overlap with those of vilified minorities, it also blinds them to the "truth" of an idea or the efficacy of solutions associated with that vilified group. And just as prejudice causes the governmental decisionmakers to misapprehend the costs and benefits of their actions, it also causes all of us to misapprehend the value of ideas in the market.

Prejudice that is unconscious or unacknowledged causes the most significant distortions in the market. When racism operates at a conscious level, opposing ideas may prevail in open competition for the rational or moral sensibilities of the market participant. But when individuals are unaware of their prejudice, neither reason nor moral persuasion will likely succeed.

Racist speech also distorts the marketplace of ideas by muting or devaluing the speech of Blacks and other despised minorities. Regardless of intrinsic value, their words and ideas become less salable in the marketplace of ideas. An idea that would be embraced by large numbers of individuals if it were offered by a white individual will be rejected or given less credence if its author belongs to a group demeaned and stigmatized by racist beliefs.

An obvious example of this type of devaluation is the Black political candidate whose ideas go unheard or are rejected by white voters, although voters would embrace the same ideas if they were championed by a white candidate. Once again, the experience of one of my gay students provides a paradigmatic example of how ideas are less acceptable when their authors are members of a group that has been victimized by hatred and vilification. Bob had not "come out" when he first came to law school. During his first year, when issues relating to heterosexism came up in class or in discussions with other students, he spoke to these issues as a sympathetic "straight" white male student. His arguments were listened to and taken seriously. In his second year, when he had come out and his classmates knew that he was gay,

he found that he was not nearly as persuasive an advocate for his position as when he was identified as straight. He was the same person saying the same things, but his identity gave him less authority. Similarly, Catharine MacKinnon argues that pornography causes women to be taken less seriously as they enter the public arena.⁴⁰ Racial minorities have the same experiences on a daily basis as they endure the microaggression of having their words doubted, or misinterpreted, or assumed to be without evidentiary support, or when their insights are ignored and then appropriated by whites who are assumed to have been the original authority.

Finally, racist speech decreases the total amount of speech that reaches the market by coercively silencing members of those groups who are its targets. I noted earlier in this chapter the ways in which racist speech is inextricably linked with racist conduct. The primary purpose and effect of the speech/conduct that constitutes white supremacy is the exclusion of nonwhites from full participation in the body politic. Sometimes the speech/conduct of racism is direct and obvious. When the Klan burns a cross on the lawn of a Black person who joined the NAACP or exercised the right to move to a formerly all-white neighborhood, the effect of this speech does not result from the persuasive power of an idea operating freely in the market. It is a threat; a threat made in the context of a history of lynchings, beatings, and economic reprisals that made good on earlier threats; a threat that silences a potential speaker. Such a threat may be difficult to recognize because the tie between the speech and the threatened act is unstated. The tie does not need to be explicit because the promised violence is systemic. The threat is effective because racially motivated violence is a well-known historical and contemporary reality. The threat may be even more effective than a phone call that takes responsibility for a terrorist bomb attack and promises another, a situation in which we easily recognize the inextricable link between the speech and the threatened act. The Black student who is subjected to racial epithets, like the Black person on whose lawn the Klan has burned a cross, is threatened and silenced by a credible connection between racist hate speech and racist violence. Certainly the recipients of hate speech may be uncommonly brave or foolhardy and ignore the system of violence in which this abusive speech is only a bit player. But it is more likely that we, as a community, will be denied the benefit of many of their thoughts and ideas.