

Amendment was never intended to protect obscenity. We live quite compatibly with a host of free-speech abridgements. There are restraints against false and misleading advertising or statements—shouting “fire” without cause in a crowded movie theater, etc.—that do not threaten, but strengthen, our societal values. Restrictions on the public display of pornography belong in this category.

The distinction between permission to publish and permission to display publicly is an essential one and one which I think consonant with First Amendment principles. Justice Burger’s words which I quoted above support this without question. We are not saying “Smash the presses” or “Ban the bad ones,” but simply “Get the stuff out of our sight.” Let the legislatures decide—using realistic and humane contemporary community standards—what can be displayed and what cannot. The courts, after all, will be the final arbiters.

Topics for Critical Thinking and Writing

1. Objecting to Justice Douglas’s remark that no one is “compelled to look” (para. 13), Brownmiller says, “This is hardly true. To buy a paper at the corner newsstand is to subject oneself to a forcible immersion in pornography, to be demeaned by an array of dehumanized, chopped-up parts of the female anatomy, packaged like cuts of meat at the supermarket.” Is this true at your local newsstand, or are the sex magazines kept in one place, relatively remote from the newspapers?
2. When Brownmiller attempts to restate the “three-part test” for obscenity established by the Supreme Court in *Miller v. California*, she writes (para. 7): “The materials are obscene if they depict . . .” and so on. She should have written: “The materials are obscene if and only if they depict . . .” and so on. Explain what is wrong here with her “if,” and why “if and only if” is needed.
3. In her next-to-last paragraph, Brownmiller reminds us that we already live quite comfortably with some “free-speech abridgements.” The examples she gives are that we may not falsely shout “fire” in a crowded theater and may not issue misleading advertisements. Do you think that these widely accepted restrictions are valid evidence in arguing on behalf of limiting the display of what Brownmiller considers pornography? Why, or why not?
4. Brownmiller insists that defenders of the First Amendment, who will surely oppose laws that interfere with the freedom to publish, need not go on to condemn laws that regulate the freedom to publicly display pornographic publications. Do you agree? Suppose a publisher insists that he cannot sell his product at a profit unless he is permitted to display it to advantage and that restriction on the latter amounts to interference with his freedom to publish. How might Brownmiller reply?

5. In her last paragraph Brownmiller says that “contemporary community standards” should be decisive. Can it be argued that because standards vary from one community to another and from time to time even in the same place, her recommendation subjects the rights of a minority to the whims of a majority? The Bill of Rights, after all, was supposed to safeguard the constitutional rights of the minority from the possible tyranny of the majority.
6. When Brownmiller accuses “the public . . . and the courts” of being “sadly confused” (para. 11), what does she think they are confused about? The definition of *pornography* or *obscenity*? The effects of such literature on men and women? Or is it something else?

Charles R. Lawrence III

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On Racist Speech

I have spent the better part of my life as a dissenter. As a high school student, I was threatened with suspension for my refusal to participate in a civil defense drill, and I have been a conspicuous consumer of my First Amendment liberties ever since. There are very strong reasons for protecting even racist speech. Perhaps the most important of these is that such protection reinforces our society’s commitment to tolerance as a value, and that by protecting bad speech from government regulation, we will be forced to combat it as a community.

But I also have a deeply felt apprehension about the resurgence of racial violence and the corresponding rise in the incidence of verbal and symbolic assault and harassment to which blacks and other traditionally subjugated and excluded groups are subjected. I am troubled by the way the debate has been framed in response to the recent surge of racist incidents on college and university campuses and in response to some universities’ attempts to regulate harassing speech. The problem has been framed as one in which the liberty of free speech is in conflict with the elimination of racism. I believe this has placed the bigot on the moral high ground and fanned the rising flames of racism.

Above all, I am troubled that we have not listened to the real victims, that we have shown so little understanding of their injury, and that we have abandoned those whose race, gender, or sexual preference

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continues to make them second-class citizens. It seems to me a very sad irony that the first instinct of civil libertarians has been to challenge even the smallest, most narrowly framed efforts by universities to provide black and other minority students with the protection the Constitution guarantees them.

The landmark case of *Brown v. Board of Education* is not a case that we normally think of as a case about speech. But *Brown* can be broadly read as articulating the principle of equal citizenship. *Brown* held that segregated schools were inherently unequal because of the message that segregation conveyed—that black children were an untouchable caste, unfit to go to school with white children. If we understand the necessity of eliminating the system of signs and symbols that signal the inferiority of blacks, then we should hesitate before proclaiming that all racist speech that stops short of physical violence must be defended.

University officials who have formulated policies to respond to incidents of racial harassment have been characterized in the press as "thought police," but such policies generally do nothing more than impose sanctions against intentional face-to-face insults. When racist speech takes the form of face-to-face insults, catcalls, or other assaultive speech aimed at an individual or small group of persons, it falls directly within the "fighting words" exception to First Amendment protection. The Supreme Court has held that words which "by their very utterance inflict injury or tend to incite an immediate breach of the peace" are not protected by the First Amendment.

If the purpose of the First Amendment is to foster the greatest amount of speech, racial insults disserve that purpose. Assaultive racist speech functions as a preemptive strike. The invective is experienced as a blow, not as a proffered idea, and once the blow is struck, it is unlikely that a dialogue will follow. Racial insults are particularly undeserving of First Amendment protection because the perpetrator's intention is not to discover truth or initiate dialogue but to injure the victim. In most situations, members of minority groups realize that they are likely to lose if they respond to epithets by fighting and are forced to remain silent and submissive.

Courts have held that offensive speech may not be regulated in public forums such as streets where the listener may avoid the speech by moving on, but the regulation of otherwise protected speech has been permitted when the speech invades the privacy of the unwilling listener's home or when the unwilling listener cannot avoid the speech. Racist posters, fliers, and graffiti in dormitories, bathrooms, and other common living spaces would seem to clearly fall within the reasoning of these cases. Minority students should not be required to remain in their rooms in order to avoid racial assault. Minimally, they should find a safe haven in their dorms and in all other common rooms that are a part of their daily routine.

I would also argue that the university's responsibility for ensuring that these students receive an equal educational opportunity provides a compelling justification for regulations that ensure them safe passage in all common areas. A minority student should not have to risk becoming the target of racially assaulting speech every time he or she chooses to walk across campus. Regulating vilifying speech that cannot be anticipated or avoided would not preclude announced speeches and rallies—situations that would give minority-group members and their allies the chance to organize counterdemonstrations or avoid the speech altogether.

The most commonly advanced argument against the regulation of racist speech proceeds 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 especially important for minorities because often it is their only vehicle for rallying support for the redress of their grievances. It will be impossible to formulate a prohibition so precise that it will prevent the racist speech you want to suppress without catching in the same net all kinds of speech that it would be unconscionable for a democratic society to suppress.

Whenever we make such arguments, we are striking a balance on the one hand between our concern for the continued free flow of ideas and the democratic process dependent on that flow, and, on the other, our desire to further the cause of equality. There can be no meaningful discussion of how we should reconcile our commitment to equality and our commitment to free speech until it is acknowledged that there is real harm inflicted by racist speech and that this harm is far from trivial.

To engage in a debate about the First Amendment and racist speech without a full understanding of the nature and extent of that harm is to risk making the First Amendment an instrument of domination rather than a vehicle of liberation. We have not known the experience of victimization by racist, misogynist, and homophobic speech, nor do we equally share the burden of the societal harm it inflicts. We are often quick to say that we have heard the cry of the victims when we have not.

The *Brown* case is again instructive because it speaks directly to the psychic injury inflicted by racist speech by noting that the symbolic message of segregation affected "the hearts and minds" of Negro children "in a way unlikely ever to be undone." Racial epithets and harassment often cause deep emotional scarring and feelings of anxiety and fear that pervade every aspect of a victim's life.

Brown also recognized that 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 contained in the message of segregation. University students bear

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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 same injury was addressed by the Supreme Court when it held that sexual harassment that creates a hostile or abusive work environment violates the ban on sex discrimination in employment of Title VII of the Civil Rights Act of 1964.

Carefully drafted university regulations would bar the use of words as assault weapons and leave unregulated even the most heinous of ideas when those ideas are presented at times and places and in manners that provide an opportunity for reasoned rebuttal or escape from immediate injury. The history of the development of the right to free speech has been one of carefully evaluating the importance of free expression and its effects on other important societal interests. We have drawn the line between protected and unprotected speech before without dire results. (Courts have, for example, exempted from the protection of the First Amendment obscene speech and speech that disseminates official secrets, that defames or libels another person, or that is used to form a conspiracy or monopoly.)

Blacks and other people of color are skeptical about the argument that even the most injurious speech must remain unregulated because, in an unregulated marketplace of ideas, the best ones will rise to the top and gain acceptance. Our experience tells us quite the opposite. We have seen too many good liberal politicians shy away from the issues that might brand them as being too closely allied with us.

Whenever we decide that racist speech must be tolerated because of the importance of maintaining societal tolerance for all unpopular speech, we are asking blacks and other subordinated groups to bear the burden for the good of all. We must be careful that the ease with which we strike the balance against the regulation of racist speech is in no way influenced by the fact that the cost will be borne by others. We must be certain that those who will pay that price are fairly represented in our deliberations and that they are heard.

At the core of the argument that we should resist all government regulation of speech is the ideal that the best cure for bad speech is good, that ideas that affirm equality and the worth of all individuals will ultimately prevail. This is an empty ideal unless those of us who would fight racism are vigilant and unequivocal in that fight. We must look for ways to offer assistance and support to students whose speech and political participation are chilled in a climate of racial harassment.

Civil rights lawyers might consider suing on behalf of blacks whose right to an equal education is denied by a university's failure to ensure a nondiscriminatory educational climate or conditions of employment. We must embark upon the development of a First Amendment jurisprudence grounded in the reality of our history and our contemporary experience. We must think hard about how best to launch legal attacks

against the most indefensible forms of hate speech. Good lawyers can create exceptions and narrow interpretations that limit the harm of hate speech without opening the floodgates of censorship.

Everyone concerned with these issues must find ways to engage actively in actions that resist and counter the racist ideas that we would have the First Amendment protect. If we fail in this, the victims of hate speech must rightly assume that we are on the oppressors' side.

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Derek Bok

Derek Bok was born in 1930 in Bryn Mawr, Pennsylvania, and educated at Stanford University and Harvard University, where he received a law degree. From 1971 to 1991 he served as president of Harvard University. The following essay, first published in the Boston Globe in 1991, was prompted by the display of Confederate flags hung from a window of a Harvard dormitory.

Protecting Freedom of Expression on the Campus

For several years, universities have been struggling with the problem of trying to reconcile the rights of free speech with the desire to avoid racial tension. In recent weeks, such a controversy has sprung up at Harvard. Two students hung Confederate flags in public view, upsetting students who equate the Confederacy with slavery. A third student tried to protest the flags by displaying a swastika.

These incidents have provoked much discussion and disagreement. Some students have urged that Harvard require the removal of symbols that offend many members of the community. Others reply that such symbols are a form of free speech and should be protected.

Different universities have resolved similar conflicts in different ways. Some have enacted codes to protect their communities from forms of speech that are deemed to be insensitive to the feelings of other groups. Some have refused to impose such restrictions.

It is important to distinguish between the appropriateness of such communications and their status under the First Amendment. The fact that speech is protected by the First Amendment does not necessarily mean that it is right, proper, or civil. I am sure that the vast majority of Harvard students believe that hanging a Confederate flag in public view—or displaying a swastika in response—is insensitive and unwise because any satisfaction it gives to the students who display these symbols is far outweighed by the discomfort it causes to many others.

I share this view and regret that the students involved saw fit to behave in this fashion. Whether or not they merely wished to manifest

their pride in the South—or to demonstrate the insensitivity of hanging Confederate flags, by mounting another offensive symbol in return—they must have known that they would upset many fellow students and ignore the decent regard for the feelings of others so essential to building and preserving a strong and harmonious community.

To disapprove of a particular form of communication, however, is not enough to justify prohibiting it. We are faced with a clear example of the conflict between our commitment to free speech and our desire to foster a community founded on mutual respect. Our society has wrestled with this problem for many years. Interpreting the First Amendment, the Supreme Court has clearly struck the balance in favor of free speech.

While communities do have the right to regulate speech in order to uphold aesthetic standards (avoiding defacement of buildings) or to protect the public from disturbing noise, rules of this kind must be applied across the board and cannot be enforced selectively to prohibit certain kinds of messages but not others.

Under the Supreme Court's rulings, as I read them, the display of swastikas or Confederate flags clearly falls within the protection of the free-speech clause of the First Amendment and cannot be forbidden simply because it offends the feelings of many members of the community. These rulings apply to all agencies of government, including public universities.

Although it is unclear to what extent the First Amendment is enforceable against private institutions, I have difficulty understanding why a university such as Harvard should have less free speech than the surrounding society—or than a public university.

One reason why the power of censorship is so dangerous is that it is extremely difficult to decide when a particular communication is offensive enough to warrant prohibition or to weigh the degree of offensiveness against the potential value of the communication. If we begin to forbid flags, it is only a short step to prohibiting offensive speakers.

I suspect that no community will become humane and caring by restricting what its members can say. The worst offenders will simply find other ways to irritate and insult.

In addition, once we start to declare certain things "offensive," with all the excitement and attention that will follow, I fear that much ingenuity will be exerted trying to test the limits, much time will be expended trying to draw tenuous distinctions, and the resulting publicity will eventually attract more attention to the offensive material than would ever have occurred otherwise.

Rather than prohibit such communications, with all the resulting risks, it would be better to ignore them, since students would then have little reason to create such displays and would soon abandon them. If this response is not possible—and one can understand why—the wisest course is to speak with those who perform insensitive acts and try to help them understand the effects of their actions on others.

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Appropriate officials and faculty members should take the lead, as the Harvard House Masters have already done in this case. In talking with students, they should seek to educate and persuade, rather than resort to ridicule or intimidation, recognizing that only persuasion is likely to produce a lasting, beneficial effect. Through such effects, I believe that we act in the manner most consistent with our ideals as an educational institution and most calculated to help us create a truly understanding, supportive community.

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