

Fighting Words

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FIGHTING WORDS

RICHARD L. ABEL*

I wrote this article before the September 11 attack. Although the terrorists' motives remain obscure, reactions worldwide tragically demonstrate that millions deeply resent what they perceive as disrespect. I hope this article illustrates how thoroughly the demand for respect suffuses intergroup relations and how urgently we need to understand and address that powerful emotion.

I. WHY DO THE NATIONS SO FURIOUSLY RAGE TOGETHER?

Early in 1996 an unusual conflict convulsed Israel. The antagonists were neither Jews and Arabs, nor religious and secular. Instead, the division was racial. An estimated 10,000 Ethiopian Jews protested violently against government rejection of their blood donations because the risk of AIDS was 50 times higher than it was in the general population. Demanding the Health Minister's resignation, demonstrators carried banners declaring "Our blood is as red as yours and we are just as Jewish as you are" and "Apartheid! The 2nd Holocaust! Genocid! in the Holy-Land."¹ The director of an Ethiopian community health project expostulated: "What connects us? It is blood. If our blood is not Jewish, then what are we, animals?"² He echoed Shylock's outburst in *The Merchant of Venice*: "Hath not a Jew hands, organs, dimensions, senses, affections, passions? ... If you prick us, do we not bleed?"³ Six years earlier an estimated 80,000 Haitian-Americans—virtually the entire local community—had demonstrated in New York over the same issue, carrying signs

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1. See Serge Schmemmann, *Ethiopians in Israeli Riot Over Dumping Donated Blood*, N.Y. TIMES, January 29, 1996, at A3; Mary Curtius, *Ethiopian Jews Attack Israeli Prime Minister's Office*, L.A. TIMES, January 29, 1996, at A1.

2. *Id.*

3. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*, act 3, sc. 1, lines 61-62.

declaring “We’re Proud of Our Blood.”⁴ In 2000, South African gay activists, who were disproportionately white, denounced blood banks for rejecting their donations on grounds of sexual orientation rather than race. Supported by the Human Rights Commission’s view that this violated South Africa’s new, democratic constitution, the National Coalition for Gay and Lesbian Equality declared it “an infringement of gay men’s rights.”⁵

Classical social theory cannot account for such passions. Marxism identifies the basic social cleavage as class, but these disputes did not pit labor against capital. Instead, they focused upon *reproduction*. Liberalism characterizes political adversaries as shifting alliances of interest groups seeking to aggrandize material resources and power. But Ethiopian Jews, Haitian-Americans, and South African gays wanted to *give*, not take—they sought *respect* not material gain.

Max Weber defined the actors in this struggle with characteristic precision: status groups were “people who successfully claim ... a special social esteem” associated with “a specific *style of life*.”⁶ Members share “the conviction of the excellence of one’s own customs and the inferiority of alien ones ... which sustains the sense of ... honor.”⁷ But Weber saw status groups as anachronistic relics of a feudal past: “The market and its processes knows no personal distinctions; functional interests dominate it. It knows nothing of honor.”⁸ Tragically, however, old hatreds persist and new resentments burgeon. A century after science declared victory over religion, secularists and believers still clash fiercely, and ecumenical unity is punctuated by bitter divisions between and within denominations.⁹ Relations between Islam and the West are the worst they have been

4. Donatella Lorch, *FDA Policy to Limit Blood is Protested*, N.Y. TIMES, April 21, 1990, at §1, 25.

5. Henri E. Cauvin, *South Africa in Quandry: Should Gays Donate Blood?*, N.Y. TIMES, June 11, 2000, at 14.

6. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY*, 306, 391 (Guenther Ross and Claus Wittich eds., 1978).

7. *Id.* at 932, 937.

8. *Id.* at 936.

9. See JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1995).

since the Crusades. Efforts to lower trade barriers reignite economic nationalism. Wars inflict festering wounds: Germany and the Holocaust, the United States and Hiroshima, Japan and Asian "comfort women." National disintegration has led to bloody war and genocide in the former Soviet Union, the former Yugoslavia, Sri Lanka, Rwanda, Burundi, the Congo.

During the unprecedented post-war prosperity, American social scientists were perplexed by virulent anti-communism especially among the working class. The social scientists attributed it "to the not uncommon resentments of individuals or groups who desire to maintain or improve their social status."¹⁰ Joseph Gusfield developed a theory of status competition in his interpretation of the American temperance movement. Through the debate over alcohol each adversary sought "the public support of [its] conception of morality" in order to "enhance[] the prestige and self-esteem of the victors and degrade[] the culture of the losers."¹¹ Once observers began viewing social conflict through this lens, they saw status aspirations and anxieties infusing the most diverse issues: school curricula, drug use, sexual orientation, the counterculture, law and order campaigns (especially against juvenile delinquency and for the death penalty), divorce, illegitimacy, contraception, abortion, gun ownership, animal rights, smoking, toxic substances and environmental degradation, feminist campaigns against pornography, efforts to curb racial hatred, and the Muslim response to Salman Rushdie's "The Satanic Verses."¹²

How should we understand the persistence of status conflicts in defiance of the modernist vision? One explanation is materialist: as inequalities of income and wealth have widened, frustrated ambitions

10. See Seymour Martin Lipset, *The Sources of the "Radical Right,"* in *THE RADICAL RIGHT*, 307, 367-68 (Daniel Bell ed., 1964); Richard Hofstadter, *The Pseudo-Conservative Revolt,* in *THE RADICAL RIGHT* 75, 78-79 (Daniel Bell ed., 1964); MAX SCHELER, *RESSENTIMENT* (1961); SVEND RANULF, *MORAL INDIGNATION AND MIDDLE CLASS PSYCHOLOGY* (1964).

11. JOSEPH R. GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* 3-5, 23, 27 (1963).

12. I developed these ideas at greater length in *SPEECH AND RESPECT* (1994) and *SPEAKING RESPECT, RESPECTING SPEECH* (1997). See generally ROBIN LAKOFF, *THE LANGUAGE WARS* (1999); PHILIPPA STRUM, *WHEN THE NAZIS CAME TO SKOKIE: FREEDOM FOR SPEECH WE HATE* (1999).

have been channelled into status claims, and anxieties have fueled status resentments. Anticipating the rise of fascism, Weber warned that “every slowing down of the change in economic stratification leads ... to the growth of status structures and makes for a resuscitation of the important role of social honor.”¹³ Cultural representation is a pivotal battlefield because information increasingly plays the dominant economic role that land, natural resources, and capital occupied in previous eras. As organic communities cease to define status, the media assumes that role. Leisure expands, displacing work as a primary source of social identity. The entertainment industry delivers surrogate satisfactions to the masses. Women and ethnic minorities, who are unable to realize collective aspirations to wealth and power, sublimate their desires in status claims, taking solace in the success of athletes and entertainers. Celebrity status can even be converted into political position. As neo-liberalism and post-communism adopt increasingly indistinguishable economic policies on issues voters find incomprehensible, like tariff barriers or interest rates, politics becomes spectacle. Parties appeal to taste rather than opinion, taking controversial positions on volatile social questions or adopting women or minority candidates. All this may exhibit American exceptionalism. As Alexis de Tocqueville said of the United States more than a century and a half ago, “equality of condition is the fundamental fact from which all others seem to be derived.”¹⁴ Yet the numerous examples below suggest that other countries are not that different.

II. THE POLITICS OF RESENTMENT

Public symbols are a common focus of struggles for respect: holidays and commemorations, monuments and museums, heroes, flags and anthems, stamps and coins, place names, ancestral relics, and the battlegrounds of education, media, art, and electoral politics. As the quincentenary of Columbus’s landfall in America approached, the

13. WEBER, *supra* note 5, at 938.

14. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 3 (Phillips Bradley ed., Vintage Books, New York, 1958)

Latin American Episcopal Conference demanded that celebration defer to an act of contrition “begging the pardon of indigenous groups for what has happened.”¹⁵ Fear of a repetition of the 1991 protests caused Denver to cancel its 1992 Columbus Day parade moments before it was to begin and not attempt another for eight years. In 2000 organizers backed out of a compromise to hold a March for Italian Pride without mentioning Columbus. Carlo Mangiarcina insisted: “I want to say what I want to say—that’s our legal right.”¹⁶ A leader of the American Indian Movement (AIM) retorted that Columbus was “a colonial pirate murderer ... [Imagine what] a parade would be for Jewish people ... if German-Americans celebrated an Adolf Hitler Day.”¹⁷ Mangiarcina called Indian opponents “architects of hatred.”¹⁸ Another AIM leader, planning to demonstrate with his sons, threatened: “if they lay a hand on my children when I’m protesting, then it’s war.”¹⁹ Each side felt its dignity at stake and compromise unthinkable.²⁰ Alabama and South Dakota have tried to resolve the problem by celebrating both American Indians and Columbus on his birthday.²¹

From the perspective of honor, the past, as William Faulkner said, is never forgotten—it’s not even past. After World War II, Germany dropped “Deutschland, Deutschland, über Alles” from its national anthem.²² Croatia, by contrast, peremptorily dismissed protests against reviving the “kuna” as the unit of currency, last used by the fascist Ustasche regime, declaring: “Minority groups, such as the Jews and the Serbs, cannot dictate Croatian policy.”²³ Rome

15. RICHARD ABEL, *SPEAKING RESPECT, RESPECTING SPEECH: DISCOURSE IN THE STRUGGLE FOR DIGNITY* ch. 4 (1997).

16. Michael Janofsky, *A Columbus Day Parade Has Denver on Edge*, N.Y. TIMES, October 6, 2000, at A18.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Alan Riding, *Aux Barricades! “La Marseillaise” Is Besieged*, N.Y. TIMES, March 5, 1992, at A1.

23. Roger Cohen, *Croatia Currency’s Name Protested*, N.Y. TIMES, May 28, 1994, at 3; Roger Cohen, *Plan for Croatia Would Give Serbs Autonomy in Some Areas*, N.Y. TIMES, January 30, 1995, at A3.

provoked an uproar by proposing to rename a street after Mussolini's Minister of Education, who had drafted racist legislation.²⁴ African nations considered boycotting the 1992 summer Olympics in Barcelona after a Haitian immigrant to Spain objected to a museum display of an embalmed nineteenth-century African corpse. The Haitian immigrant said, "For black people, it's a humiliation."²⁵ The body's return to Botswana eight years later made the front page of local newspapers, and hundreds stood in line for hours to see it. Some brought flowers or sang the national anthem. The director of the National Museum called it "a stepping-stone toward the repatriation of remains."²⁶ The curator of the Spanish museum, which had surrendered it under international pressure, resented the accusation of racism, responding: "It was exhibited with respect. ... It was a time when to see exotic things you had to bring them to Europe, whether they were animals or human beings."²⁷ But the Botswana Foreign Minister said the return would "cleans[e] that act of desecration, restore the dignity of a common ancestor ... [and] correct a wrong which has no statute of limitations."²⁸

In his 1992 campaign for the Republican presidential nomination, Patrick Buchanan demagogically combined economic anxieties with prejudices toward other nations, races, sexes, sexual orientations, ages, and sizes. He said that a Bush campaign adviser who lobbied on behalf of the President's "little friends in Japan" "ought to be wearing a kimono."²⁹ Buchanan described former government officials who represented foreign powers as "the geisha girls of the New World Order"³⁰ and desecrated Deng Xiaoping as an "eighty-five-year-old chain-smoking communist dwarf."³¹

24. *Rome Mayor Drops Plan To Name Street for Fascist*, N.Y. TIMES, September 19, 1995, at A7.

25. See David Hearst, *Europe: People: Scull to Skull*, THE GUARDIAN (London), November 22, 1991, at 26; Rachel L. Swarns, *Africa Rejoices as a Wandering Soul Finds Rest*, N.Y. TIMES, October 6, 2000, at A4.

26. *Id.*

27. *Id.*

28. *Id.*

29. ABEL, *supra* note 15.

30. *Id.*

31. *Id.*

Those little dinky countries can't beat us. You know, you take Germany ... that's about the size of Oregon and Washington. ... You take Japan. It's a pile of rocks over there. You could put the whole thing in California.³²

The oldest social divisions in the struggle for respect are religion, nation, and language. Conveniently forgetting their own bloody history, Westerners express horror at the violence of religious dissension in South Asia: the Hindu assault on Babri Masjid, the mosque in Ayodhya, and the massacre of a thousand Muslims in Bombay and Ahmedabad.³³ Yet western nations steadfastly refuse to accord equality to Islam. France prohibits Muslim girls to wear headscarves (while allowing Jewish boys to wear yarmulkes).³⁴ When a mosque opened in Rome, the Catholic Council of the Northern League denounced it as "a veritable foothold in a Western country, a general headquarters for the expansion of Islam."³⁵ In response to the terrorist attacks on the United States, Silvio Berlusconi, the Italian Prime Minister, infuriated Muslims by declaring Western civilization superior to Islamic culture. The Arab League secretary general demanded an apology to "the Muslim nation of more than one billion people." A

32. *Id.*

33. *Id.*

34. See Youssef M. Ibrahim, *Arab Girls' Veils at Issue in France*, N.Y. TIMES, November 12, 1989, at §1, 1; Youssef M. Ibrahim, *Ban on Muslim Political Party Expected in Algeria*, N.Y. TIMES, January 21, 1992, at A6; Ari Goldman, *Fight to Dress Like Muslim*, N.Y. TIMES, August 14, 1993, §1, at 7; *French School Expels Muslim*, N.Y. TIMES, January 21, 1994, at A3; Youssef M. Ibrahim, *France Bans Muslim Scarfs in its Schools*, N.Y. TIMES, September 11, 1994, §1, at 4; Alan Riding, *A New Mosque as a Beacon for a "French Islam,"* N.Y. TIMES, October 29, 1994, §1, at 4; Paul Sen & Arif Nurmohamed, *Signining up for Pupil Segregation*, THE GUARDIAN (London), November 5, 1991, at 29; Haydn Price, *Death Threats as School Declares a Pig-free Zone*, THE INDEPENDENT (London), November 10, 1991, at 8; Craig Turner, *Quebec Separatism Brings Fear of Intolerance*, L.A. TIMES, November 10, 1995, at A12.

35. Celestine Bohlen, *After 20 Years, a Mosque Opens in Catholicism's Back Yard*, N.Y. TIMES, June 22, 1993, at A3.

Turkish newspaper called him “a new Mussolini.”³⁶ An Austrian Freedom Party politician found it “too much” when “our children have to celebrate the end of the Muslim Ramadan feast.”³⁷ Equally unsympathetic to head scarves, he pronounced “We remove our hats when we enter a room. So they can remove their head scarves.” (This, of course, refuses to acknowledge the difference between *compliance* with European custom and *violation* of Muslim custom.)³⁸ Christianity is just beginning to repudiate anti-Semitism, as when Pope John Paul II referred to Jews as “elder brothers” in the faith and withdrew the charge of deicide.³⁹

Some of the most intense confrontations pit secularists against believers and religious liberals against conservatives. Bavaria, for instance, continues to defy the German Constitutional Court by requiring classrooms to display a crucifix; the million-member Committee of Catholics declared it “almost unthinkable” that “a symbol of the values we love most ... can be taken away from us like this.”⁴⁰ Orthodox Jews asked a London borough for planning permission to erect an “eruv,” which would relax Sabbath restrictions within the boundaries of a barely visible wire. In response, Lord McGregor, chair of the local council, denounced Jews for having “affronted every other sect,” and Lord Soper, former head of the Methodist Conference, called the application “a piece of

36. See *Furor at Berlusconi Remark on West's Superiority*, N.Y. TIMES, September 28, 2001, at A6; Melina Henneberger, *Berlusconi Stands By Remarks on Islam*, N.Y. TIMES, September 29, 2001, at A5.

37. Roger Cohen, *Austrian School Drama: Crucifix Meets Ramadan*, N.Y. TIMES, March 20, 2001, at A3.

38. *Id.*

39. See ABEL, *supra* note 15, at ch. 5.

40. Stephen Kinzer, *Crucifix Ruling Angers Bavarians*, N.Y. TIMES, August 23, 1995, at A3; *Bavaria Defies Court Ban on Classroom Crucifixes*, N.Y. TIMES, September 13, 1995, at A6; *Bavarians Call for Cross*, N.Y. TIMES, September 24, 1995, §1, at 5; *Bavarian Law Orders Crucifixes for Schools*, N.Y. TIMES, December 14, 1995, at A18. After 13 years of litigation, the Federal Administrative Court ultimately required the Bruckmühl school to remove the offending crucifix but simultaneously upheld a Bavarian law requiring it to be displayed unless a parent raises “serious and reasonable” objections.

impertinence”—a phrase that pointedly captures the centrality of status.⁴¹

That nationalism implicates pride as much as, if not more than, power or wealth is illustrated by Greece's fierce opposition to the former Yugoslav province's use of the name Macedonia and the sixteen-pointed star of Vergina.⁴² Macedonia's recognition of Albanian as an official language was “the toughest issue” in negotiations to end the civil war. U.S. special envoy James Pardew said: “For Albanians it goes to the heart of their status and whether they are viewed as second-class citizens. For Macedonians it goes to their identity as a country ... they are a people who need to have a sense of homeland.”⁴³ When France passed a law describing the Ottoman Empire slaughter of Armenians some 80 years earlier as “genocide,” Turkey canceled contracts with French firms worth over \$400 million.⁴⁴ The mayor of Ankara planned to rename Strasbourg and Paris avenues and erect a monument commemorating “the massacre of our Muslim brothers” in Algeria.⁴⁵ Residents threw eggs at the French embassy, and taxi drivers refused to carry French passengers.⁴⁶

Japan's half-century refusal to offer an unqualified apology for conquering Asia and perpetrating atrocities (civilian massacres, forced prostitution, and experiments on POWs) continues to outrage former victims.⁴⁷ When the Japanese Education Ministry approved a textbook (written by a nationalist group) which omitted any reference to “comfort women,” protesters in Seoul burned Japanese products and effigies, and 200 Asian Americans demonstrated in Los Angeles. An

41. John Darnton, *In London, a Jewish Ritual Fence is Becoming a Thorn Bush*, N.Y. TIMES, February 22, 1993, at A5; *London Panel Rejects A Jewish Ritual Fence*, N.Y. TIMES, February 25, 1993, at A10; Madeleine Bunting, *Going to the Wire*, THE GUARDIAN (London), December 14, 1993, at 22.

42. ABEL, *supra* note 15, ch. 5; HUGH POULTON, WHO ARE THE MACEDONIANS? (1995); Misha Glenny, *The Birth of a Nation*, NEW YORK REVIEW OF BOOKS, November 16, 1995, at 24 (reviewing HUGH POULTON, WHO ARE THE MACEDONIANS? (1995)).

43. Alissa J. Rubin, *Macedonians Make Tentative Language Deal*, N.Y. TIMES, August 2, 2001, at A3.

44. Amberin Zaman, *Turkey Assails France for Genocide Law*, L.A. TIMES, January 31, 2001, at A6.

45. *Id.*

46. *Id.*

47. ABEL, *supra* note 15, ch. 5.

80-year-old Korean American woman said: “my blood pressure shot up, and I couldn't sleep. ... Not mentioning comfort women is tantamount to insulting the women the world over.”⁴⁸ Protesters tried to enter the Japanese Embassy and demanded South Korea cancel joint sponsorship with Japan of the 2002 World Cup soccer tournament. South Korea threatened to stop liberalizing the import of Japanese cultural items, its Foreign Ministry asked Japan to erase from the Yasukuni Shrine the names of more than 20,000 Koreans who died fighting for Japan in World War II, and its National Assembly unanimously urged the government to oppose a Japanese seat on the U.N Security Council. At least 532 of Japan's 542 municipal school districts rejected the controversial text.⁴⁹ Japanese Prime Minister Junichiro Koizumi exacerbated tensions by proposing to visit the Yasukuni Shrine to the nearly 2.5 million Japanese military war dead—including notorious war criminals—on the anniversary of Japan's surrender. Few critics were mollified when he moved the visit up two days, and nationalists were angered by his failure to follow the Shinto practice of bowing twice deeply, clapping twice, and bowing again. China expressed “strong indignation” and South Korea “deep concern” that Koizumi paid respect “to even war criminals who destroyed world peace and inflicted indescribable damage to the neighboring countries.” In South Korea, 20 men in black protested at the Independence Gate (where the Korean resistance had been imprisoned during Japanese colonial rule) by cutting off their little fingers and binding the stumps with the Korean flag. Japan is planning a new monument to the war dead, not associated with war criminals.⁵⁰

48. K. Connie Kang, *Protesters Decry Japan's New History Textbooks*, L.A. TIMES, April 18, 2001, at B1.

49. Howard W. French, *Japan's Refusal to Revise Textbooks Angers Its Neighbors*, N.Y. TIMES, July 10, 2001, at A3; *South Korea: Pressure on Japan*, N.Y. TIMES, July 19, 2001, at A8; Howard W. French, *Shrine Visit and a Textbook Weigh on Koizumi's Future*, N.Y. TIMES, August 12, 2001, §1, at 3; Mark Magnier, *School Districts in Japan Reject Controversial History Textbook*, L.A. TIMES, August 16, 2001, at A3.

50. Howard R. French, *Koizumi Plan to Visit Shrine Raises Warning From China*, N.Y. TIMES, July 26, 2001, at A8; Stephanie Strom, *Japan's Premier Visits War Shrine, Pleasing Few*, N.Y. TIMES, August 14, 2001, at A1; Valerie Reitman, *Leader Stirs Anger With Visit*, L.A. TIMES, August 14, 2001, at A3; Don Kirk, *Koreans Slice Their Fingers in Anti-Japan Rite*, L.A. TIMES, August 14, 2001, at A6; *Japan Plans to Build Monument as Alternative to Controversial Shrine*, L.A. TIMES, August 19, 2001, at A16.

South Korea canceled joint military exercises with Japan and sued in Tokyo to enjoin distribution, but the new Japanese Prime Minister, Junichiro Koizumi, refused to intervene.⁵¹ Proposals to make the national flag (with its rising sun) and national anthem (praising the Emperor) the official symbols of Japan were denounced by the Singapore Straits Times as “rekindl[ing] a divisive national issue.”⁵² Yuko Tojo, granddaughter of the wartime Prime Minister, has been waging a campaign for his rehabilitation in order “to improve the image of wartime Japan.”⁵³ The time may be ripe. Her book about Hideki Tojo sold 100,000 copies, a laudatory comic book about him sold 550,000, and “Pride” was the highest grossing movie in the first half of 1998.⁵⁴ When a Japanese comic book portraying Taiwanese women eagerly volunteering as wartime prostitutes for Japanese soldiers was translated into Chinese, it was burned in Taiwan, together with a Japanese flag. A legislator who led the protest said the book “betrays Taiwan’s national dignity.”⁵⁵ The leader of a group of 100 survivors called it “an outrageous distortion of a painful history.”⁵⁶

Cultural imperialism can provoke almost as much anger. French intellectuals denounced Euro Disneyland as a “cultural Chernobyl,” “a construction of hardened chewing gum and idiotic folklore taken straight out of comic books written for obese Americans.”⁵⁷ Nations that used to repel foreign conquerors now exclude or subordinate immigrants. The United States has contemplated building its own Berlin wall on the Mexican border.⁵⁸ British Tory MP Winston Churchill (the wartime Prime Minister's

51. Mark Maginier, *S. Korea Sees a Textbook Case of Whitewash*, L.A. TIMES, April 10, 2001, at A4; *Effort to Soothe China*, N.Y. TIMES, May 8, 2001, at A8; Don Kirk, *South Korea Scraps Military Exercise With Japan*, N.Y. TIMES, May 9, 2001, at A10; Calvin Sims, *No Surrender in Textbook Clash*, N.Y. TIMES, May 12, 2001, at A5.

52. Nicholas D. Kristof, *Japan Weighs Formal Status For Its Flag And Anthem*, N.Y. TIMES, March 28, 1999.

53. Nicholas D. Kristof, *A Tojo Battles History, for Grandpa and for Japan*, N.Y. TIMES, April 22, 1999, at A4.

54. *Id.*

55. Mark Landler, *Cartoon of Wartime “Comfort Women” Irks Taiwan*, N.Y. TIMES, March 2, 2001, at A3.

56. *Id.*

57. ABEL, *supra* note 15, ch. 5.

58. *Id.*

grandson) warned that if the “relentless flow of immigrants” were not stopped, in 50 years “the muezzin will be calling Allah’s faithful to the high street mosque.”⁵⁹ As mayor of Paris, French President Jacques Chirac sympathized with French workers who “go crazy” from the “noise and smell” of an “overdose of immigration.”⁶⁰ Chancellor Helmut Kohl bluntly declared that Germany was “not an immigrant country.” Several years later the Christian Democrats reiterated that “Germany is not a classic country of immigration, and because of its history, geography and economic conditions, it cannot be one.”⁶¹ They continued, “Our Christian culture, marked by Christianity, ancient philosophy, humanism, Roman law and the Enlightenment, must be accepted” (an extraordinary demand just 50 years after the defeat of the “thousand-year Reich”).⁶² An Austrian Freedom Party politician complained of “Überfremdung” (over-foreignerization). “Perhaps a 12 percent foreign presence is enriching, but 33 percent is a burden. When you have 200 Muslims in the park cooking lamb, we don’t understand it. And when we eat pork, they say it stinks.”⁶³

Other countries can no longer smugly dismiss race as a uniquely American obsession. Two weeks after Nani Mokoena, a black contestant, was crowned People’s Miss Johannesburg in 1990 organizers restaged the beauty contest and replaced her with a blond-haired, blue-eyed winner. A year later the recently unbanned ANC Women’s League denounced the white Miss South Africa,

59. Dan Fisher, *Split Between Britain, U.S. Seen as “Inevitable,”* L.A. TIMES, April 19, 1990, at A10; Sheila Rue, *Britain Will Offer Refuge to 50,000 Successful Hong Kong Families,* N.Y. TIMES, April 20, 1990, at A3; William E. Schmidt, *A Churchill Draws Fire With Remark on Race,* N.Y. TIMES, June 1, 1993, at A2; *Risk of Racism,* THE OBSERVER (London), October 6, 1991, at 22; John Carvell, *Asylum Plea Fails in European Court: Lawyers Attack ‘Anti-refugee’ Climate and Worry About Faster Appeals,* THE GUARDIAN (London), October 31, 1991, at 4; Rachel Borill, *The Tory Backbench Voices Raised Against Integration,* INDEPENDENT ON SUNDAY (London), November 3, 1991, at 12; David Osborne & Andrew Marshall, *Eight Steps to European Union,* INDEPENDENT ON SUNDAY (London), November 3, 1991, at 12.

60. ABEL, *supra* note 15, ch. 5.

61. *Id.*; Roger Cohen, *How Open to Immigrants Should Germany Be? An Uneasy Country’s Debate Deepens,* N.Y. TIMES, May 13, 2001, §1, at 11.

62. *Id.*

63. Roger Cohen, *Austrian School Drama: Crucifix Meets Ramadan,* N.Y. TIMES, March 20, 2001, at A3.

participating in the Miss World pageant for the first time in 14 years, for allegedly attributing the absence of blacks to the fact that most “fall pregnant by the age of 15.”⁶⁴ Next year’s Miss South Africa was “Coloured,” and a year later a local paper applauded the African winner as “representative of the racial origins of the great majority of South Africans.”⁶⁵ Italian Labor Minister Clemente Mastella was forced to apologize for blaming “the New York Jewish lobby” for the precipitate fall of the lira and the Bank of Italy’s decision to raise the discount rate.⁶⁶ Japanese officials have repeatedly apologized for disparaging the intelligence of African Americans and comparing them to prostitutes who “ruin the atmosphere” by moving into white neighborhoods.⁶⁷ When the Emperor subsequently visited the Martin Luther King Center in Atlanta, an African American leader publicly rebuked the Japanese for being “very disrespectful of black Americans.”⁶⁸

Over six decades Disney films have repeatedly offended the sensibilities of numerous ethnic minorities. The Big Bad Wolf in the “Three Little Pigs” (1933) had a strong Jewish accent, and the villain Stromboli had the only Italian accent in “Pinocchio” (1940); that year the shoeshine girl in “Fantasia” was a black centaurette; “Peter Pan” (1953) stereotyped Indians; as late as 1994 the evil lion and his hyena accomplices had inner-city accents in “The Lion King.”⁶⁹ Disney had

64. Steven Lee Myers, *Chornicle*, N.Y. TIMES, December 12, 1991, at B12.

65. Nora Zamichow, *Mrs. America to Retain Crown if She Stays Wed*, L.A. TIMES, January 25, 1992, at B6; Scott Kraft, *Beauty and the Beast of Apartheid in S. Africa*, L.A. TIMES, January 28, 1992, at H1; Nancy Ray, *Barred From Pageant, Mother Claims Bias*, L.A. TIMES, February 28, 1992, at A3; Bill Keller, *Apartheid’s End Transforms Beauty Show*, N.Y. TIMES, September 19, 1993, at A1.

66. *Italy Official’s Remark Angers Jewish Groups*, L.A. TIMES, August 13, 1994, at A4; Alan Cowell, *Italian Government Assures Jews It Rejects Anti-Semitism*, N.Y. TIMES, October 2, 1994, §1, at 14.

67. David E. Sanger, *Japanese Offers Apology for Slur*, N.Y. TIMES, October 18, 1990, at A7.

68. See *id.*; James Sterngold, *Tokyo, Irritated by U.S. Rebuke, Says Furor Over Slur Seems Racist*, N.Y. TIMES, October 22, 1990, at A5; Catherine S. Manegold, *Japan’s Emperor Unflappable in Atlanta*, N.Y. TIMES, June 11, 1994, §1, at 7; Sam Jameson, *Embarrassed Japanese Hurry to Reject Latest Racial Remark*, L.A. TIMES, March 20, 1993, at A10.

69. Paula Schwartz, *It’s a Small World ... And not Always P.C.*, N.Y. TIMES, June 11, 1995, §2, at 22.

to edit the anti-Arab lyrics of "Alladin's" opening song; and even though it hired prominent American Indians to work on "Pocahantas," one Indian leader objected that it was "like trying to teach about the Holocaust and putting in a nice story about Anne Frank falling in love with a German officer."⁷⁰

As other subordinated groups—women, gays and lesbians, and the physically challenged—seek equal respect, the dominant complain about identity politics and "political correctness." A Mitsubishi poster displays incredible insensitivity by pronouncing: "It must be dyslexic. It thinks it's a \$41,000 car. The Lancer is here. \$14,000." When England's famous Rugby school chose a girl as head pupil, half the boys boycotted the bicentenary of its founder and displayed posters declaring: "Girls don't play rugby, boys don't play netball. Please don't confuse us."⁷¹ Some 700 Anglican clergy threatened to resign when their church ordained women; one characterized *women* wearing liturgical robes as transvestites!⁷² Although several American Protestant denominations have rewritten the liturgy in gender-neutral language, a Tory MP urged that £1 be withheld from any vicar's stipend each time he used a new "non-sexist" prayer book. He remarked: "These prayers refer to God as 'Our Mother and Father.' Curates who are themselves confused about bisexuality should not try to confuse the congregation as to whether Jesus was a hermaphrodite."⁷³

The gay and lesbian struggle for respect resembles the early American civil rights and feminist movements in enjoying limited legitimacy and suffering a powerful backlash. When the Labour-dominated Greater London Council launched a campaign against heterosexism in the 1980s, tabloid headlines screamed "Wife Ran Off

70. See *id*; Edward Rothstein, *Ethnicity and Disney: It's a Whole New Myth*, N.Y. TIMES, December 14, 1997, §2, at 37; Sarah Kershaw, *Coming to Classrooms: The Real Pocahantas Story*, July 12, 1995, at B6; David J. Fox, *Disney Will Alter Song in Aladdin*, L.A. TIMES, July 10, 1993, at F1.

71. Nina Darton, *Rugby Journal: Old School, New Day, With Girl as Head*, N.Y. TIMES, July 8, 1995, §1, at 4.

72. John Darnton, *After 460 Years, The Anglicans Ordain Women*, N.Y. TIMES, March 13, 1994, §1, at 1.

73. *The Day in Politics: Clergy Warned About Mother and Father*, THE GUARDIAN (London), October 22, 1991, at 6.

With Another Woman” and warned that “Gay Lovers Leap Housing Queue.”⁷⁴ The national Conservative Government responded by prohibiting local authorities from “intentionally promot[ing] homosexuality,” frightening county councils into canceling Benjamin Britten’s opera “Death in Venice” and a Jean Genet film.⁷⁵ The Anglican Church recently reiterated its ban on homosexually active clergy and ordinands and refused to place homosexual unions “on a par with heterosexual marriage.”⁷⁶ The Vatican sought to block a World [Gay] Pride Festival during the 2000 Jubilee Year, employing a clause in the Concordat preserving Rome’s “sacredness.”⁷⁷ Even Socialist Prime Minister Giuliano Amato called the Festival “inopportune.” But this was not enough for the right-wing National Alliance, which denounced him (in typically inflated rhetoric) as “the Pontius Pilate of the year 2000.”⁷⁸ Amato’s wife defended the event, as did the Agriculture Minister, who came out as bisexual. And the leader of Rome’s Jewish community made common cause with homosexuals. But Francesco Rutelli, Rome’s center left mayor, withdrew the \$150,000 he had pledged and forbade use of the city logo, asking organizers to spare the feelings of “an aging pope” and invoking “the question of public order.”⁷⁹ (He made it clear that the feelings of gays and lesbians were unimportant.) On the eve of the

74. GREATER LONDON COUNCIL GAY WORKING PARTY, *CHANGING THE WORLD: A LONDON CHARTER FOR GAY AND LESBIAN RIGHTS* (1985).

75. K. Pringle, T. Kaufmann and P. Lincoln, *Clause 28 in Practice*, in *HIGH RISK LIVES: LESBIAN AND GAY POLITICS AFTER THE CLAUSE* (T. Kaufmann & P. Lincoln, eds., 1991); P. THOMAS AND R. COSTIGAN, *PROMOTING HOMOSEXUALITY: SECTION 28 AND THE LOCAL GOVERNMENT ACT 1988* (Cardiff Law School, Cardiff, 1990). In spring 2000, the Labour-dominated Parliament declined to repeal the law.

76. Ari L. Goldman, *Religion Notes*, N.Y. TIMES, December 14, 1991, §1, at 10; John F. Burns, *Gay Canadian Minister Stands Trial*, N.Y. TIMES, February 9, 1992, §1, at 3; John Darnton, *Gay Issue Roils Church of England*, N.Y. TIMES, March 19, 1995, §1, at 10; Sarah Lyall, *Sexually “Ambitious” Bishop Is Promoted*, N.Y. TIMES, April 12, 1995, at A3. So did the Methodist Church, the second-largest American Protestant denomination.

77. Richard Boudreaux, *Vatican Sees Gay Festival as an Affront*, L.A. TIMES, June 3, 2000, at A2.

78. Alessandra Stanley, *Dueling Festivals: Gay Pride and Vatican Collide*, N.Y. TIMES, June 3, 2000, at A4.

79. *Id.*

Festival, Forza Nuova demonstrated, giving the Nazi salute and declaring: "Italy needs children, not homosexuals."⁸⁰

Gays and lesbians have sought enhanced dignity—and outraged homophobes—by claiming famous historical figures like Michelangelo. Americans, who long pointed to Eleanor Roosevelt's allegedly lesbian relationship with her secretary, also noted that Abraham Lincoln shared a bed with a man during his first years in the House of Representatives.⁸¹ But when Knesset member Yael Dayan (Moshe's granddaughter) emphasized the biblical King David's love for his grandson in an appeal for gay rights in the Israeli military, conservative MPs called her "a foul and dirty creature" who was "raping all of the people we Israelis hold to be holy."⁸²

But there have been some surprising victories. Courts in France, Germany, and Italy banned a Benetton advertisement featuring a man's arm with an HIV tattoo, which angered both Jews (for demeaning the Holocaust) and gays.⁸³ And the Chinese Psychiatric Association declared in 2001 (decades after its western counterparts) that homosexuality is not a mental disease.⁸⁴

III. FIGHTING WORDS

As these examples illustrate, struggles for respect are waged through symbols. If the protagonists are fighting *with* words, how should we fight *against* words? The answer is complicated by the fact that speech is arguably the defining element of our humanity: essential to political discourse, economic activity, artistic expression, scientific discovery, social intercourse, and individual self-realization. (Hence the intensity of debates over whether animals can learn to speak with humans.) In response to this tension, liberal states vacillate between

80. *700 March in Rome Against Gay Festival*, N.Y. TIMES, July 2, 2000, §1, at 6.

81. David W. Dunlap, *In Search of History: When Today's Agenda Is a Prism for the Past*, N.Y. TIMES, October 1, 1995, §4, at 3.

82. Michael Parks, *A New View of David Stirs Goliath-size Roar*, L.A. TIMES, February 11, 1993, at A4.

83. Amy M. Spindler, *Patterns*, N.Y. TIMES, November 23, 1993, at B11.

84. Henry Chu, *Chinese Psychiatrists Decide Homosexuality Isn't Abnormal*, L.A. TIMES, March 5, 2001, at A1.

the extremes of civil libertarianism and enthusiastic regulation. Americans fetishize the First Amendment.⁸⁵ But even the United States limits speech that facilitates crime, threatens national security, violates intellectual property, defames reputation or invades privacy, is obscene, violent, or pornographic, or is motivated by profit. Governments regulate the time, place, and manner of speech; prevent criminals from selling their stories; tax speakers; enforce anti-trust laws against the media; and frequently compel both silence and disclosure. Speech, paradoxically, is most constrained where political theory values it most highly—*within* government (courts, legislatures, the executive, and the electoral process) and coercive institutions (schools, prisons, and the military). State action *creates* property interests in speech: copyright, trademarks, and patents. Information technology has forced the wholesale rewriting of these rules. Contract, tort, and property law limit speech. Speech is no more free in the private realm. Commodification of speech perversely compromises its value in politics, law, science, art, and the media. The fall of communism has freed speech from state control merely to subject it to market forces. Only the solipsistic speaker (an oxymoron) is entirely free; the larger the audience sought, the broader the requisite cooperation and thus the greater the constraint on individual autonomy; this is particularly true of the mass media. Those who pay to disseminate a message, whether advertisers or audience, significantly influence its content.

The opposite of civil libertarianism is represented by repressive regimes and recent experiments in the regulation of pornography, violent images, racial hatred, and blasphemy. But such laws dichotomize the continuum from intolerable to protected speech, deny the irreducible ambiguity of symbolic communication, disregard or misread speaker motive, and strip language of its social context.⁸⁶ The

85. For a recent, philosophically grounded, argument against state restrictions on speech harming groups, see DAVID A.J. RICHARDS, *FREE SPEECH AND THE POLITICS OF IDENTITY* (1999).

86. How would state regulation of racist images deal with “Witness,” an exhibition of photographs and picture postcards of lynchings, initially intended to celebrate the crimes, then collected by an Atlanta antiques dealer, and recently displayed in an upper East Side New York gallery? Somini Sengupta, *Racial Hatred in America’s Past Stirs Emotions at Exhibition*, N.Y. TIMES, January 24, 2000, at B1.

laws predicate prohibition on consequences without adequate proof of causality. Their paternalism encourages evasion and valorizes deviance.

How, then, can we recognize and redress the real harms of speech while minimizing the equally real dangers to speech? I begin by rejecting liberalism's aspiration to neutrality. States and laws that blind themselves to existing social, economic, and political inequalities are complicit in perpetuating and even amplifying them. I advocate extending the ideal of equality from the domain of the state (the bourgeois liberal project), relations of production (the socialist project), and patterns of consumption (the social democratic project) to the sphere of reproduction—social and cultural life, the media, and education.

Deference used to infuse daily interactions. For a century after the Civil War, American patterns of interracial speech and behavior reproduced subordination, for instance, the use of first and last names and titles in ordinary greetings. Well after World War II the English class system was daily reenacted whenever workers doffed their caps or symbolically touched their forelocks to employers and "betters." Just as these emblems of coerced deference in personal interaction have become unacceptable, so subordinates are challenging their analogs in mass, technologically advanced societies. I urge, therefore, that we champion the socially or culturally subordinated—religious, national, linguistic and racial minorities, women, gays and lesbians, and the physically different—whenever they seek respect from superiors (though not when they disrespect inferiors).

Speech reproduces status inequalities in two ways (constituting the ends of a continuum). Even in mass society speech still acts *intensively*, through face-to-face insults and humiliations. What is new, and increasingly important, are its *extensive* effects on large and growing audiences through texts and curricula, advertising, elite and popular culture, journalism, public rituals and symbols. To accept the existing distribution of such messages as apolitical, indeed inevitable, is to capitulate to cultural hegemony. A counter-hegemonic strategy must encourage new voices to speak and secure them a hearing. The goal is to equalize cultural capital—access to and position within

symbolic space—through affirmative action in the domain of values.⁸⁷ This aspiration maintains not that talent and achievement are equally distributed but that we can perceive and appreciate their variety and value more fully if we critically examine our cultural blinders.

In order to begin the redistribution of cultural capital the invisible and despised must seek recognition and respect. The weakest link in every remedial process is victim passivity, not institutional obstruction; in all regulatory procedures the greatest attrition occurs at the earliest stages: naming an experience as harmful, blaming another, and claiming redress.⁸⁸ It is essential, therefore, to encourage and support complainants. The first step, and the most difficult, is transforming consciousness so that victims perceive the harm as contingent rather than inevitable and caused by others rather than self-inflicted. Women internalize male definitions of love, sex, and beauty. Ethnoreligious minorities resign themselves to remaining outsiders or try to assimilate, changing their customs, language, accent, clothes, even physical appearance. Gays and lesbians remain in the closet. The disabled stay home.

The second step, voicing the grievance, is psychologically stressful and socially dangerous. Victims need shared norms that validate their sense of violation, elicit audience sympathy, and legitimate the complaint in the offender's eyes. They need the support of collectivities—both fellow victims and ideological or political allies. Complaining, like any behavior, can be learned; visible rewards encourage these victims to claim again and others to emulate them. Victims also need protection against retaliation.

Private remedial mechanisms can reduce the many costs of state regulation: procedural fetishism, excessive severity, formalism, inaccessibility, delay, and the danger that punishment will create perverse incentives to defy authority and invite martyrdom (the backlash against “political correctness”). Harmful speech is best handled within the diverse communities of civil society, which include

87. See generally PIERRE BOURDIEU, *LANGUAGE AND SYMBOLIC POWER*, (Cambridge, 1991); *BENDING REALITY: THE STATE OF THE MEDIA* (James Curran, Jake Ecclestone, Giles Oakley and Alan Richardson eds., 1986).

88. William L.F. Felstiner, Richard L. Abel and Austin Sarat, *The Emergence and Transformation of Disputes*, 15 *LAW & SOCIETY REVIEW* 631(1980).

schools and universities, workplaces, neighborhoods, trade unions, mass transportation, voluntary associations and cultural venues (including the mass media).

Because face-to-face communities construct social status, they can also modify it. Communities can encourage complaints and offer complainants support and protection. Members linked by significant social bonds can influence each other through the informal sanctions of gossip, cooperation and obstruction, deference and contempt, inclusion and ostracism. They may respond to speech outside the community with ridicule or boycott. Communities should influence speech informally in situations where state power is inappropriate but indifference unacceptable. Through their greater accessibility and speed, informal responses achieve an extensiveness (application to a higher proportion of infractions) that compensates for their relative leniency. Because the norms governing status relations are inchoate and constantly evolving, informalism legislates while adjudicating (a blurring of roles that embarrasses courts). The ambiguity of symbols, nuance of meaning, opacity of motive, and complexity of history—all of which make the dichotomies of formal law unacceptably crude instruments for regulating speech—create the indispensable discursive space and flexibility for parties to renegotiate respect. Since a central goal of the process is empowerment, it must be controlled by victims rather than professionals. The objective is equality of status not resolution of conflict, substantive rather than formal justice. Communities, unlike states, are not limited to the lowest common denominator of liberalism—formal equality; they can prefigure a more inclusive social order in which ascriptive qualities no longer constitute a status hierarchy.

IV. ATTENTION MUST BE PAID⁸⁹

The most fundamental demand of the culturally subordinated is recognition, visibility. That was certainly *one* aspiration of the civil rights movement. Occasionally the motivation is intensely personal. Based on genetic research suggesting that Sally Hemings had at least one child with her slave-master, Thomas Jefferson, her descendants secured an invitation to the annual gathering of Jefferson kin. But when a Hemings descendant invited everyone to gather for a photograph on the steps of Monticello, many Jeffersons declined to join them, and the family flatly refused to open the Monticello cemetery to the Hemingses. Lucien K. Truscott IV, a Jefferson descendant and Hemings champion, said: “in this family, the word ‘genealogy’ is a code word for racism. But I’m going to make it much harder for them to exclude the Hemings than to let them in.”⁹⁰ When Charlottesville proposed to name a street Hemings Way, Agnes Cross-White, the (aptly-named) editor of the local black community newspaper, objected that this was “not honoring [Hemings] but Jefferson and the institution of slavery that defiled and demeaned our ancestors.” “Are we so devoid of self-esteem that we will accept and cling to anything white because it makes us feel more valuable, more American?”⁹¹ Some “white” Hemings descendants, who had kept that lineage secret for six generations, have taken DNA tests establishing their link to Jefferson. One “couldn’t care less about membership or where I’m buried. We want our family to recognize us, to embrace us. And that’s a very important symbolic gesture for the rest of the nation to see.”⁹² But a “black” descendant of Sally’s sister Mary was

89. As Arthur Miller has Linda say of her husband, Willy Loman, toward the end of the first act of *Death of a Salesman*. “Willy Loman never made a lot of money. His name was never in the paper. He’s not the finest character that ever lived. But he’s a human being, and a terrible thing is happening to him. So attention must be paid. He’s not to be allowed to fall into his grave like an old dog. Attention, attention must finally be paid to such a person.” ARTHUR MILLER, *DEATH OF A SALESMAN*, act i. (1949).

90. Michael Janofsky, *Jefferson’s Kin Not Ready To Accept Tie to Slave*, N.Y. TIMES, May 16, 1999, §1, at 22.

91. Francis X. Cline, *Street-Name Plan Sparks a Jeffersonian Debate*, N.Y. TIMES, May 14, 2000, §1 at 16.

92. *Id.*

“saddened to see Sally’s descendants acting like grateful supplicants at the prospect of being recognized by the master’s family.”⁹³ President George W. Bush invited “black” Hemings descendants to the White House to celebrate Jefferson’s 258th birthday. But “white” descendants commissioned a study by prestigious academics, which concluded that the male Jefferson ancestor was probably Thomas’s younger brother Randolph (presumably restoring the president’s honor).⁹⁴

Most struggles are waged by larger collectivities. When the Sioux Empire Gay and Lesbian Coalition threatened a federal lawsuit, South Dakota Governor William Janklow allowed it to erect an Adopt-a-Highway sign but declared he would eliminate sponsorship claims on all 1,000 signs in the state because “I do not think government should be used to offend people.”⁹⁵ Gay, lesbian, and straight high school students have formed some 600 clubs nationwide and sought recognition from their schools—ironically invoking the 1984 Equal Access Act passed to protect religious groups.⁹⁶ The Salt Lake City school board initially excluded *all* extracurricular groups rather than acquiesce but reversed itself in response to a lawsuit.⁹⁷ When an Orange County, California, high school banned the Gay-Straight Alliance, a member of the Campaign for California Families exulted: “I’m happy that the parents know that their children are going to be

93. Edna Bolling Jacques, Letter to the Editor, *Sally Hemings’s Kin: The Past Is Not Past*, N.Y. TIMES, May 18, 2000, at A30.

94. *Bush at Ceremony Honoring Jefferson*, L.A. TIMES, April 13, 2001, at A20; *National Briefing: Virginia: Jefferson Paternity Challenged*, N.Y. TIMES, April 13, 2001, at A15; SHANNON LANIER & JANE FELDMAN, *JEFFERSON’S CHILDREN: THE STORY OF ONE AMERICAN FAMILY* (2000). See also Michael Janofsky, *Jefferson’s Kin Not Ready To Accept Tie to Slave*, N.Y. TIMES, May 16, 1999, §1, at 22; *Thomas Jefferson Is Likely Slaves’ Father, Group Says*, L.A. TIMES, January 27, 2000, at A10; Francis X. Cline, *Street-Name Plan Sparks a Jeffersonian Debate*, N.Y. TIMES, May 14, 2000, §1 at 16; Edna Bolling Jacques, Letter to the Editor, *Sally Hemings’s Kin: The Past Is Not Past*, N.Y. TIMES, May 18, 2000, at A30; Madison J. Gray, *A Founding Father and His Family Ties*, N.Y. TIMES, March 3, 2001, at B1.

95. *S. Dakota Gay Group Gets Highway Sign, for a While*, L.A. TIMES, August 18, 2001, at A18.

96. Kate Folmar & Scott Martelle, *Gay Clubs Bring School Use Debate Back Into Spotlight*, L.A. TIMES, December 9, 1999, at A1.

97. *Id.*

protected from gay indoctrination.”⁹⁸ The Washington state Christian Coalition opposed a bill to discourage school bullying because it could punish students for attacking homosexuality.⁹⁹ A student won the right to wear a pentagram, the symbol of her Wicca religion, after the school had banned witches (along with Satanists, black nail polish, and vampire makeup).¹⁰⁰ Guatemalan Mayan students successfully resisted expulsion for wearing traditional dress rather than school uniforms. A Mayan legislator, who wears traditional dress in the Congress, said this would “encourage other Mayan students to exercise their rights to express their ethnic identity.”¹⁰¹ The Education Department called the expulsion threat “a violation against the dignity of these two young ladies.”¹⁰²

In Turkey, however, Merve Kavakci, a newly elected member of parliament from the Islamic “Virtue” party, was prevented from taking the oath while wearing her headscarf, as opposing deputies stood, clapping rhythmically and chanting “Out! Out!”¹⁰³ The Prime Minister told the acting speaker to “[p]lease put this lady in her place.”¹⁰⁴ In banning the headscarf seven decades earlier, Kemal Ataturk declared, “this barbarous posture ... is a spectacle that makes the nation an object of ridicule.”¹⁰⁵ (Eight years before this incident a woman deputy who sought to take her oath in Kurdish was removed from the chamber and later imprisoned on charges of supporting separatism.) Illustrating the perverse consequences of repression, every Turkish newspaper featured Ms. Kavakci’s photo on its front page. The chief prosecutor opened an investigation. For Ms. Kavakci, it was as though Parliament had said: “You are not like me so you cannot exist.” Ironically, she found greater acceptance in the United States, where she had graduated from the University of Texas at

98. *Id.*

99. Sam Howe Verhovek, *National Briefing West: Washington: Bullying Measure Opposed*, N.Y. TIMES, May 4, 2001, at A18.

100. *School Settles Suit Over Pentagram Ban*, L.A. TIMES, March 23, 1999, at A14.

101. *Mayan Pupils Allowed to Wear Traditional Attire*, N.Y. TIMES, April 8, 1999, at A5.

102. *Id.*

103. Stephen Kinzer, *Head Scarf Puts Assembly In Turkey Into Uproar*, N.Y. TIMES, May 3, 1999, at A14.

104. *Id.*

105. *Id.*

Dallas. Invoking her failure to disclose that she had accepted American citizenship in 1999, Turkey stripped her of its citizenship (another way of denying her existence).¹⁰⁶

Yet the United States can hardly pretend to have resolved claims for equal recognition to contending groups. Jewish parents in a Cincinnati suburb persuaded the public schools to close on the High Holy Days, since they closed on Good Friday. The ACLU promptly sued. Muslim parents complained, “[i]f you’re going to give a holiday to the Jews, you ought to give holidays to the Muslims, to the Hindus, to the Buddhists, to the Sikhs—and that is impractical. If we’re all minorities, we’re all minorities together. *We should not have degrees of minority.*”¹⁰⁷ Although Muslims were not plaintiffs in the lawsuit, a Jewish parent called it “a personal kick in the face. They’ll do anything to bash a Jew.”¹⁰⁸ An Inglewood, California, high school canceled both Black History Month and Cinco de Mayo when a riot broke out, in part because Hispanic students objected to the fact that Blacks had a *month* but Chicanos only a *day*.¹⁰⁹ In 1994 California Governor Pete Wilson vetoed a bill to make Cesar Chavez’s birthday a state holiday.¹¹⁰ (Martin Luther King’s birthday was already observed.) Six years later, after all the Democratic state Senators voted 23-0 for another such bill, Senator Richard Polanco, its sponsor, condemned his Republican colleagues for abstaining, stating, “They talk about reaching out to the Latino community, but they remain silent.”¹¹¹ But efforts to accord *equal* recognition—analagizing Chanukah, Kwanzaa, Ramadan, and Diwali to Christmas, and Passover to Easter—or to find non-denominational substitutes—like

106. See Stephen Kinzer, *An Official’s Head Scarf Upsets a Turkish Taboo*, N.Y. TIMES, May 2, 1999, §1, at 22; Stephen Kinzer, *Islamic Woman in a Head Scarf Suddenly Galvanizes Turkey*, N.Y. TIMES, May 4, 1999, at A7; Stephen Kinzer, *Musings on Freedom, by Wearer of Muslim Scarf*, N.Y. TIMES, May 12, 1999, at A4; Stephen Kinzer, *Turkish President Strips a Muslim Parliamentarian of Citizenship*, N.Y. TIMES, May 16, 1999, §1, at 3.

107. Laurie Goodstein, *A.C.L.U. Sues a School District for Closing on the Jewish High Holy Days*, N.Y. TIMES, September 9, 1999, at A20 (emphasis added).

108. *Id.*

109. *High School Cancels Two Ethnic Celebrations*, N.Y. TIMES, February 15, 1999, at A14.

110. Carl Ingram, *State Senate OKs Bill to Establish Cesar Chavez Holiday*, L.A. TIMES, February 1, 2000, at A3.

111. *Id.*

Halloween (Satanism to some Christians) and Thanksgiving (imperialism to some American Indians)—inevitably dilute the meaning of the commemoration.

If established polities have difficulty achieving a balance, the constituents of new ones are even more sensitive to slights. The European Union has two official languages, English and French, and permits the rotating presidency's language at informal meetings. After handing over the presidency to Finland in July 1999, Germany, boycotted informal meetings unless German continued to be accepted—even though its finance, culture, and housing ministers speak fluent English. Finland's EU affairs minister responded, “[w]hen you introduce another language ... you raise protests from other countries ... then you easily enter a debate over why not four, or five, or eight, and quite soon you would be translating every comment into all 11.”¹¹² “The Germans think—and they’ve said this themselves—that because they are one of the biggest countries in the EU, that they are entitled to use their own language...” If efficiency limits the number of official languages, other means may be necessary to counteract the dignitary slight.¹¹³

Like post-apartheid South Africa, Northern Ireland has had to negotiate symbolic recognition following the 1999 Easter Sunday agreement between Protestants and Roman Catholics. When Protestants complained that the Union Jack was not displayed on Stormont, the Parliament building, Catholics insisted the Irish Republic flag be equally prominent.¹¹⁴ Catholics wanted Gaelic to be an official language; Protestants retorted with a demand for Ulster Scots. Ian Paisley Jr. (a militant Loyalist legislator, like his father) even found significance in the Stormont basement pub, which he denounced as “a bar to heaven and a door to hell.”¹¹⁵ When trust is so tenuous, it is essential to expose the meaning of potentially fractious

112. Carol J. Williams, *A War Over Words Thwarts European Union*, L.A. TIMES, October 17, 1999, at A4

113. *Id.*

114. James F. Clarity, *Ulster Assembly Starts, With Debates on Flags and Languages*, N.Y. TIMES, September, 15, 1998, at A7.

115. *Id.*

symbols and preserve the delicate balance among people deeply insecure about their honor.¹¹⁶

Governments have long had to juggle the sensitivities of diverse populations. The newer, and increasingly important, terrain is the mass media. Following the example of many successful clothing manufacturers, Clairol's new advertising campaign, entitled "a beauty all your own," features African American and Asian American, as well as European American, models.¹¹⁷ At its 90th annual convention, the National Association for the Advancement of Colored People declared that its highest priority was not jobs, or education, or housing, or welfare, or health care, or equal justice, or political power but the invisibility of minorities in the fall 1999 television season.¹¹⁸ The organization considered boycotting shows and networks and appealing to both the Federal Communications Commission and Congress. Soon thereafter a coalition of Latino media groups called for a one-week boycott of network television, claiming that none of the 26 new fall series had a minority lead.¹¹⁹ Both African American and Latino groups planned to buy stock and raise the issue at shareholder meetings. Fearful of boycotts of sponsors and lowered ratings, the networks were placatory.¹²⁰ ABC planned to add at least five minority characters. NBC's "The West Wing" incorporated many minority characters, after its pilot contained none. CBS's "Judging Amy" wrote in a black bailiff; its "Family Law," about a struggling law firm, included black and Hispanic law students. NBC's "Suddenly Susan" made a black woman the assistant to the new boss of a men's magazine. The pilot for ABC's "Wasteland" was reshot to include a black. CBS was developing a series about a Mexican-American

116. *Id.*

117. Patricia Winters Lauro, *Advertising: After Years of Selling Products, Clairol Now Hopes to Sell its Image*, N.Y. TIMES, March 2, 2001, at C4.

118. Duncan Campbell, *Bid to Shatter Glass Screen Blocking Black Stars on TV*, THE GUARDIAN (London), July 13, 1999, at 13.

119. Claudia Kolker, *Latino Groups Urge Boycott of Network TV*, L.A. TIMES, July 28, 1999, at A12.

120. See Bernard Weinraub, *Stung by Criticism of Fall Shows, TV Networks Add Minority Roles*, N.Y. TIMES, September 20, 1999, at A1; Elizabeth Jensen, Greg Braxton, & Dana Calvo, *NBC, NAACP in Pact to Boost Minorities in TV*, L.A. TIMES, January 6, 2000, at A1.

family in New York. ABC was trying one based on Walter Mosley's black detective, Easy Rawlins. Twentieth Century Fox Television, which produces the largest number of shows, promised "for next season casts that are multiethnic and ensembles that feature the kind of diversity that we have in real life."¹²¹ But when NBC announced an agreement with the NAACP to increase minority representation, the Latino, Asian Pacific American, and American Indian coalition partners promptly denounced it. Responding to the aspirations of one subordinated group inevitably encourages others to demand equal treatment.¹²²

Resistance to cultural domination can reflect national as well as ethnic pride. The French have long resented the growing hegemony of American culture. Distressed that the French cinema's share of the French movie audience dropped from 34.5 percent in 1997 to 27 percent in 1998 (partly because "Titanic" alone sold one of eight tickets), they placed their hope in "Astérix et Obélix contre César," based on the popular comic book hero of Gallic resistance to Roman imperialism. It was the most expensive French film ever made and starred Gérard Depardieu, Roberto Benigni, and Laetitia Casta (who had just been chosen as the new model for the French national symbol, Marianne).¹²³ But though *Le Monde* called the film "the image of resistance to American cinematographic imperialism," French reviews were scathing.¹²⁴ It barely edged out "Star Wars, Episode I: The Phantom Menace" for top box offices sales in 1999; and among the top ten films, the seven American grossed twice as much as the three French.¹²⁵

Astérix is not the only French hero to defy the Americans. José Bové, head of the Confédération Paysanne (a farmers' union), made the front page of every French newspaper, photographed with

121. Bernard Weinraub, *Stung by Criticism of Fall Shows, TV Networks Add Minority Roles*, N.Y. TIMES, September 20, 1999, at A1.

122. Dana Calvo & Greg Braxton, *NBC-NAACP Diversity Plan Irks Coalition*, L.A. TIMES, January 7, 2000, at A1.

123. Alan Riding, *French Comic Book Heroes Battle Hollywood's Hordes*, N.Y. TIMES, February 10, 1999, at E2.

124. *Id.*

125. John Tagliabue, *Now Playing Europe: Invasion of the Multiplex*, N.Y. TIMES, January 27, 2000, at C1.

handcuffed fists raised in defiance after being arrested for causing \$120,000 in damage to the local McDonald's.¹²⁶ Although he was explicitly protesting the American embargo of Roquefort cheese (which he made), among other French food products, in retaliation for the EU ban on U.S. hormone-treated beef, his crime elicited graffiti demanding "End McDomination" and President Jacques Chirac's assurance that he "detests McDonald's food."¹²⁷

V. APPROPRIATING SYMBOLIC SPACE

The subordinated not only seek recognition from the relevant audience but also claim exclusive ownership of meaningful places and rituals. Some disputes are easily resolved. A Dartmouth fraternity and sorority canceled a Hawaiian luau (just an excuse for partying) after a student protested. Another Hawaiian student explained that the traditional feast had spiritual content. He said, "[t]hat people feel a right to capitalize on some stereotype of where I am from and the people I feel cultural responsibility to in the name of fun, angers and hurts me."¹²⁸ Subordinated groups, as well as dominant, can insult others. The 1999 SITE Santa Fe international contemporary art exhibition was devoted to "Looking for a Place."¹²⁹ In two instances the search turned sour. Mexican artist Yolanda Gutiérrez designed "Nos Susurra el Rio y Silva la Serpiente/The River Whispers to Us and the Snake Whistles" as "a new symbol of brotherhood between the North American and Mesoamerican cultures."¹³⁰ But elders of the San Ildefonso Pueblo, on whose lake she launched the 82-foot long snake, forced its removal. The Swedish artist Carl Michael von Hausswolff bathed the cemetery of Our Lady of Guadalupe Roman Catholic

126. Suzanne Daley, *French See a Hero in War on "McDomination,"* N.Y. TIMES, October 12, 1999, at A1.

127. *Id.*

128. *Luau Fails to Find Roots in New England,* L.A. TIMES, August 22, 1999, at A4. One of the protesting students, Aaron Akamu, may have been Japanese-American; and many native Hawaiians perform luaus for tourists. *Id.*

129. Ruth Lopez, *Exploring "Place" Can Be Tricky When the Place Is Someone Else's,* N.Y. TIMES, August 22, 1999, §2, at 33.

130. *Id.*

Church in red spotlights for his “Red Night.” But a parishioner whose relatives were buried there turned off the lights. At a panel on the opening day the director of the Venice Biennale (speaking from the heights of class, race, and gender privilege) sneered that “this is what happens when you take art to the peasantry.”¹³¹

The negotiation of respect is more intractable if groups compete for the same space. Jews insist on the uniqueness of their loss in the Shoah. Jews strenuously objected to symbols of Christian suffering at Auschwitz, where the vast majority of the 1,300,000 murder victims were Jews. In anticipation of Pope John Paul II’s 13-day visit to his homeland, the Polish government removed nearly 800 small crosses erected by followers of Kazimierz Switon, a right-wing Roman Catholic who railed against the “Jewish-Communist-Masonry” conspiracy and claimed that Poles were “enslaved in our own homeland” and were threatened by Israel and Germany—“satanic-pagan forces aiming at extermination of the Polish nation.”¹³² But the government left the 30-foot cross constructed for the papal visit 20 years earlier. Rabbi Menachem Joskowitz used his papal audience “to ask the pope to urge his people to take the last cross out of the camp so that Jews who come here can say their final prayer before dying” (a clear demand for exclusivity).¹³³ “I was in Auschwitz, which was a gate to heaven, and many people passed through that gate. Auschwitz is marked with people’s blood. It’s a sacred place.”¹³⁴ But Rabbi Stanislaw Krajewski said Rabbi Joskowitz’s request (a last wish before retirement) “makes the situation more difficult.”¹³⁵ Krajewski was seeking an accommodation that would preserve some memento of the 1979 papal mass. A Vatican spokesman replied: “The vast majority of people in this country want the papal cross to remain there in Auschwitz.”¹³⁶ And the Christian National Union was unyielding.

131. *Id.*

132. See Carol J. Williams, *Pope Urged to Remove Camp Cross*, L.A. TIMES, June 12, 1999, at A14.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

“This demand is not acceptable. There are many Catholics here, and they have the right to their religious symbols.”¹³⁷

Nazareth witnessed a similar conflict with different players. The town center is the Basilica of the Annunciation, a modern building on the ruins of a 12th-century Crusader church, allegedly located at the site where the angel Gabriel told Mary she was pregnant. For the millennium, the Christian mayor sought to build a plaza next door.¹³⁸ But Muslim leaders were determined to use the plot (owned by the Israeli Land Authority) for a \$20 million mosque financed by Persian Gulf nations and surmounted by a 325-foot minaret topped by a laser crescent (which would be by far the tallest building in town). In December 1997, the mayor received Israeli permission to bulldoze the site except for a small mosque said to contain the tomb of a 12th-century holy figure. Muslims protested by erecting a large shabby tent, to the annoyance of Christian tourists. In January 1999, the Islamic Movement exploited the issue to capture the city council for the first time (Muslims outnumber Christians 42,000 to 18,000). Fighting broke out on Easter Sunday. Muslims claimed that Christian youths bragged that Mohammed would fall as Jesus ascended. In succeeding days businesses were firebombed, Muslims prayed at the site, and the Basilica closed temporarily.

An Islamic Movement city councilor, who had helped design the proposed mosque, explained, “[t]he point is not to overshadow the church. We are willing to build a bridge connecting the mosque and the church. The point is that Nazareth, which may be known to the world as Christian, is a Muslim-majority city. It has two identities.”¹³⁹ A Christian leaving a wedding at the Basilica disagreed violently, arguing, “this is the city of Jesus. They want to connect our church to a mosque with a bridge! That is unthinkable. What is happening here now is planting enmity in our hearts.”¹⁴⁰ A Muslim businessman

137. Carol J. Williams, *Pope Urged to Remove Camp Cross*, L.A. TIMES, June 12, 1999, at A14. Holocaust denial is the ultimate symbolic contestation. See MICHAEL SHERMER & ALEX GROBMAN, *DENYING HISTORY: WHO SAYS THE HOLOCAUST NEVER HAPPENED AND WHY DO THEY SAY IT?* (2000).

138. See Deborah Sontag, *God's Half Acre, but Whose God? A Town Is Torn*, N.Y. TIMES, April 13, 1999, at A4.

139. *Id.*

140. *Id.*

retorted, “[t]his city will burn if the big mosque doesn’t get built.”¹⁴¹ A Christian woman claimed, “[w]hen we go outside, we’ve been hassled because we wear crosses around our neck. Racism is coming to the surface here....”¹⁴² The Muslim city councilor offered to postpone construction until after the Easter 2000 millenium celebrations, when the Pope was to visit. “In fact, we are ready to invite the Pope to lay the cornerstone himself,” he said. But, of course, that was not what Christians wanted.¹⁴³

Conflict is especially bitter *within* religions. The Adat Y'shua Ha Adon Messianic Jewish Congregation of Woodland Hills (Los Angeles) obtained a city permit to erect street banners, decorated with Mogen Davids, declaring “YES, there are JEWS who Believe in JESUS!” and “FREE High Holy Days and Shabbat Services. JESUS Is the Messiah!”¹⁴⁴ A local (Jewish) city councilor called these “an affront to the Jewish community, especially during the High Holy Days.”¹⁴⁵ But the congregation’s minister, Reverend Michael Brown, insisted “[w]e are not intending to be offensive. We are merely stating what kind of congregation we are.”¹⁴⁶ He further inflamed the situation, however, by adding: “we hope that our *fellow Jewish people* would be tolerant even if they disagree.”¹⁴⁷ When 33 American reform rabbis visiting Jerusalem sought to pray *near* the Western Wall (kept well away from it by their permit), orthodox Jews spewed vituperation. One told them to “go back to Germany” to be exterminated.¹⁴⁸ Another said: “[t]his is like if I went to the Vatican with my prayer shawl. They’d find me completely nuts. You want to do a new religion? Fine. Go do it somewhere else, in Sri Lanka.

141. *Id.*

142. *Id.*

143. Deborah Sontag, *God's Half Acre, but Whose God? A Town Is Torn*, N.Y. TIMES, April 13, 1999, at A4.

144. See Annette Kondo, *Council to Seek Curbs After Complaints on Congregation's Banners*, L.A. TIMES, September 16, 1999, at B3.

145. *Id.*

146. *Id.*

147. *Id.* (emphasis added).

148. Deborah Sontag, *Orthodox Confront U.S. Reform Rabbis at Western Wall*, N.Y. TIMES, February 2, 1999, at A3.

Leave us Jerusalem.”¹⁴⁹ A Knesset member yelled that they were “nothing but biological Jews.”¹⁵⁰ The Orthodox were particularly affronted that women participated with men, wore skullcaps and prayer shawls, and held the Torah.

The executive director of the Association of Reform Zionists of America responded, “[i]t’s only provocative if you succumb to the ultra-Orthodox world view, which sees the Western Wall and all of Israel not as the heritage of the Jewish people, but as a giant ultra-Orthodox synagogue.”¹⁵¹ Reform and Conservative Jewish groups sued for the right to conduct services of men and women at the wall; Women of the Wall sued to be allowed to read prayers and wear shawls. When the Israeli Supreme Court upheld the women’s right, one of their leaders rejoiced that this was “moving the Western Wall out of the complete monopoly of the ultra-Orthodox.”¹⁵² “The voices of women, who are half of the Jewish people, were silenced in the holiest place to Jews.”¹⁵³ But the Deputy Religious Affairs Minister protested that the ruling would “nullify the State of Israel as a Jewish state and turn it into a state of all its citizens.”¹⁵⁴ Within a week the Shas Party had introduced a bill to overturn the decision, punishing desecration with sentences up to seven years. “[T]here is no desecration greater than that of women who come to desecrate the holiness of the Western Wall with all kinds of provocations...”¹⁵⁵ And when women exercised their new right, Orthodox execrated them as “worse than Christians!”¹⁵⁶

In the last three examples, *subordinates* sought respect (although Christians are subordinate within Israel and Reform Jews dominant within American Judaism). But *dominant* groups also

149. *Id.*

150. *Id.*

151. *Id.*

152. Joel Greenberg, *Israeli High Court Rules for Women’s Services at Western Wall*, N.Y. TIMES, May 23, 2000, at A6.

153. *Id.*

154. *Id.*

155. Tracy Wilkinson, *Israeli Women Defy Custom, Say a Prayer for Equality*, L.A. TIMES, June 5, 2000, at A1.

156. *Id.* See also Terence Neilan, *World Briefing, Israel: Women and the Wall*, N.Y. TIMES, June 1, 2000 at A12.

champion their own symbols, especially when they feel their status eroding. Some American schools display the ten commandments, seeking to evade clear Supreme Court interpretations of constitutional prohibitions by using volunteers to print and post them, or adopting transparent paraphrases like “Honor your parents and family members,” “Save sex for marriage,” and “Leave other people’s property alone”—only to give away the game by beginning with “Trust in God.”¹⁵⁷ Chief Justice Roy Moore guided workers installing a 5,280 pound monument with the Ten Commandments in the Alabama Supreme Court in the middle of the night. “I’m the mightiest legal authority in the state, and I wanted it there. Doesn’t it look great?” An ACLU spokesperson threatened suit because “Moore’s basically taken a state building, established his version of religion and said if you don’t like it, tough.” But when the ACLU clashed with Moore five years earlier, the governor proposed to protect his homemade wooden Ten Commandments with the National Guard, and thousands rallied in support.¹⁵⁸ Even the House of Representatives in 1999 voted 248-180 to allow public places, including schools, to exhibit the ten commandments.¹⁵⁹

In 1995, two families, one Mormon and one Catholic, anonymously sued the Galveston County, Texas, school district to eliminate prayers at football games and graduation, claiming their children suffered religious harassment for not participating.¹⁶⁰ The Fifth Circuit Court of Appeals allowed prayers to “solemnify” graduation but declared that football games lacked the same “singularly serious nature.” (In fact, Friday night high school football is *the* old-time religion in Texas.) When Santa Fe High School threatened to punish a student who planned to lead a pre-game prayer, a federal district judge defied the appellate court and enjoined the school from doing so, declaring that school guidelines “favor atheism

157. *Schools Let Biblical Rules Be Posted*, L.A. TIMES, August 12, 1999, at A25; Dirk Johnson, *School Creates Own Commandments, and a Fuss*, N.Y. TIMES, December 16, 1999, at A23.

158. Jeffrey Gettleman, *Conviction Cast in Stone*, L.A. TIMES, August 2, 2001, at A9.

159. Alison Mitchell & Frank Bruni, *Guns and Schools; The Overview: House Vote Deals a Stinging Defeat to Gun Controls*, N.Y. TIMES, June 18, 1999, at A1.

160. See Claudia Kolker, *Girl Gets Special “Blessing” for Football Game Prayer*, L.A. TIMES, September 4, 1999, at A1.

over any religion.”¹⁶¹ When the 17-year-old daughter of a local pastor said the prayer, the 4,000 fans gave a standing ovation, and fellow bandmembers traded high-fives with her. George W. Bush, then Governor and presidential candidate, supported her. But the city’s only Jewish student claimed that schoolmates harassed him for two years and ultimately threatened to hang him. Police charged three of his classmates, and his parents sued the school for contributing to the climate of intolerance. A white parent in ridiculing an Anti-Defamation League billboard campaign declaring “Santa Fe Is No Place for Hate” said, “Kids are cruel. I don’t care where you are.”¹⁶² At the first game after the U.S. Supreme Court upheld the prayer ban, fans wore t-shirts with biblical verses and “Gotta Believe,” and protesters outside the stadium carried crosses and sang hymns. Other southern schools openly defied the ruling, encouraged by organizations named “We Still Pray” and “No Pray, No Play.”¹⁶³ These incidents illustrate the tendency of legal regulation to provoke evasion and defiance.

Formerly subordinate groups resent and resist public display of badges of oppression; past oppressors reply with appeals to historical truth. In 1999, at Thabo Mbeki’s inauguration as South Africa’s second black President, statues of white apartheid leaders were covered in sackcloth, provoking furious media debate.¹⁶⁴ That same year, on the eve of celebrations of the 400th anniversary of Spanish settlement in the American west, members of Acoma Pueblo in New Mexico sawed off the right foot of an equestrian statue of Don Juan de Oñate and sent a photo of the trophy to local newspapers. Acoma Pueblo declared “[w]e see no glory in celebrating Oñate’s fourth

161. *Id.*

162. Claudia Kolker, *Unabashed Texas Town Takes Issue with Its Bad Reputation*, L.A. TIMES, August 24, 2000, at A5.

163. See David Firestone, *South’s Football Fans Still Stand Up and Pray*, N.Y. TIMES, §1, at 1; Dirk Johnson, *Prayer Comes First but Football Game Is the Main Event*, N.Y. TIMES, September 2, 2000, at A9; Claudia Kolker, *In Texas, They Shall Not Want for Pregame Prayer*, L.A. TIMES, September 2, 2000, at A10. See generally, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

164. Suzanne Daley, *At Inauguration, Mbeki Calls for Rebirth of South Africa*, N.Y. TIMES, June 17, 1999, at A3.

centennial, and we do not want our faces rubbed in it.”¹⁶⁵ The conquistador had chopped off the right feet of 24 captured Acoma warriors in 1599. Overseeing the fitting of a new foot on the statue, Estevan Arrellano, director of the Oñate Monument and Visitors Center, said, “[g]ive me a break—it was 400 years ago. It’s O.K. to hold a grudge, but for 400 years?”¹⁶⁶ But when Indians suggested erecting a statue in the United States Capitol to Popé, who led a 1680 revolt that briefly expelled all Spaniards from New Mexico, Arrellano retorted, “Popé tortured and killed 20 priests, and murdered countless numbers of women and children.”¹⁶⁷ Albuquerque was so divided over its Oñate statue that the proposed Civic Plaza site was given to a Holocaust memorial (although—or perhaps because—Jews were only one percent of the population).¹⁶⁸

State highway litter cleanup programs have fought a losing battle to block Ku Klux Klan sponsorship. Anne Arundel County in Maryland responded by terminating the program.¹⁶⁹ The Missouri Department of Transportation, enjoined by a federal court from discriminating against the Klan, still prohibited cleanup in hoods—because they obscured vision!¹⁷⁰ Vandals destroyed the two signs proclaiming KKK sponsorship in Missouri within 24 hours, and the Highway Department said it would take at least six weeks to replace them. A state Senator who proposed to rename the highway after Rosa Parks said, “To have the Klan clean up a section of highway named to honor the woman who started the modern civil rights movement—I love it.”¹⁷¹ In 2001, under threat of a boycott by civil rights groups,

165. James Brooke, *Conquistador Statue Stirs Hispanic Pride and Indian Rage*, N.Y. TIMES, February 9, 1998, at A10.

166. *Id.*

167. *Id.*

168. *Id.*

169. See Bill Dedman, *Klan Gets Its Wish, but Fight Over Project Continues*, N.Y. TIMES, December 4, 1999, at A10.

170. *Id.*

171. See *Highway Name Proposed To Tweak the Klan*, N.Y. TIMES, January 22, 2000, at A16; *Ruling Allows Klan to “Adopt” Highway*, L.A. TIMES, April 1, 2000, at A5; David G. Savage, *Klan’s Bid to “Adopt” Highway Detoured*, L.A. TIMES, October 31, 2000, at A13; David G. Savage, *Klan Has Right to “Adopt” Highway, U.S. Justices Say*, L.A. TIMES, March 6, 2001, at A5; See *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000), cert. denied sub nom. Yarnell v. Cuffley, 121 S.Ct. 1225 (2001).

Virginia Governor James S. Gilmore changed the name of “Confederate History Month” to “Month for Remembrance of the Sacrifices and Honor of All Virginians Who Served in the Civil War.” The Virginia Commander of the Sons of Confederate Veterans called this “totally unacceptable.”¹⁷²

The lengthy negotiation over Confederate symbols vividly illustrates the precise calibration of relative respect. The NAACP boycotted South Carolina for refusing to remove the Confederate battle flag from the top of the state Capitol, calling it “an unspoken symbol of resistance to the battle for civil rights and equality” and an “affront to the sensibilities and dignity” of African Americans.¹⁷³ At least 42 state and national organizations joined the boycott. But a ceremony to reinter 22 Confederate soldiers, attended by 2,500 people, prominently displayed the flag. The president of the Confederate Heritage Trust, which organized the event, explained, “This was a soldier’s flag, and that’s why it’s wrapped around those caskets right there. This is our heritage, and if the flag comes down, then next the monuments will come down, and then the street names, and then we will forget our history.”¹⁷⁴ A participant, dressed like his Confederate soldier great-grandfather, was adamant. “The people of South Carolina have the right to choose what flags they want to fly. No one from any other state can tell us what to do. I would remind the N.A.A.C.P. that the South was willing to go to war to protect its states rights, and we are still stubborn enough not to give in to this boycott.”¹⁷⁵ The crowd sang “Dixie” and hollered rebel yells. At the ceremony, a state senator declared, “The N.A.A.C.P. doesn’t care about the flag, they’re just doing this to raise money. ... I would say

172. *Virginia Drops “Confederacy” from Remembrance*, L.A. TIMES, March 21, 2001, at A5.

173. *NAACP Boycotts Tourism in S.C.*, L.A. TIMES, October 17, 1999, at A25. See *Black Groups Switch Sites For Meetings In Flag Protest*, N.Y. TIMES, July 25, 1999, §1, at 11; Sam Fullwood, *U.S. Sues Hotel Chain, Charges Racial Bias*, L.A. TIMES, December 17, 1999, at A37; Irvin Molotsky, *Boycott Over Battle Flag Has Spoleto Under Siege*, N.Y. TIMES, March 6, 2000, at E1.

174. David Firestone, *South Carolina Argues Future of a Rebel Flag*, N.Y. TIMES, November 16, 1999, at A10.

175. *Id.*

that not only will the state not negotiate under threat of a boycott, but we'll never vote to take down that flag at all."¹⁷⁶

Supported by the state Chamber of Commerce and Baptist Convention and Bob Jones University, the Democratic Governor, Jim Hodges, sought a compromise. If the NAACP lifted the boycott, he would press the legislature to move the flag, make Martin Luther King's birthday a state holiday, and build a museum to the linked histories of blacks and whites. The NAACP refused to be bribed by an MLK holiday and doubted the government's willingness to reform. An NAACP member stated, "[w]e are committed to standing firm to the end, and it is up to the leadership of the state to change."¹⁷⁷ The chairman of the state Democratic party told his executive committee that opposition to the flag "ought to be the litmus test for candidates. ... We see the enemy and it is us."¹⁷⁸

When reporters challenged presidential candidates to take positions, Bush diplomatically deferred to South Carolina voters.¹⁷⁹ John McCain claimed to "understand both sides. Some view it as a symbol of slavery. ... Personally, I see the battle flag as a symbol of heritage. I have ancestors who have fought for the Confederacy, none of whom owned slaves. I believe they fought honorably."¹⁸⁰ After dropping out of the campaign, McCain apologized for having acted "in an unprincipled way." He said his ancestors had "fought on the wrong side of American history. ... That is the honest answer I never gave to a fair question" because "I feared that if I answered honestly, I could not win the South Carolina primary."¹⁸¹ (He lost anyhow.) Interviewed by Jesse Jackson just before King's birthday, Al Gore called the flag "a hurtful message for many Americans that recalls the

176. *Id.*

177. *Id.*

178. B. Drummond Ayres, Jr., *Angry Words Flutter Once Again in Dixie*, N.Y. TIMES, August 22, 1999, §1, at 32.

179. Back in Texas, the NAACP asked Bush to remove Confederate plaques and monuments from state courts and end celebration of Confederate Heroes Day, the birthday of General Robert E. Lee. Judy Pasternak & Lianne Hart, *Rebel Flag Rises Again as an Issue, in Bush Country*, L.A. TIMES, January 22, 2000, at A1.

180. *Bush, McCain Refuse to Tread on Flag*, L.A. TIMES, January 13, 2000, at A16.

181. Steven A. Holmes, *After Campaigning on Candor, McCain Admits He Lacked It on Confederate Flag Issue*, N.Y. TIMES, April 20, 2000, at A22;

pain of slavery.”¹⁸² He condemned people who “like it on public buildings because, to the minorities, they want to express views of racial superiority and support for discrimination.”¹⁸³ A week after 6,000 whites gathered at the South Carolina Capitol to support the flag, 46,000 demonstrated there against it on King’s anniversary, carrying signs declaring “Your Heritage Is My Slavery.”¹⁸⁴

Three months later Joseph P. Riley, who had been mayor of Charleston for 25 years, led some 600 flag protesters on a five-day march to the state capitol. They had grown to 2,000 on arrival but were met by 250 flag supporters.¹⁸⁵ On the 139th anniversary of the shelling of Fort Sumter in Charleston, which began the Civil War, the state Senate voted 36-7 for a compromise, which would move the flag to a memorial for Confederate soldiers in front of the Capitol, where it could fly no more than 20 feet above the ground. The bill also declared that no Confederate or African American history monuments on public property would be modified and no historical place names changed. Quoting General Lee at Appomattox, the state Senator who had led the pro-flag forces stated: “There’s nothing left for me to do than get terms from General Grant.”¹⁸⁶

But though both houses readily passed another compromise, becoming the very last state to commemorate King’s birthday (while simultaneously honoring the death of General Stonewall Jackson with Confederate Memorial Day), 24 of the 26 black state Representatives, supported by the NAACP, vowed to block the Senate’s flag proposal. Unpersuaded by the argument that the new flag would be smaller, one representative declared: “Would you ask the Jewish community to

182. Edwin Chen, *Gore Tackles Race Issue With Entry Into Flag Fray*, L.A. TIMES, January 16, 2000, at A1.

183. *Id.*

184. David Firestone, *46,000 March on South Carolina Capitol to Bring Down Confederate Flag*, N.Y. TIMES, January 18, 2000, at A14.

185. David Firestone, *Long March Ends in South Carolina, But Little Time Is Left to Lower Flag*, N.Y. TIMES, April 7, 2000, at A14. See *Marchers Urge Removal of Battle Flag on South Carolina Statehouse*, L.A. TIMES, April 3, 2000, at A10; Stephen Braun, *Anti-Flag Trek Ends; Banner Yet Waves*, L.A. TIMES, April 7, 2000, at A1.

186. David Firestone, *S. Carolina Senate Votes to Remove Confederate Flag*, N.Y. TIMES, April 13, 2000, at A1. See Stephen Braun, *South Carolina Senate Moves to End Stalemate on Confederate Flag*, L.A. TIMES, April 13, 2000, at A32.

accept a smaller swastika flag?”¹⁸⁷ Many white Democrats joined the black Representatives in proposing their own compromise: either a granite slab bearing a relief of the flag near the memorial or an “avenue of flags,” including the Confederate battle flag. But Representatives voted 65-43 against this “insult” to their heritage. A white Republican Representative called the Civil War “a big part of the history of the state, not a small part, but huge. But this tombstone monument type of bill, you might as well lower it down and give it perpetual care. You’re saying, ‘Bury that baby, get rid of it.’”¹⁸⁸ Another proposal, to fly the flag only on Confederate Memorial Day, was rejected (ironically, on that very day). A black Democratic Representative declared, “[t]o fly that flag for a day, even for an hour, even for a minute, is unacceptable to us ... an insult to people of color.”¹⁸⁹ A white Representative was incredulous: “[y]ou get 364 days, and they get one. I’m asking them to give up all their days, and I’m asking you to make that commitment for only one day. This amendment ... says to our citizens of color that we are going to view it more like you view it.”¹⁹⁰ The white Republican majority leader, who supported the compromise, said it had been doomed when black members compared the Confederate flag to a swastika and protesters burned a flag outside the Capitol.

Finally, after *seventeen* hours of debate, the House passed a version of the Senate bill (by just four votes); but because it raised the flagpole 10 feet and illuminated the flag at night, the bill would have to go to a conference committee. And the NAACP vowed to continue resisting, stating, “[w]hy bring it down from the dome and wave it

187. David Firestone, *Flag Compromise Resisted in South Carolina House*, N.Y. TIMES, April 14, 2000, at A18. See *The Rebel Flag in South Carolina*, N.Y. TIMES, April 17, 2000, at A18; David Firestone, *Flag Fighters See Momentum in South Carolina*, N.Y. TIMES, April 20, 2000, at A22; *South Carolina: State Is Last to Get King Holiday*, L.A. TIMES, May 2, 2000, at A9.

188. David Firestone, *South Carolina House Debates Options for Moving Rebel Flag*, N.Y. TIMES, May 10, 2000 at A20.

189. David Firestone, *S. Carolina House Backs Plan to Move Rebel Flag*, N.Y. TIMES, May 11, 2000, at A5.

190. *Id.*

right in our faces? That's an insult. We can't accept that."¹⁹¹ The group planned to ask organized labor and the entertainment industry to join the boycott. The Senate voted to reduce the flagpole from 30 to 25 feet, winning two black votes and passage. A senator hoped "this represents the last battle of the Civil War."¹⁹² Signing the bill, the Governor declared that "the descendants of slaves and the descendants of Confederate soldiers join together in the spirit of mutual respect."¹⁹³ But NAACP leader Kweisi Mfume retorted, "[t]he governor and the legislature have taken a political position. The NAACP has a principled position." Moving the flag "to a place where anyone coming down the main street will see it is an insult."¹⁹⁴

When the flag was moved two months later the NAACP organized a demonstration of 800 to protest this "moral lynching" and the continued "reign of the flag." Flag supporters shouted back: "off the dome and in your face."¹⁹⁵ A state senator, calling the compromise "the biggest mistake we've ever made," vowed to restore the flag to the dome.¹⁹⁶ The following year the legislature unveiled a \$1.1 million monument it had commissioned as part of the compromise, depicting notable South Carolinians, including Rev. Jesse Jackson, Dizzy Gillespie, and Marian Wright Edelman.¹⁹⁷

The struggle quickly erupted in other states. The Georgia House of Representatives shrunk the Confederate symbol to one of five small historical reproductions at the bottom of the new flag.

191. Sue Anne Pressley, *Rebel Flag Loses S. Carolina House Vote*, L.A. TIMES, May 11, 2000, at A26. See *NAACP Poses Wider Boycott of S. Carolina*, L.A. TIMES, May 17, 2000, at A13.

192. *S.C. Lawmakers OK Rebel Flag Plan*, L.A. TIMES, May 19, 2000, at A16. See *South Carolina Senate Backs Flag Compromise*, N.Y. TIMES, May 18, 2000, at A28; David Firestone, *South Carolina Votes to Remove Confederate Flag From Dome*, N.Y. TIMES, May 19, 2000, at A16.

193. *S.C. Governor Signs Legislation to Remove the Confederate Flag*, L.A. TIMES, May 24, 2000, at A11

194. *S.C. Lawmakers OK Rebel Flag Plan*, L.A. TIMES, May 19, 2000, at A16.

195. *Confederate Flag Removed From S.C. Statehouse*, L.A. TIMES, July 2, 2000, at A18. See David Firestone, *Battle Flag Is Lowered, But War Isn't Quite Over*, N.Y. TIMES, July 2, 2000, §1, at 10.

196. *Id.*

197. *National Briefing, Columbia, S.C.: Monument to African-Americans Unveiled*, N.Y. TIMES, March 30, 2001, at A17.

Making an unusual appearance in the House, Governor Roy Barnes said: "The Confederacy is part of our history, but it is not two-thirds of our history."¹⁹⁸ All 36 black members supported the compromise, though some had reservations. One, who had fought to change the flag for 23 years, "finally had to acknowledge ... that Confederate history is a part of our history. We cannot erase it, and it needs to be preserved for history's sake."¹⁹⁹ A segregationist Representative, who had helped design the 1956 flag, advocated the change, saying, "I've learned in all my years—and it took a while to learn it—that I have to live with all my neighbors."²⁰⁰

Several months after the South Carolina decision a commission appointed by Mississippi Governor Ronnie Musgrove recommended a referendum on eliminating the Confederate symbol from that state's flag.²⁰¹ The commission's hearings provoked death threats against members and racial vituperation in audiences. The House of Representatives voted 120-1 for the referendum. Partisans on both sides staffed phone banks, did fundraising, and sent out mailings. The business community framed the issue as job creation. The flag represented "slavery, lynchings, treason" to the NAACP but "honor, ancestors, extraordinary bravery against superior forces" to a heritage group.²⁰² Polls showed that three-fourths of whites opposed the change, while two-thirds of blacks supported it. The one-third of registered voters who turned out retained the existing flag 2:1.²⁰³

198. David Firestone, *Redesigned Georgia Flag Is Advanced By House*, N.Y. TIMES, January 25, 2001, at A14. See Jeffrey Gettleman, *Georgia House Shrinks Flag's Rebel Cross*, L.A. TIMES, January 25, 2001, at A1; Jeffrey Gettleman, *Less-Confederate Flag Gets Georgia Senators' Salute*, L.A. TIMES, January 31, 2001, at A5.

199. David Firestone, *The New South: Old Times There Are Not Forgotten*, N.Y. TIMES, January 28, 2001, §4, at 4.

200. David Firestone, *Redesigned Georgia Flag Is Advanced By House*, N.Y. TIMES, January 25, 2001, at A14.

201. *Mississippi Urged to Drop Stars and Bars From Its Flag*, N.Y. TIMES, December 13, 2000, at A20; David Firestone, *Mississippi House Wants Voters to Decide Fate of Confederate Emblem*, N.Y. TIMES, January 10, 2001, at A12; Kevin Sack, *Battles Lines Form Again on the Battle Flag*, N.Y. TIMES, April 4, 2001, at A12.

202. Jeffrey Gettleman, *Vote on Flag Likely to Win One for Dixie*, L.A. TIMES, April 17, 2001, at A1.

203. See Jeffrey Gettleman, *Mississippi Votes to Keep Confederate Battle Cross on State's Flag*, L.A. TIMES, April 18, 2001, at A8; David Firestone, *Mississippi Votes by Wide*

In the wake of these decisions, Southern school districts have banned t-shirts displaying the Confederate symbol. The school superintendent of Seminole County, in rural Georgia, said otherwise “there would be violence—and lots of it.” But the Southern Legal Resource Center decried the “institutional bias against Confederate symbols.” Although the district for decades had prohibited all clothing with “race-related” messages, including “black is beautiful” and pictures of Martin Luther King Jr., the ACLU challenged the decision. Similar disputes are roiling at least 30 other school districts.²⁰⁴

These struggles extended to the private sector as well. Contemporaneously, the Adam’s Mark hotel chain (under investigation for discriminating against black guests) barred meetings by Sons of Confederate Veterans (SCV).²⁰⁵ The hotel CEO, Fred Kummer, explained:

They wear the flag on their T-shirts, and they put it on our flagpole. You know, we operate mostly in urban areas, and we have a large number of Afro-Americans who work in our hotels. For them, it’s like waving a red cloth in front of a bull [not the most sensitive metaphor].²⁰⁶

Many employees called in sick during the last convention. “I don’t think the environment was respectful of our employees,” explained Kummer.²⁰⁷ The SCV commander-in-chief replied that if employees who “work in a service industry ... don’t find everything to their personal liking, they should just take a deep breath and carry on. ... We are not anti-African-American.”²⁰⁸ The group planned to boycott the hotel chain. The SCV Heritage Defense Committee protested that

Margin to Keep State Flag that Includes Confederate Emblem, N.Y. TIMES, April 18, 2001, at A14.

204. Jeffrey Gettleman, *Confederate Flag Still Flies as Do Lawsuits to Shelve It*, L.A. TIMES, July 25, 2001, at A18.

205. David Firestone, *For the Keepers of the Confederate Heritage, a Taste or Two of Appomattox*, N.Y. TIMES, November 25, 1999, at A18.

206. *Id.*

207. *Id.*

208. *Id.*

“groups like the N.A.A.C.P. want to destroy everything Confederate, from the flags to the monuments on courthouse lawns.”²⁰⁹ Each “heritage violation” reported on the SCV website increased its membership. Members’ credit cards sport the flag. The group had won campaigns in Maryland and North Carolina to keep the flag on personalized license plates and was waging one in Virginia.²¹⁰ However, seven prominent Southern chain stores, including Sam’s Club, Winn-Dixie, Bi-Lo, Kroger and Wal-Mart, have boycotted the immensely popular All Natural Gourmet Blend BBQ Sauce because its manufacturer, Maurice Bessinger, flies the confederate flag over his headquarters and distributes pamphlets defending slavery in his Piggy Park restaurant chain.²¹¹ Piggy Wiggly held out until an African American minister threatened to bus customers to the other chains. Maurice’s older brother, Melvin, took advantage of the furor to promote his own sauce. “I don’t say anything about black people, as long as they’re educated and do right. I don’t hold myself up as better than nobody.” A Charleston man explained: “Buying a barbecue sandwich is now a political act. You have to declare which side you’re on.”²¹²

VI. RESISTING STEREOTYPES

Subordinate groups seeking to eliminate stereotypes and slurs encounter responses ranging from graceful acquiescence to adamant defiance. Santa Monica high school students and the Mexican-American Legal Defense and Education Fund (MALDEF) complained to Walt Disney Co. that the first human target in its best-selling “Toy Story 2” video game was a caricatured Mexican—stocky, swarthy, wearing a bandolier of bullets, sombrero, and droopy moustache. The company immediately acknowledged its “mistake,” “regretted” the offense, thanked MALDEF for raising the matter, and re-edited the game (though it declined to recall those already in the stores for

209. *Id.*

210. *Id.*

211. David Firestone, *Sauce Is Boycotted and Slavery Is the Issue*, N.Y. TIMES, September 29, 2000, at A14; Jack Hitt, *A Confederacy of Sauces*, NEW YORK TIMES MAGAZINE, August 26, 2001, at 28.

212. *Id.*

Christmas).²¹³ The protesters also wanted a formal apology, a meeting with management to discuss how the “mistake” happened, and cultural training for staff.²¹⁴

When the B’nai B’rith Anti-Defamation League complained to Hasbro, Inc., in 1994 that its Official Scrabble Player’s Dictionary listed “jew” as a verb, the National Scrabble Association reviewed the entire work and eliminated 150 offensive words.²¹⁵ Four years later, Delphine Abraham, an African American woman, objected that the 10th Collegiate Edition of Merriam-Webster’s Dictionary defined “nigger” as simply a “black person.”²¹⁶ (My 1969 American Heritage Dictionary labels it “vulgar” and calls it “an offensive term used derogatorily.”) The dictionary decided to retain that definition but add a usage warning to it and 200 other offensive words. A spokesperson disparaged the complainant’s opinion as “different from what this group of [12] senior editors and scholars would say in determining what should go in a dictionary.”²¹⁷ The NAACP was unappeased, declaring, “[w]e are going to fight them until hell freezes over.”²¹⁸ Abraham added, “I don’t think a group of white males can get together and decide this. They don’t know or care that their decision is used to dehumanize a group of people.”²¹⁹

Merriam-Webster was more accommodating toward gay and lesbian complainants that its thesaurus listing for “homosexual” included slurs like “faggot,” “fruit,” “pederast,” “nancy,” and “uranist.”²²⁰ (My 1946 edition of the “original” Roget’s Thesaurus locates homosexual under the heading “unconformity” and offers as synonyms “hermaphrodite,” “androgynous,” “epicene,” “effeminate,” “sodomist,” and “perverted”; but at least it notes that “queer,” “homo,”

213. *Disney Will Change Game Character Irking Hispanics*, CHICAGO TRIBUNE, December 10, 1999, at C2.

214. *Id.*

215. Sam Fullwood, III, *Dictionary’s Stance on “N-Word” May Mark Defining Moment*, L.A. TIMES, May 11, 1998, at A5.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. Doreen Carvajal, *Thesaurus Takes Action To Remove Gay Slurs*, N.Y. TIMES, January 20, 1999, at A29.

“fairy,” “pansy,” “queen,” “nance,” “Molly,” “betty,” “painted,” and “flute” are slang.) Merriam-Webster temporarily removed the entire work from America Online when GAYBC Radio Network, an Internet audio service, urged listeners to e-mail the company. The company issued an apology and excised all reference to homosexuals, just as it had expunged every possibly offensive word for ethnic and racial minorities. A spokesperson explained, “while a dictionary needs to be comprehensive, a thesaurus doesn’t.”²²¹ The Gay and Lesbian Alliance Against Defamation was delighted and planned to review other reference works. But the GAYBC reporter who began the campaign was “not entirely happy that they want to withdraw the word altogether.”²²² In these instances the publisher was vulnerable to economic pressure from the aggrieved group and their sympathizers, and compliance was easy and unlikely to alienate other consumers. But the last example shows the dangers of overreaction.

Some insults are conscious, even deliberate. *Variety* suspended editor-in-chief Peter Bart when a *Los Angeles Magazine* article accused him of racist, sexist, anti-Semitic, and homophobic language. The newspaper reinstated him after three weeks on condition that he undergo diversity training and donate his salary for that period to “appropriate organizations,” to which the newspaper would make additional contributions. Bart said the words quoted “do not reflect my personal beliefs and values.... Nevertheless, I am deeply sorry and regret that they offended anyone. It will not happen again.”²²³

The syndicated “Mark & Brian” show, produced by KLOS-FM radio in Los Angeles (owned by ABC and hence Disney), launched a promotional campaign giving away “Black Hoes” (slang for whore) to listeners and advertisers.²²⁴ Judy Goodwin, an African American and the station’s traffic manager, complained to management and the ABC human resources department. But though the on-air promotion

221. *Id.*

222. *Id.*

223. David Shaw & Rachel Abramowitz, *Peter Bart Suspended as Editor of Variety*, L.A. TIMES, August 18, 2001, at A1; Rick Lyman, *Variety’s Editor to Return to Job After Suspension for Remarks*, N.Y. TIMES, August 31, 2001, at C5.

224. See Chuck Philips, *Disney Station Accused of Racial Discrimination*, L.A. TIMES, August 7, 1999, at C1; Chuck Philips, *Disney to Settle Racial Bias Suit Over Radio Gag*, L.A. TIMES, August 22, 2000, at A1.

ended, managers and employees continued to joke about the campaign in stereotyped black accents, and African American women employees were made to mail black hoes to advertisers. Although employees protested to the state Department of Fair Employment and sued in state court, KLOS, ABC, and Disney initially stonewalled. But after CORE threatened a boycott, Disney apologized and offered \$2 million to Goodwin and another million to two other black women plaintiffs. However, it refused to fire the executives of the station, which generates an estimated \$30 million in annual advertising revenues, and it extended the show's contract.²²⁵

The prestigious Michigamua club at the University of Michigan (established in 1901, membership by invitation, all male until 1999) has included such notables as former President Gerald R. Ford (whose club nickname was "flipp 'um back Ford") and former Supreme Court Justice Frank Murphy.²²⁶ When the Students of Color Coalition occupied its office they discovered sacred Indian pipes, drums, and headdresses. Photographs depicted members in loincloths and headdresses, one with an Indian pipe in one hand and a beer in the other. The SCC gave tours to students and demanded abolition of the club. Current members apologized but claimed ignorance of the artefacts. A Latino member said "at no time was anyone intending to hurt the Native American community."²²⁷ The chairman of the Old Wolves Council of alumni took "full responsibility ... it is our fault [the artefacts] weren't properly removed."²²⁸

Schools are less flexible when the offenders are the mass of alumni (and donors) rather than an elite club. The 75-year reign of Chief Illiniwek as a University of Illinois mascot has been under attack for nearly a decade.²²⁹ The U.S. Department of Education rejected a claim of discrimination in 1995. But 13 university departments, other Big 10 schools, and the American Anthropological

225. *See id.*

226. Robyn Meredith, *Michigan Students Protest Campus Club's Indian Relics*, N.Y. TIMES, February 13, 2000, §1, at 18.

227. *Id.*

228. *Id.*

229. *See* J. Linn Allen, *U. of I. Can't Stifle Anti-Illiniwek Talk*, CHICAGO TRIBUNE, April 6, 2001, at 1; *See generally* CAROL SPINDEL, *DANCING AT HALFTIME: SPORTS AND THE CONTROVERSY OVER AMERICAN INDIAN MASCOTS* (2000).

Association advocated elimination. Reaccrediting the university in 1999, the North Central Association of Colleges and Schools urged reconsideration. But a 14-month “dialogue” initiated by the university trustees elicited overwhelming support for the chief. A coalition of faculty and students obtained an injunction stopping the university from threatening discipline under NCAA rules for the coalition’s efforts to discourage prospective athletes from enrolling.²³⁰

At San Diego State University, the Native American Student Alliance campaigned against the use of Monty Montezuma, the mascot since 1941.²³¹ A 1997 compromise agreed that Monty would wear a historically accurate costume and indulge in less cartoonish behavior. A poll by the *Daily Aztec* student newspaper found 90 percent favored retention. The head of the Aztec Athletic Foundation thought it “hard to believe that anybody would find disrespect in the symbol.”²³² The director of marketing for the athletic department (which earns substantial amounts from clothing and souvenirs with the mascot’s likeness) insisted it had treated him “with dignity and cultural correctness.”²³³ But an alumnus and former director of the Chicano Federation retorted, “Montezuma was an emperor, not a half-naked savage.”²³⁴ A professor of Chicana and Chicano Studies added, “When you walk in [the] mocassins [of Native Americans, Chicanos, or Mexicans] then you can say what offends them. But not until then.”²³⁵ The student council voted for abolition.²³⁶ Two members of the San Diego Board of Supervisors (all five of whom were alumni) urged it to support retention. Supervisor Diane Jacob insisted, “[t]here is absolutely nothing demeaning, nothing racist about Monty. If anything, Monty helps instill pride, honor and culture. This is about

230. *Id.*

231. Tony Perry, *San Diego State Aztec Mascot Provokes Battle*, L.A. TIMES, September 25, 2000, at A3.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Student Council Is Convinced: Monty Montezuma Must Go*, L.A. TIMES, September 28, 2000, at A20.

maintaining the traditions of San Diego State University.”²³⁷ Supervisor Pam Slater concurred, “[w]e want to stand up and say we’re Aztecs and proud of it.”²³⁸ A Chicano who played Monty for eight years said “there are a lot of people in San Diego who admire Monty Montezuma and don’t want to see anything happen to him.”²³⁹ The student body overwhelmingly voted for retention.

University President Stephen Weber agreed “invocation of Aztec culture is based on the belief that Aztec civilization exemplifies admirable qualities of strength, bravery, trueness to friends and civic virtue. ... [But,] we have a responsibility to be historically accurate.”²⁴⁰ Montezuma “did not run around throwing a spear.”²⁴¹ A UCSD history professor called the emperor “a somewhat melancholic temperament, a thoughtful philosopher-king, deeply religious.”²⁴² The U.S. Civil Rights Commission declared all Native American mascots and nicknames “innappropriate and insensitive in light of the long history of forced assimilation.”²⁴³ A university task force recommended that his costume be changed from loincloth and peacock feather headdress to tunic and cape and that he maintain a dignified seat on the sidelines. But this did not satisfy the chairwoman of the university’s MEChA branch, who stated, “Montezuma was a warrior king. He did not go to football games.”²⁴⁴ And a history professor on the task force said Montezuma’s subjects would not even have been allowed to look at him.²⁴⁵

The American Indian Movement has denounced the use of Indian tribal and individual names and practices by the YMCA Indian

237. Tony Perry, *Battle Over School's Aztec Mascot Moves Beyond Campus*, L.A. TIMES, October 10, 2000, at A3.

238. *Id.*

239. *Id.*

240. Tony Perry, *Campus to Keep a More Accurate Monty? Maybe a More Regal One*, L.A. TIMES, November 17, 2000, at A3.

241. *Id.*

242. *Id.*

243. *National Briefing: Washington: End Sought to Use of Indian Mascots*, N.Y. TIMES, April 14, 2001, at A8.

244. Tony Perry, *San Diego State Panel Suggests Mascot Changes*, L.A. TIMES, May 3, 2001, at A3.

245. *Id.*

Guide Program, established in 1926.²⁴⁶ Parents and children typically form “tribes” and engage in crafts, camping, and story-telling. National participation is believed to exceed 200,000. In response to earlier complaints, the YMCA issued “Responsible Use of the Native American Theme” in 1992. Nevertheless, some Indian Guide participants still greet each other by saying “How,” paint their faces, and wear feathers. An AIM spokesman called the programs “breeding grounds for racism. ... It dehumanizes the whole culture of living, breathing human beings.”²⁴⁷ In each confrontation the appeal by dominant groups to “tradition” just compounds the offense to the subordinated. The dominant offer to modify the stereotype; the subordinated demand its elimination.

A common response to complaints is incomprehension, indifference, and evasion. After 17 years of pressure, the Los Angeles Unified School District finally banned team nicknames and mascots based on American Indians.²⁴⁸ A federal district court rejected a lawsuit brought by alumni seeking to preserve the Birmingham High School Braves but enjoined the District from banning the sale of privately manufactured T-shirts reading: “Save the Braves, 44 Years of Pride.” Advocates for American Indian Children were “overjoyed.” One advocate explained, “[t]his shows that we are not mascots, we are human beings.”²⁴⁹ The director of the District’s American Indian Education Commission, who led the campaign, said it was “going to have a momentous affect [sic].”²⁵⁰ But the school athletic director was “very disappointed. Most everyone wanted to keep ‘the Braves,’ because we felt we were honoring, not denigrating, American Indians,” he said.²⁵¹

246. Daniel Yi, *Native American Groups Decry YMCA Program's Use of Cultural Themes*, L.A. TIMES, April 30, 2001, at B1.

247. *Id.*

248. Martha L. Willman & Tom Becker, *District Ban on Indian Nicknames Is Upheld*, L.A. TIMES, April 7, 1998, at B1. See generally SPINDEL, *supra* note 229.

249. *Id.*

250. *Id.*

251. *Id.*

In neighboring Arcadia, American Indian activists sought for two years to eliminate the high school's Apache mascot.²⁵² After Apaches and other Indians protested in full tribal regalia at school board meetings and sports events for two months, Principal Martin Plourde visited the Fort Apache Reservation in Arizona. Although Apache students at its Alchesay High School urged change, Apache tribal leaders were honored by the mascot and sought a sister-city relationship. Plourde concluded that Arcadia students have a right to "hold their heads up as Apaches."²⁵³ Indian activists condemned this (with typical hyperbole) as "not only a crime against Apache people, but all of humanity."²⁵⁴ At basketball games they waved caricatures of Plourde as a KKK grand wizard. When a delegation from wealthy Arcadia delivered winter coats and Christmas gifts to the impoverished reservation, an Alchesay senior said: "You've taken almost everything from us. In the very least, I ask that you leave us our name."²⁵⁵ Although David Hsu, Arcadia student body vice president, was impressed by the "profound stuff ... those kids speak about the culture and traditions they have, and what they have lost," he agreed with the decision to keep the mascot as a symbol of "people who have been through so much ...[and] despite it all, they are standing proud."²⁵⁶ Both encounters nicely illustrate the capacity of symbols to have diametrically opposed meanings to different audiences.

The absence of malice does not preclude injury. Crayola renamed its "indian red" crayons "chestnut" because many students associated it with Native Americans' putative skin color (even though the pigment was named after its provenance near India).²⁵⁷ Alaskan biologists expressed embarrassment at discussing with Indians the decline in the number of "oldsquaw" ducks.²⁵⁸ But though the

252. Jessica Garrison, *Visit Only Inflames Apache Mascot Debate*, L.A. TIMES, March 1, 2000, at B1.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Chestnut Replaces a Color Crayola Called Indian Red*, CHICAGO TRIBUNE, July 27, 1999, at C2.

258. Nora Zamichow, *Name Flap Ruffles Feathers*, L.A. TIMES, November 12, 1999, at A1.

chairman of the American Ornithologists' Union committee on classification and nomenclature protested (irrelevantly) that "the ducks aren't offended by what they're called," and an Internet poll of members opposed the change 2:1, the ducks were renamed "long-tailed."²⁵⁹ In Colorado the endangered squawfish became the pikeminnow.²⁶⁰ In Maine, the Penobscot Nation's representative to the state legislature sought to change the many place names containing squaw (as Minnesota and Montana had done): "I can say with 99% certainty, if you are a native woman and live on a reservation, you have heard the word and felt the sting and pain."²⁶¹ (There is disagreement about whether the word is a vulgar reference to female genitals.) South Dakota changed 39 place names using "squaw" and "Negro," but Idaho refused to alter any.²⁶²

Plants pose similar issues. Jewbush has become slipperflower and Blackboy the Australian grass tree.²⁶³ Changing "digger pine" to gray or foothill pine (because of the alleged pejorative association with digging roots) was more controversial. The author of *Conifers of California* accepted the proposal: "Common names are completely discretionary. ... as long as there are perfectly good alternative names with just as much history, then why use an offensive name?"²⁶⁴ But a curator and research botanist at the Smithsonian Museum of Natural History said "the whole point of vernacular names is they are what people say" (another appeal to "tradition").²⁶⁵

Sometimes the arguments seem more closely balanced. A 39-year-old Aboriginal rights activist, who had moved to Toowoomba, Queensland, to study at the university, was outraged that the stadium

259. *Id.*

260. *Maine to Decide if "Squaw" Is Offensive*, L.A. TIMES, March 5, 2000, at A16.

261. *Id.*

262. *Idaho Will Retain "Squaw" Place Names*, N.Y. TIMES, February 27, 2001, at A16. See also *Offensive Town Names to Be Changed*, L.A. TIMES, March 2, 2001, at A22; Jesse Sheidlower, *What Is, And Isn't, In a Word*, N.Y. TIMES, March 4, 2001, §4, at 2; JESSE SHEIDLLOWER, *THE F-WORD* (1999).

263. Nora Zamichow, *Name Flap Ruffles Feathers*, L.A. TIMES, November 12, 1999, at A1.

264. *Id.*

265. *Id.*

was named after E.S. Nigger Brown.²⁶⁶ At three years old Brown had acquired the nickname, an ironic reference to his fair skin, blond hair, and inappropriate surname. The rugby star served with distinction in World War One, became a successful businessman, and was elected alderman. Although the complainant endured racist phone calls, physical assaults, and KKK threats after he sued to change the name, he was unyielding. "I'm a proud Aboriginal man. My people have been putting up with this sort of thing all our lives."²⁶⁷ The local Aboriginal community, however, unanimously supported the existing name.²⁶⁸ By contrast, the Amherst (Massachusetts) Regional High School promptly canceled "West Side Story" after a Puerto Rican student gathered 158 signatures on a petition.²⁶⁹ The principal insisted (unconvincingly) that "this isn't about censorship. It's about sensitivity."²⁷⁰ A local newspaper columnist organized a rally in support of the play, and the state senator explored moving it outside the high school and adding a discussion of the controversy. But though the principal said most calls and letters supported the play, he did not "think our kids should be forced to walk through a picket line."²⁷¹ In both instances a thorough discussion of the meanings contending groups attached to the texts might have ameliorated or even dissolved the hurt.

Sometimes subordinated groups, rather than attacking particular manifestations of status inequality, ridicule the entire hierarchy. The Sisters of Perpetual Indulgence, a San Francisco street theater troupe who mock the Roman Catholic Church through dress and ritual, were founded on Easter 1979 by four gay men from Iowa.²⁷² The 30 gay, lesbian, bisexual, and transgender members, who dress as nuns and adopt names like Phyllis Stein, Reyna Terror, and

266. Mark Chipperfield, *Aborigines Rally to "Nigger" Brown Cause*, SUNDAY TELEGRAPH (London), November 11, 1999, at 34.

267. *Id.*

268. *Id.*

269. Elizabeth Mehren, *A New Drama Begins After Play Is Canceled*, L.A. TIMES, December 7, 1999, at A5.

270. *Id.*

271. *Id.*

272. See Bill Staggs, *Troupe Irks San Francisco Catholics*, N.Y. TIMES, March 26, 1999, at A14.

Dimanda Tension, join gay pride parades and hold parties to raise money for charitable causes. Street performances like “Condom Saviour Mass” and ritual exorcisms attract thousands. When the San Francisco Board of Supervisors allowed them to close a block in the gay Castro Street district for an Easter 1999 performance, the San Francisco Diocesan newspaper denounced the decision as “extraordinarily insensitive to people of all faiths” and urged readers to complain.²⁷³ Two Board members sought to postpone the event one week. One board member, a Baptist pastor, noted that “the celebration, while well-intentioned, has caused a lot of friction in the Catholic community, particularly on this most important day in Christendom.”²⁷⁴ Through a spokesman, Mayor Willie L. Brown Jr. asked all parties to show mutual respect (an impossibility). William Donohue, president of the New York-based Catholic League for Religious and Civil Rights, planned to ask San Francisco Catholic groups to boycott the city (not an easy task).

This is not just a bunch of gay guys dressed up as nuns in some sort of “Saturday Night Live.” Their attacks on holy communion and the eucharist demonstrate that we're dealing with an invidious, vicious anti-Catholic group that does some good things like throwing money at charities. I don't give a damn about their fund-raising. They're a bunch of bigots.²⁷⁵

Sister Ann R. Key disagreed. “We do not mock nuns. We are not drag queens. We are nuns, and that is a important distinction. The work we do is the same as Catholic sisters do. We educate, we minister to the sick,” volunteering in hospices and caring for AIDS patients.²⁷⁶ They intended no offense. “It's sometimes crazy stuff that we do, but there's meaning behind it. We integrate sacred elements of organized religion in a lighthearted way.”²⁷⁷ Board of Supervisors

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

president Tom Ammiano, a gay activist (who presumably had been raised Catholic), saw the conflict differently. He called the Catholic paper's editorial "over the top. The archdiocese has been against the city's domestic partners legislation for years. ... I feel that this is all homophobic."²⁷⁸ Blocking a change of date (which required a unanimous vote), he called "the real issue here that of the separation of church and state."²⁷⁹ On Good Friday, the Archbishop declared that "city government has gone out of its way to associate itself with this ridicule and blasphemy."²⁸⁰ Other Catholics analogized the event to a neo-Nazi party on Passover. (Have gays and lesbians engaged in the genocide of Catholics?) But Ammiano retorted: "the message of Easter is one of resurrection, and I think it's time in San Francisco that we resurrect the spirit of coexistence that has existed for the past 20 years."²⁸¹ On Easter Sunday, the group celebrated "two decades of decadence" in high heels and fishnet stockings.²⁸² Observers have no alternative but to take sides; I accept ridicule of dominant groups by subordinates as a means of equalizing respect, if the tactics sometimes leave me uncomfortable.

Just as gays and lesbians challenge Roman Catholics for respect in San Francisco, so the ultra-Orthodox (haredim) demand respect from the secular Israeli state. A coalition of haredim, religious Zionists, and settlers in the occupied territories, infuriated by recent judicial decisions ending deferment from military service for Orthodox yeshiva students, ordering Orthodox religious councils to accept Reform and Conservative members, and allowing kibbutz shops to open on the Sabbath, and apprehensive about a pending decision to recognize non-Orthodox converts as Jews, sought to mobilize more than 100,000 to rally in Jerusalem against "the judicial dictatorship."²⁸³ Rabbi Ovadia Yosef, spiritual leader of the religious

278. Bill Staggs, *Troupe Irks San Francisco Catholics*, N.Y. TIMES, March 26, 1999, at A14.

279. *Id.*

280. "Sisters" Stage a Party And Infuriate Catholics, N.Y. TIMES, April 5, 1999, at A15.

281. *Id.*

282. *Id.*

283. Deborah Sontag, *Plans for Rival Rallies on Religion Issue Stir Fears in Israel*, N.Y. TIMES, February 12, 1999, at A3. See also Tracy Wilkinson, *Ultra-Orthodox Rabbis Escalate Attacks on Israeli Court*, L.A. TIMES, February 12, 1999, at A14.

Shas party, called the Supreme Court judges “empty-headed and wanton evil-doers,” who are “unclean and desecrate the Sabbath.”²⁸⁴ His son, also a rabbi, denounced the Chief Justice as an “enemy of Judaism.” Assailing the court’s “anti-Semitic decisions,” the head of the Orthodox Agudath Israel movement warned of a revolt. A spokesman for the Orthodox organization Am Echad said

we feel closed in, we feel attacked. There is a certain siege mentality. We know that there’s a resentment that we didn’t disappear into history. And indeed, the rally will be a kind of statement that we haven’t disappeared—that we are here, we are many, and we are not going away.²⁸⁵

(This strikingly resembled the defiant chant at gay pride parades: “We’re here, we’re queer, get used to it.”) When police arrested three Hasidic men on charges of vandalizing the apartment of Christian women in Jerusalem’s Orthodox Mea Shearim district, the community created a memorial with graffiti declaring: “Here three religious men were kidnapped and taken to jail” (a typical inversion of criminal and victim).²⁸⁶

Secular Israelis had an equal and opposite reaction. A Knesset member from the leftist Meretz Party warned: “The Supreme Court is one institution that they can’t blackmail or intimidate, and this institution enjoys extraordinary prestige because it is independent. And they want to topple this last bastion” (the siege mentality in reverse).²⁸⁷ The Hebrew University law school dean denounced the haredim for “severing themselves from the basic Israeli social contract. And their institutions should therefore not receive even a single cent.”²⁸⁸ The State Attorney warned that their language was not only “a shame and a disgrace, but also borders on the criminal.”²⁸⁹ In

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. Deborah Sontag, *Plans for Rival Rallies on Religion Issue Stir Fears in Israel*, N.Y. TIMES, February 12, 1999, at A3.

Mea Shearim, however, rally posters proclaimed: "Incitement! Like never before, an incitement campaign is being conducted against Judaism and the Jewish heritage. And we remain silent?"²⁹⁰ Fearing the kulturkampf might turn violent, both Prime Minister Benjamin Netanyahu and President Ezer Weizman sought to mediate.²⁹¹

VI. DISSING IS ALWAYS HAVING TO SAY YOU'RE SORRY

As the above examples demonstrate, speech is performative as well as communicative and expressive. But the power to subordinate is also the power to elevate. The response to harmful speech, therefore, should be an institutionalized but informal conversation between victims and offenders.²⁹² Once the victim has voiced a grievance, the offender should be allowed to offer an account—a contextualized interpretation that seeks to render ambiguous words innocuous and obscure motives innocent. To the extent the victim honors this account, it may salve the wound.²⁹³ But because few accounts entirely nullify the harm, an apology may also be necessary.²⁹⁴

Apologies are highly stylized degradation rituals in which offenders affirm the norm of status equality, acknowledge violating it, and express regret.²⁹⁵ Offenders offer apologies, thereby

290. *Id.*

291. *Id.*

292. See generally, JURGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION*, VOL. 1: REASON AND THE RATIONALIZATION OF SOCIETY (1984).

293. See Marvin B. Scott & Stanford M. Lyman, *Accounts*, 33 *AMERICAN SOCIOLOGICAL REVIEW* 46 (1968); P. W. Blumstein et al., *The Honoring of Accounts*, 39 *AMERICAN SOCIOLOGICAL REVIEW* 551 (1974).

294. Barry R. Schlenker & B. W. Darby, *The Use of Apologies in Social Predicaments*, 44 *SOCIAL PSYCHOLOGY QUARTERLY* 271 (1981); CROSS-CULTURAL PRAGMATICS: REQUESTS AND APOLOGIES (Shoshana Blum-Kulka, Juliane House and Gabriele Kasper eds., 1989); NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* (1991). Apologies can redress only the harm to the victim's dignity; other remedies may be necessary to deal with other harms. *WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* (Roy L. Brooks ed., 2000).

295. Cf. Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 *AMERICAN JOURNAL OF SOCIOLOGY* 420 (1956). Apology agencies have emerged in China, in

acknowledging their moral inferiority. Victims choose whether to accept apologies, restoring offenders to a plane of moral equality, or reject them, reaffirming the moral imbalance. Thus, a victim not only initiates the remedial process by complaining but also controls its outcome, becoming the arbiter of the offender's rehabilitation. This transaction should be witnessed by the community that constructs status relationships.

An apology should begin with a full acknowledgement of the wrong. Offenders frequently balk at such unconditional self-abasement. After accusing black men of competing to father illegitimate children, New Jersey Governor Christine Todd Whitman offered "an apology to anyone who is offended by it. But I really can't pretend that it doesn't happen."²⁹⁶ The commonest evasion of culpability is disavowal of bad motives. When Asian Americans criticized New York Senator Alphonse M. D'Amato for impersonating the O.J. Simpson trial Judge Lance Ito, using a crude and inappropriate Japanese accent, D'Amato said "I'm sorry" but added: "I was making fun of the pomposity of the judge and the manner in which he's dragging the trial out."²⁹⁷ Acknowledging that "some of my words were poorly chosen," media personality Dr. Laura Schlessinger said: "I deeply regret the hurt this situation has caused the gay and lesbian community."²⁹⁸ As an Orthodox Jew, however, she remained a "staunch defender of the traditional family."²⁹⁹ The director of the Gay and Lesbian Alliance Against Defamation vowed to continue its campaign against her radio and television shows. It "has been about

Tianjin and Xian, for offenders who are unable or unwilling to face their victims directly. Elisabeth Rosenthal, *For a Fee, Chinese Company Will Beg Pardon for Anyone*, N.Y. TIMES, January 3, 2001, at A1.

296. Joseph F. Sullivan, *Whitman Apologizes for Remarks on Blacks*, N.Y. TIMES, April 14, 1995, at B6.

297. Lawrence Van Gelder, *D'Amato Mocks Ito and Sets Off Furor*, N.Y. TIMES, April 6, 1995, at B1; Melinda Henneberger, *D'Amato Gives a New Apology on Ito Remarks*, N.Y. TIMES, April 7, 1995, at A1.

298. Jim Rutenberg, *In an Ad, Radio's "Dr. Laura" Says She Regrets Hurting Gays*, N.Y. TIMES, October 11, 2000, at A14.

299. *Id.*

stopping her defamation, and there is nothing in her statement that says she intends to do that.”³⁰⁰

Apologies are especially effective in modifying group status. Lutherans have apologized to Jews for their founder’s anti-Semitism, white Southern Baptists to blacks for slavery and segregation, Methodists to blacks for racism, New Zealand to the Maori, the United States to American Indians, South African whites for apartheid, Christians to Muslims for the Crusades, Pope John Paul II to Africa for the slave trade and to the Orthodox Church, Germans to the Dutch for the military invasion, and France to the Jews for Nazi collaboration.³⁰¹ At the U.N. conference on racism in Durban, Europeans expressed “profound regret” for colonialism and slavery but would not apologize for fear of encouraging lawsuits. Geraldine Fraser-Moleketi, South African minister of public services complained that apologies had “been granted elsewhere in the world.” The European Union responded by calling on nations “who have not yet contributed to restoring the dignity of the victims to find appropriate ways to do so.”³⁰² Two years after Australian Prime Minister John Howard refused to apologize for the 100,000 Aboriginal children torn from their families, Parliament passed his motion expressing “its deep and sincere regret that indigenous Australians suffered injustices under the practices of past generations, and for the hurt and trauma that many indigenous people continue to feel.”³⁰³ Parliament, however, rejected the opposition Labor Party amendment, which would have said it was “sorry.” Some

300. *Id.*

301. John Dart, *Joining the Rush to Repent*, L.A. TIMES, June 19, 1995, at A1; Mary Rourke, *A Growing Number of Christian Leaders Have Apologized for Crimes Against Humanity*, L.A. TIMES, June 27, 1995, at E1; Gustav Niebuhr, *Baptist Group Votes to Repent Stand on Slaves*, N.Y. TIMES, June 21, 1995, at A2, *Mr. Chirac Honors the Truth*, N.Y. TIMES, July 18, 1995, at A12; Gustav Niebuhr, *Repenting Racist Acts and Recalling Genocide*, N.Y. TIMES, May 13, 2000, at A14; Henri E. Cauvin, *In Africa, A Mea Culpa For Apartheid Tests Whites*, N.Y. TIMES, December 17, 2000, §1, at 37; Richard Boudreaux, *Pope Apologizes for Anti-Orthodox Past*, L.A. TIMES, May 5, 2001, at A1; J. DAWSON, *HEALING AMERICA'S WOUNDS* (2d ed., Regal, 1994).

302. Rachel L. Swarns, *Overshadowed, Slavery Debate Boils in Durban*, N.Y. TIMES, September 6, 2001, at A1; Rachel L. Swarns, *Racism Talks Still Seek to End Impasses on Israel and Slavery*, N.Y. TIMES, September 8, 2001, at A5.

303. *Australia Expresses Regret for Injustice to Aborigines*, L.A. TIMES, August 27, 1999, at A14.

Aborigines insisted on that word, as well as payment of compensation to the “stolen generations.” But the second Aborigine ever to sit in Parliament, who helped draft the motion, said: “People ought to take heart that it gives an expression of even severe regret.”³⁰⁴ The Australian Labor Party made an apology to Aborigines a central part of its 2001 electoral pledge.³⁰⁵

The nuanced phrasing devised to preserve the offender’s honor may fail to satisfy the victim. After 11 years of deliberation, the Vatican Commission on Religious Relations With the Jews issued “We Remember: A Reflection on the Shoah,” a 14-page teaching document, which it called “an act of repentance” and “more than an apology.”³⁰⁶ It acknowledged that in the “tormented” history of relations between Jews and Christians “the prevailing mentality down the centuries penalized minorities and those who were in any way ‘different.’”³⁰⁷ That the Holocaust occurred “in countries of long-standing Christian civilization raises the question of the relation between the Nazi persecution and the attitudes down the centuries of Christians toward the Jews.”³⁰⁸ But the document stressed

the difference which exists between anti-Semitism, based on theories contrary to the constant teaching of the church on the unity of the human race and on the equal dignity of all races and peoples, and the longstanding sentiments of mistrust and hostility that

304. *Id.*

305. See Kim Beazley & Bob McMullan, *Labor’s Response to the Stolen Generation*, Joint Media Statement, May 25, 2001, available at <http://www.alp.org.au/media/0501/kbbmmssg250501.html>. “We are today announcing Labor’s response to *Bringing Them Home*, the report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families. The response is made up of three main commitments: A national apology in the first sitting week of a new Parliament; A national conference to examine methods of resolving the consequences of forced removal; Monitoring and annual reporting to Parliament by the Human Rights and Equal Opportunity Commission on the progress of the implementation of the recommendations of the *Bringing them Home Report*.” *Id.*

306. Celestine Bohlen, *Vatican Repents Failure To Save Jews From Nazis*, N.Y. TIMES, March 17, 1998, at A1.

307. *Id.*

308. *Id.*

we call anti-Judaism, of which, unfortunately, Christians also have been guilty.³⁰⁹

It was the former that produced the genocide of “neo-pagan Nazis.” Although many Christians gave “every possible assistance to those being persecuted, and in particular to the persecuted Jews,” others did not.³¹⁰ “We deeply regret the errors and failures of those sons and daughters of the church.”³¹¹ The Anti-Defamation League’s co-liaison with the Vatican called it “a very important statement, but ... disappointing in certain respects.”³¹² Jewish commentators also criticized the document for failing to address the wartime role of Pope Pius XII, contenting itself with repeating praise of him by Jewish leaders. By contrast, the German Roman Catholic bishops accepted the church’s “co-responsibility” for the Holocaust, adopting the phrasing of the Protestant Church of the Rhineland. And the French bishops conference asked the Jewish people for forgiveness for the church’s failure to intercede.³¹³

Precise phrasing is particularly important in the Far East, where apologies are a central cultural tradition. The Chinese Foreign Ministry expressed satisfaction when Japanese Prime Minister Tomiichi Murayama wrote a scroll saying “I face up to history,” acknowledged that his country’s “invasions and colonization caused unbearable suffering and misery to huge numbers of people,” and substituted the stronger “owabi” for the more ambiguous “hansei” (both expressing regret).³¹⁴ Although Murayama also apologized to

309. *Id.*

310. *Id.*

311. *Id.*; Gustav Niebuhr, *Several Voices: A Stand Bold and Cautious at Once*, N.Y. TIMES, March 17, 1998, at A11.

312. Celestine Bohlen, *Vatican Repents Failure To Save Jews From Nazis*, N.Y. TIMES, March 17, 1998, at A1.

313. *Id.*; Gustav Niebuhr, *Several Voices: A Stand Bold and Cautious at Once*, N.Y. TIMES, March 17, 1998, at A11. See Garry Wills, “The Vatican Regrets,” 47(9) *New York Review of Books* 19 (May 25, 2000); Christopher Begg et al., *Memory and Reconciliation: The Church and the Faults of the Past*, available at www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20000307_memory-reconc-itc_en.html.

314. See Nicholas D. Kristof, *Many in Japan Oppose Apology to Asians for War*, N.Y. TIMES, March 6, 1995, at A9; Nicholas D. Kristof, *Why Japan Hasn’t Said That Word*, N.Y.

South Korea for Japan's "colonial rule and aggression," three years later the new Prime Minister, Keizo Obuchi, expressed "deep sorrow" and Emperor Akihito "deep remorse."³¹⁵ South Korean Prime Minister Kim Dae Jung (who had experienced the occupation and spoke fluent Japanese) accepted the apology because "the weight of Japan's words was different. ... It clarified whom they were talking to, and this time expressed regret and apology."³¹⁶ Addressing the Diet, Kim said the 1,500-year relationship between the two countries had been marred "for a short time by tragedy. We should not overvalue this sad period, and look toward the future and a strong relationship."³¹⁷ He invited the Emperor to visit.³¹⁸ When President Clinton personally apologized for the killing of a Japanese exchange student in Louisiana, the boy's parents felt "a great honor to get an apology directly from the President."³¹⁹

Just as it took more than half a century for Japan to say these words, so apologies for recent events tend to be more qualified. On the eve of the first visit to England of an Argentine President since the Falklands War, Carlos Menem tacked back and forth.³²⁰ *The Sun* quoted him as saying "1982 was a sad and traumatic blot in the history of our relations. Some brave young Argentine and British soldiers lost their lives in a conflict that should never have happened and that we deeply regret."³²¹ But when the tabloid's front page headlined this

TIMES, May 7, 1995, §4, at 3; Nicholas D. Kristof, *Why a Nation of Apologizers Makes One Large Exception*, N.Y. TIMES, June 12, 1995, at A1; Sam Jameson, *Japan Apology Goes to WWII Sex Slaves*, L.A. TIMES, July 19, 1995, at A1; Teresa Watanabe & David Holley, *Japan Premier Offers Apology for WWII Role*, L.A. TIMES, August 16, 1995, at A1. See also Hiroshi Wagatsuma and Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOCIETY REVIEW 461 (1986); FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN (1987).

315. Valerie Reitman, *S. Korea Leader's Visit Is a Reel Success for Tokyo*, L.A. TIMES, October 9, 1998, at A6.

316. *Id.*

317. *Id.*

318. *Id.*

319. *Clinton Meets Parents of Slain Japanese Student*, L.A. TIMES, November 17, 1993, at A10.

320. Marjorie Miller, *War of Words Precedes Argentine President's Visit to Britain*, L.A. TIMES, October 24, 1999, at A5.

321. *Id.*

“Argentina Says: We’re Sorry for Falklands,” Menem balked. Later that day the *Evening Standard* headline declared: “I’m Not Sorry for Falklands.” The president of the Falkland Island Families Association welcomed the expression of regret as “a positive step forward.”³²² But the mother of a soldier killed in the war refused to appear with Menem at a wreath-laying ceremony for the victims. The Islands’ wartime governor was “sorry that he hasn’t made an apology, a genuine apology, for Argentina starting the war in 1982.”³²³ Downing Street was predictably diplomatic: “The words speak for themselves. ... We welcome the sentiments expressed.”³²⁴

After U.S. veterans told reporters in 1999 that they had shot Korean civilians near the village of No Gun Ri during the 1950 war, a U.S. Army investigation confirmed civilian casualties “at the hands of American soldiers” but insisted this was “very different from the allegation that was made that this was a massacre in the classic sense, that we lined up innocent people and gunned them down.”³²⁵ Clinton expressed “condolences,” adding (inexplicably): “many Americans have experienced the anguish of innocent casualties of war.”³²⁶ He offered to construct a memorial to all civilians killed in the war and create a scholarship. One Korean survivor denounced the report as “full of excuses.”³²⁷ Another wanted “a more sincere apology, not a vague statement of regret.”³²⁸ A group spokesman called it “a Pentagon attempt to whitewash the massacre.”³²⁹

The American ambassador, seeking the release of the 24 crew members of the U.S. spy plane that made an emergency landing in China after a collision with a Chinese air force plane, expressed “sincere regret” over the missing Chinese pilot and said “we are very

322. *Id.*

323. *Id.*

324. *Id.*

325. Paul Richter, *U.S. Won't Apologize for No Gun Ri, Officials Say*, L.A. TIMES, December 22, 2000, at A4.

326. Norman Kempster, *Clinton "Regrets," Doesn't Apologize for, No Gun Ri*, L.A. TIMES January 12, 2001, at A4.

327. Elizabeth Becker, *Army Confirms G.I.'s in Korea Killed Civilians*, N.Y. TIMES, January 12, 2001, at A1.

328. *Id.*

329. Norman Kempster, *Clinton "Regrets," Doesn't Apologize for, No Gun Ri*, L.A. TIMES January 12, 2001, at A4.

sorry the entering of Chinese airspace and the landing did not have verbal clearance....”³³⁰ China initially had demanded a “dao qian”—“a formal apology conveying an admission of wrongdoing.”³³¹ Although the U.S. and China issued identical English-language versions of the American statement, the New China Agency translated these into expressions of “profound regret” and culpability, whereas the U.S. Embassy version stuck to “very sorry.” Communist Party leaders told Chinese media the U.S. had agreed to “a form of apology.” But Chinese fluent in English, who had access to the official version through the Internet, said they could tell “the difference between ‘sorry’ and ‘apologize.’”³³² Once the Americans were back on native soil, Defense Secretary Donald H. Rumsfeld held the Chinese pilot solely responsible for the collision, and Secretary of State Colin L. Powell denounced as “Chinese propaganda” the assertion that the U.S. had offered an apology. The Chinese Foreign Ministry promptly retorted that “the U.S. side should take a cooperative attitude and not seek excuses to evade responsibility.”³³³

Apologies are readily offered and accepted when the offense is inadvertent and the speaker vulnerable. Politicians satisfy both conditions. President Clinton, praising efforts to end ethnic conflict in the Balkans, invidiously compared the intractability of fighting among his “forebears in Northern Ireland.”³³⁴ “Every time they make an agreement to do it, they’re like a couple of drunks walking out of the bar for the last time—when they get to the swinging door they turn around and go back in and say, ‘I just can’t quite get there.’”³³⁵

330. Erik Eckholm, *Chinese Claim a Moral Victory, Describing a Much Bigger Battle*, N.Y. TIMES, April 12, 2001, at A1. See Craig S. Smith, *China Releases U.S. Plane Crew 11 Days After Midair Collision*, N.Y. TIMES, April 12, 2001, at A1; David E. Sanger & Steven Lee Myers, *Delicate Diplomatic Dance Ends Bush's First Crisis*, N.Y. TIMES, April 12, 2001, at A1; Ching-Ching Ni, *Words May Be Enough to Soothe Feelings*, L.A. TIMES, April 12, 2001, at A12; Anthony Kuhn, *'Very Sorry' Proves to Be Key Phrase*, L.A. TIMES, April 12, 2001, at A14.

331. *Id.*

332. Henry Chu, *Some Chinese Are Reading U.S. Letter for What It Is*, L.A. TIMES, April 14, 2001, at A1.

333. Norman Kempster & Paul Richter, *U.S. Takes Harder Line With China Before Talks*, L.A. TIMES, April 14, 2001, at A1.

334. *Clinton Sorry for "Drunks" Metaphor*, L.A. TIMES, October 9, 1999, at A10.

335. *Id.*

Within hours he expressed “regret” for the offense caused by his “inappropriate” metaphor.³³⁶

California Lieutenant Governor Cruz Bustamante, a lifelong crusader against racism and the first Latino invited to address the Coalition of Black Trade Unionists, misspoke “Nigger” while reading a speech praising the American Negro Labor Committee, the National Negro Congress, the National Negro Labor Council and the National Negro American Labor Council.³³⁷ Several in the audience walked out. Bustamante immediately said: “If you heard what I think I heard, I want you to know it wasn’t me; it’s not the way I was raised, it’s not the way I was taught, it’s not the way I raised my children and it’s not what’s in my heart.”³³⁸ He also called numerous black leaders to apologize. The chairman of the California Republican Party tried to take political advantage, suggesting Bustamante “sign up immediately for the state-sponsored sensitivity courses and that he not take them just one time, but twice, to ensure that these kinds of mistakes do not happen again.”³³⁹ But black leaders accepted it was “a totally honest mistake,” with no “derogatory” intention.³⁴⁰ Governor Jesse Ventura of Minnesota joked on the David Letterman show that St Paul’s confusing streets could have been designed by drunken Irishmen. After apologizing the next day he (like Senator D’Amato) qualified that by noting that the show “is generally considered comedic, and that’s the light in which I did the show.”³⁴¹

Businesses with mass clientele are exposed to similar pressures. When Volkswagen used religious themes in four advertising posters, one parodying Leonardo da Vinci’s “Last Supper” and captioned (in French): “My friends, let us rejoice because a new Golf is born,” the French Catholic bishops promptly sued to provoke

336. *Id.*

337. See Julie Tamaki, *Bustamante Voices Regret for Racial Slur*, L.A. TIMES, February 14, 2001, at A3; George Skelton, *Not the Speech Cruz Bustamante Hoped to Deliver*, L.A. TIMES, February 19, 2001, at A3.

338. Julie Tamaki, *Bustamante Voices Regret for Racial Slur*, L.A. TIMES, February 14, 2001, at A3.

339. *Id.*

340. *Id.*

341. *Gov. Ventura Stumbles*, N.Y. TIMES, February 26, 1999, at A13.

public debate about the use of religious symbols in advertising.³⁴² The poster “ridicules a religious image, which is particularly symbolic to all Christians and the basis for the eucharist. Mockery is a corrosive like rust, that gradually erodes everything. ... There is a language of signs and symbols that belongs to the Christian faith. They are certainly available to all, but not to be used for whatever people want.”³⁴³ Advertising “has become very intrusive and at times insulting to human dignity, not only to religion. The Last Supper is not folklore.”³⁴⁴ Advertising experts had told the bishops that sellers were turning to religion because sex no longer shocked (although they would not insult Islam for fear of attack or Judaism out of guilt). Volkswagen instantly ended the \$16 million campaign and covered up the 10,000 posters. Although an employee of the DDB-Needham advertising agency, which produced it, said the goal had been to shock, the director denied this: “we thought the work was done with humor.”³⁴⁵ The lawsuit was settled within weeks by an apology and payment of \$15,000 legal costs and \$50,000 to a Catholic charity. The bishops lost another suit against posters advertising the film “The People vs. Larry Flynt” with a man in briefs posed for the crucifixion and a woman’s pelvis in the background; but the film’s director had the posters removed when religious groups protested and vandalized them.³⁴⁶ By contrast, gay activists refused to remove a “wanted poster” showing Pope John Paul II on an encyclical opposing condoms and the caption “This man is a killer.”³⁴⁷

Although Atlanta Braves pitcher John Rocker apologized for denigrating foreigners, blacks, gays, young mothers, and New Yorkers in a *Sports Illustrated* article, the Major League Baseball Commissioner suspended him for 73 days (with pay), fined him

342. Marlise Simons, *Did VW Mock the Gospel? French Bishops Sue*, N.Y. TIMES, February 7, 1998, at A4.

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.*; *French Church and Volkswagen Settle Suit*, N.Y. TIMES, March 1, 1998, §1, at 10.

347. Marlise Simons, *Did VW Mock the Gospel? French Bishops Sue*, N.Y. TIMES, February 7, 1998, at A4.

\$20,000, and ordered sensitivity training.³⁴⁸ The Commissioner said: "Major League Baseball takes seriously its role as an American institution and the important social responsibility that goes with it."³⁴⁹ But the real reason may have been economic. The team's president acknowledged: "it has been a very difficult time for the Braves' front office ... difficult for the sales department, the promotions department, the community relations department."³⁵⁰

Apologies are particularly effective when they reflect a learning process or change of heart. A training officer for the Cambridge, Massachusetts, police department told a local reporter that pepper spray "doesn't affect ... people who have consumed cayenne pepper from the time they are small children, and this generally breaks into ethnic categories," such as Mexican Americans, Cajuns, Pakistanis and Indians.³⁵¹ The article provoked outrage among Latinos throughout New England. A Latino lawyer for Central American refugees conceded that people would laugh at the statement, "but it's a laugh with irony and an edge because of the knowledge that these officers think you are physically different."³⁵² National counsel for the Mexican American Legal Defense and Education Fund also laughed at first but added "it's racial stereotyping at its finest. It's really dehumanizing."³⁵³ The police commissioner immediately apologized, acknowledging "there is no scientific evidence to support these statements," which would be deleted from future training materials.³⁵⁴

For a dozen years a member of the Virginia House of Delegates annually roasted colleagues with dirty jokes, entertaining the men and embarrassing the women.³⁵⁵ After his 1998 performance

348. Murray Chass, *Baseball Suspends Rucker Till May for Comments*, N.Y. TIMES, February 1, 2000, at A1.

349. *Id.*

350. *Id.*

351. Hector Tobar, *Cambridge Police Apologize Over Pepper Spray Remark*, L.A. TIMES, August 14, 1999, at A4.

352. *Id.*

353. *Id.*

354. *Id.*

355. B. Drummond Ayres, *Annual Ribald Roast Is Followed by Rebuttal*, N.Y. TIMES, March 23, 1998, at A12.

a woman delegate declared on the floor: "Sexual harassment needs to end. We've got to step back from the line of improper insults, from crudeness."³⁵⁶ The 30-year member initially called his accuser "thin-skinned." But a day later, on the verge of tears, he offered a "profound" apology, which elicited a standing ovation and acceptance by his accuser.³⁵⁷

Shortly after Britain's Secretary for Wales resigned after being assaulted in a park known for gay cruising *The Sun*, the most homophobic among Britain's right-wing newspapers, outed Trade Secretary Peter B. Mandelson.³⁵⁸ It then published a front-page editorial accusing a gay conspiracy of running Britain and, the next day, a photograph of the Agriculture Minister, who had been outed two days earlier, wearing a mandatory blue hair net while touring a dairy. In an astonishing volte face two days later, however, it resolved not to reveal sexual orientation absent an "overwhelming public interest." "We hope our declaration will encourage gays to feel more at ease. ... In a perfect world, their sexuality would then cease to be an issue." It also fired the columnist who had outed Mandelson.³⁵⁹

Apologies alone may be insufficient to restore respect for several reasons.³⁶⁰ Unlike the last three examples, they may be coerced and hence not represent the speaker's feelings. Houston affirmative action director Lenoria Walker clashed with Council Member Joe Roach over whether the city affirmative action plan should include the disabled.³⁶¹ At a conference she complained: "We have a Republican council member saying that we should have something with people with disabilities—a midget."³⁶² Roach, a dwarf, was offended. (A midget is proportioned like a full-sized person; a dwarf is not.) The mayor ordered Walker to apologize and create a sensitivity training program for city employees and suspended

356. *Id.*

357. *Id.*

358. Sarah Lyall, *About-Face for British Daily That Scourged Gay Laborites*, N.Y. TIMES, November 13, 1998, at A7.

359. *Id.*

360. See WHEN SORRY ISN'T ENOUGH, *supra* note 294.

361. *Official Calls Dwarf "Midget," Is Penalized*, L.A. TIMES, April 24, 1998, at A27.

362. *Id.*

her for three days without pay but refused to fire her.³⁶³ Some speakers traffic in slurs. Doug Tracht, a “shock jock” known as “Greaseman” on Washington, D.C., radio station WARW, played a song by a young black hip-hop artist who won five Grammys that night and commented “No wonder people drag them behind trucks”—a reference to a white racist just convicted of murdering a black man that way in Jasper, Texas.³⁶⁴ Tracht quickly declared:

I’m truly sorry for the pain and hurt I have caused with my unfeeling comment. I have no excuse for my remark, and regret it. If I could take it back I would. In the course of my show, split-second judgment is made over ad-libs. This remark was a grave error in my judgment.³⁶⁵

The station apologized “to all the listeners who were quite rightly offended” by the statement and fired Tracht, properly acknowledging that he lacked the “split-second judgment” the job apparently required.³⁶⁶

At the last nine Labor Day parades in Broad Channel, Queens—a Jamaica Bay island that remains a white enclave in multiethnic New York City—a group of men had won the prize for the “funniest float” with entries whose “humor” was captured by titles like “Gooks of Hazzard,” “Hasidic Park,” and “Happy Gays.”³⁶⁷ For their 1998 float, entitled “Black to the Future: Broad Channel, 2098,” the men donned blackface and Afro wigs, bounced basketballs, listened to

363. *Id.* I wonder what would happen if an American newspaper did anything like *Bild*, with the largest circulation in Germany. After Switzerland held the German football team to a humiliating 1-1 draw, *Bild* published a front-page photograph of the players drastically foreshortened, as in a fun-house mirror, with the caption “May we introduce Europe’s footballing dwarfs!” *The Times* story managed to make the same mistake as Walker. See Allan Hall, “Midgets” Shown Red Card Over Swiss Role, *THE TIMES* (London), April 29, 2000, at 19.

364. *D.C. “Shock Jock” Fired After Joke About Dragging Death*, *L.A. TIMES*, February 26, 1999, at A28.

365. *Id.*

366. *Id.*

367. Jim Yardley, *An Island That Sees No Racism: Enclave in Queens Defends a Float, and a Way of Life*, *N.Y. TIMES*, September 14, 1998, at B1.

boom boxes, threw watermelon slices to the bystanders and enacted the same racist Texas murder mocked by “Greaseman.” After an amateur video was broadcast the next night, Mayor Rudolph W. Giuliani sought to fire the two police officers and two fire fighters, withdrew the city’s \$6,100 contribution to the volunteer fire department (which had sponsored the parade), and revoked the sale of city land for a new firehouse. One suspended police officer offered an apology, while declaring “I’m not a racist.”³⁶⁸ The lawyer for the threatened men said they were “spoofing” the fact that in a hundred years the all-white community “would have to have blacks.”³⁶⁹

A local retired white construction worker accused the mayor of “playing politics.” “Whether it’s a black float or a Jew float. It’s all in fun. They may call it prejudice, but it isn’t prejudice. If there’s any town without prejudice, this is it.”³⁷⁰ Residents “didn’t have to have any” prejudice because there were no blacks (which, of course, was the goal of segregation and apartheid). A younger white construction worker said the float “was a bunch of black guys who were supposed to be drunk coming back from a basketball game. Where was that racist? That’s the whole idea of it—to be like ‘Saturday Night Live.’”³⁷¹ (Humor, like tradition, is frequently offered as a justification.) The Uniformed Firefighters’ Association felt “obligated to represent our members”; but the Patrolmen’s Benevolent Association refused to defend anyone who had participated in “this disgraceful racist incident.”³⁷² Both departments said employees could be disciplined for discrediting their uniform by engaging in activity “that may be instrumental in arousing religious, racial or other hatred.”³⁷³ The New York Civil Liberties Union invoked the speakers’ constitutional rights. But whether the city can or should

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

372. Kit R. Roane, *City Suspends Three Workers in Racial Float*, N.Y. TIMES, September 12, 1998, at D7.

373. *Id.*

discipline them, no apology is likely to neutralize nine years of deliberate ethnic, religious, and homophobic stereotyping.³⁷⁴

Some offenders, of course, deliberately condemn other groups to exploit the consequent notoriety. Eminem used misogyny and homophobia to sell 10 million copies of "The Marshall Mathers LP," even *before* winning a Grammy.³⁷⁵ Gary L. Bauer, a candidate for the Republican presidential nomination, denounced the Vermont Supreme Court decision requiring the state to recognize same-sex partnerships as "in some ways worse than terrorism."³⁷⁶ When Minnesota Governor Jesse Ventura told *Playboy* that organized religion "tells people to go out and stick their noses in other people's business" and was "a sham and a crutch," the Navy Tailhook sexual harassment scandal was "much ado about nothing," and fat people were unable to "push away from the table," opponents in the Reform Party (whose Presidential nomination he was seeking) demanded his resignation.³⁷⁷ Ventura's official response was "Pffff!"³⁷⁸

Some forms of disrespect claim justification in religious beliefs and practices. Catholicism, many forms of Protestantism, and Orthodox Judaism invoke the bible for their homophobia: The Church of Jesus Christ of the Latter Day Saints baptizes non-Mormons posthumously to give them an opportunity to join the church in the afterlife. Under pressure from Jewish organizations, the Church removed several hundred thousand Holocaust victims from their genealogical records in 1995. The Simon Wiesenthal Center subsequently complained it was "insulting" that the Mormons had also baptized 200 prominent Jews, including Albert Einstein and David Ben-Gurion. "What they're saying is that without baptism we won't

374. See generally, Kit R. Roane, *City Suspends Three Workers in Racial Float*, N.Y. TIMES, September 12, 1998, at D7; Jim Yardley, *An Island That Sees No Racism, Just Joke in Neighborhood Parade*, N.Y. TIMES, September 14, 1998, at B1.

375. Jon Pareles, *Pop Music's War of Words: While Eminem Is Attacked, Steely Dan Gets a Free Pass*, N.Y. TIMES, February 18, 2001, §2, at 1.

376. *Bauer Likens Ruling on Gay Couples to Terrorism*, N.Y. TIMES, December 28, 1999, at A22.

377. *Ventura's Interview Brings Demand That He Quit Party*, L.A. TIMES, October 2, 1999, at A8.

378. Mike Allen, *Leave Party, Reform Chairman Tells Ventura*, N.Y. TIMES, October 2, 1999, at A9.

have salvation.” The church also removed these names.³⁷⁹ Reverend Marvin Rosenthal, a Jewish convert to Christianity and president of Zion’s Hope Church in Orlando, Florida, created “The Holy Land Experience,” illustrating the history of Israel from 1450 B.C. to A.D. 66. Christian leaders praised it, but an Orlando rabbi found it “offensive” to claim “you can be Christian and Jewish at the same time.”³⁸⁰ And the executive director of the Jewish Federation of Greater Orlando objected that “Hebrew Christians want to force Jews to accept Jesus.”³⁸¹

Far more serious is the anti-Semitic charge of deicide. The famous Oberammergau passion play, performed decennially for nearly four centuries, perpetrates that slander.³⁸² In 1965 the Second Vatican Council declared that Jesus’ death “cannot be blamed upon all the Jews then living, without distinction, nor upon the Jews of today.”³⁸³ Nevertheless, Paul Weyrich, a prominent conservative, posted a 2001 Easter message on his organization’s website declaring that Christ “was crucified by the Jews.”³⁸⁴ Weyrich said he was “merely quoting Scripture.”³⁸⁵ Several days later New York Knicks point guard Charlie Ward told *The New York Times Magazine*: “They had his blood on their hands.”³⁸⁶ Allan Houston, another player, said “They spit in Jesus’ face and hit him with their fists.” Ward apologized and agreed to meet with a rabbi.³⁸⁷

379. Michael Janofsky, *National Briefing: Rockies: Utah: An End to Baptizing Jews*, N.Y. TIMES, May 1, 2001, at A20.

380. Dana Canedy, *A Biblical Theme Park in Florida Begets Ill Will*, N.Y. TIMES, February 3, 2001, at A8.

381. *Id.*

382. See JAMES SHAPIRO, *OMBERAMMERGAU: THE TROUBLING STORY OF THE WORLD'S MOST FAMOUS PASSION PLAY* (2000).

383. Gustav Niebuhr, *What's Taught, Learned About Who Killed Christ*, N.Y. TIMES, April 29, 2001, §4, at 5.

384. *Id.*

385. *Id.*

386. *Id.*; Eric Konigsberg, *Marcus Camby Has Nobody to Play With*, N.Y. TIMES MAGAZINE, April 22, 2001, at 70.

387. *Id.* See also Jonathan Zimmerman, *Anti-Semitism: an All-American Attribute*, L.A. TIMES, May 2, 2001, at B9; Larry B. Stammer, *Pilate, the Jews and Jesus*, L.A. TIMES, May 12, 2001, at B10; SHAPIRO, *supra* note 382.

Victims may preserve moral superiority by rejecting apologies. The liberal *Asahi Weekly* ridiculed the rightist Japanese politician Shusuke Nomura by transforming the ideogram of his "Society of the Wind" party into "Society of the Lice."³⁸⁸ Nomura rejected the apology that "this cartoon was published in the midst of a political campaign."³⁸⁹ After lengthy negotiations, the newspaper promised a fuller apology. When its president refused to include a condemnation of the Socialist Party, Nomura, who had arrived at Asahi's offices dressed in a kimono, bowed in the direction of the Imperial Palace, declared he would kill the paper and himself, and committed ritual suicide (emulating his exemplar, Yukio Mishima).³⁹⁰ Alternatively, victims may make impossible demands. When Israel resumed diplomatic relations with the Vatican, the largest Israeli newspaper called the Roman Catholic Church "one of the most conservative, oppressive, and corrupt organizations in all human history" and said "the reconciliation can be done only if the Catholic Church and the one who heads it fall on their knees and ask forgiveness from the souls of millions of tortured who went to Heaven in black smoke, under the blessing of the Holy See."³⁹¹

As consultant to the California Public Employees Retirement System (Calpers) on investment opportunities in Turkey, Professor Marvin Zonis of the University of Chicago Business School wrote that before World War One "the very large Greek minority fled to Greece. The Armenian majority was dealt with in a different way."³⁹² California Treasurer and Calpers board member Phil Angelides, whose family had fled Turkey, sponsored a motion that such consultants be required to "put a premium on historical truth."³⁹³ Charles Valdes, board vice president and chairman of its investment committee,

388. David E. Sanger, *Militant Japanese Rightist Kills Himself*, N.Y. TIMES, October 21, 1993, at A12.

389. *Id.*

390. *Id.*; Sam Jameson, *Japanese Rightists Kills Self at Newspaper*, L.A. TIMES, October 21, 1993, at A15.

391. Clyde Haberman, *Diplomatic Pact Signed by Israel and the Vatican*, N.Y. TIMES, December 31, 1993, at A1.

392. Tony Perry, *Board Fires Advisor for Remarks on Armenians, Greeks*, L.A. TIMES, November 16, 1999, at A3.

393. *Id.*

compounded the offense by saying: "What we have here is a Greek treasurer who doesn't like Turkey, who doesn't like Turks."³⁹⁴ Although Valdes apologized to Angelides, a Greek American Assemblyman reprimanded the Board for not having rebuked Valdes. And though Zonis insisted his remarks did not reflect his views, the board passed Angelides's motion unanimously and rescinded the consulting agreement. An Armenian former state legislator called Zonis's report "a cancer, and you have to cut it out. Casting aside the consultant and starting over is the only course open to you."³⁹⁵

Repeated denials and justifications may neutralize the ultimate apology. In May 1998 Glenn Hoddle, coach to England's national soccer team, expiated on reincarnation and disability to the BBC.

I think we make mistakes when we are down here and our spirit has to come back and learn. That's why there is an injustice in the world. Why there are certain people born with terrible physical problems and why there's a family who has got everything right, physically and mentally.³⁹⁶

Eight months later he elaborated to *The Times*:

You and I have been physically given two hands and two legs and half-decent brains. Some people have not been born like that for a reason. The karma is working from another lifetime. I have nothing to hide about that. What you sow, you have to reap. You have to look at things that happened in your life and ask why?³⁹⁷

394. *Id.*

395. *Id.*

396. Brian Alexander, *Recollections From Coach's Previous Existence*, SUNDAY TELEGRAPH (London), February 7, 1999, at 7

397. Matt Dickinson, *Hoddle Puts His Faith in God and England*, THE TIMES (London), January 30, 1999.

This appeared under the front-page headline: "Hodde says disabled are paying price of sin."³⁹⁸ The Football Association felt extreme pressure to fire him. The Nationwide Building Association (a mortgage lending bank), which had paid £8 million to sponsor the team, said "Glenn Hodde can't escape the fact that he has a responsibility to ensure that his personal views shouldn't be confused with those of the England team, the FA or its sponsors."³⁹⁹ Prime Minister Tony Blair agreed that Hodde's statement "was very wrong" and "very offensive" and made it "very difficult for him to stay."⁴⁰⁰

His agent said the coach had "dropped his guard," but "what was stated in *The Times* was rubbish. He in no way mentioned the word punishment or disabled being punished."⁴⁰¹ Hodde's 13-year-old daughter wrote the BBC that this was "the most pathetic reason for someone to maybe lose their job."⁴⁰² His faith healer friend Eileen Drewery said he was being treated "worse than Saddam Hussein."⁴⁰³ Hodde told one television station: "I'm not going to resign over this because at the end of the day I didn't say any of those things."⁴⁰⁴ The "last thing" he wanted to do was "hurt people."⁴⁰⁵ He said to another: "I'm sorry for any distress it may have caused."⁴⁰⁶ He complained to a tabloid that *The Times* had "misquoted" him and threatened to sue for libel. The "point I wanted to make was that there has to be some reason why some people suffer in the world and others do not."⁴⁰⁷

The reporter who had interviewed Hodde retorted: "Instead of issuing a proper denial, he is in denial."⁴⁰⁸ He "invites friendly

398. Matt Dickinson & Stephen Farrell, *Hodde Says Disabled Are Paying Price of Sin*, THE TIMES (London), January 30, 1999.

399. Michael Harvey & Alex O'Connell, *FA to Decide Hodde's Fate Today*, THE TIMES (London), February 2, 1999.

400. *Id.*

401. *Id.*

402. Matt Dickinson, Michael Harvey & Adrian Lee, *Hodde Sacked for 'Serious Error.'* THE TIMES (London), February 3, 1999, at 1.

403. Michael Harvey & Alex O'Connell, *FA to Decide Hodde's Fate Today*, THE TIMES (London), February 2, 1999.

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.*

408. Matt Dickinson, *Matt Dickinson Writes*, THE TIMES (London), February 2, 1999.

television interviewers to enable him to give excuses.”⁴⁰⁹ The reporter had offered “Hodde the chance to distance himself from previous allegations that he thought the disabled were being punished for sins in a former life. Instead, he not only confirmed that view but expanded it.”⁴¹⁰ *The Times* editorialized that Blair had expressed “the most decent popular instincts of the country.”⁴¹¹ Hodde’s explanations “constituted a degrading farrago of half-truth and evasion, the incoherent and inconsistent combined.” “He seems determined to compound his original offence. No amount of waffle can alter the exact words that the England coach chose...”⁴¹² His “apparent apology to those whom he has undoubtedly offended lacks all credibility. ... An outright admission that he had said something that he has subsequently come to regret would have been more honest and allowed him to preserve some personal honour. ... The England coach manufactured yet more reasons yesterday why he should now submit his resignation—and why, if that resignation does not come, he should be removed from his post.”⁴¹³

Hodde then acknowledged “a serious error of judgment ... which caused misunderstanding and pain to a number of people. This was never my intention and for this I apologise.”⁴¹⁴ But four days after the initial words were published, he was terminated (and allegedly paid £500,000 for the remaining 18 months of his contract). The FA said “the position had become increasingly untenable for both the FA and for Glenn.”⁴¹⁵ The pain of the last four days “is as nothing compared to any offence that may have been caused to disabled people in our community and in our country.”⁴¹⁶ The British Sports Minister agreed that though Hodde was “a decent man ... his views caused distress to many disabled sportsmen and women.”⁴¹⁷ The Disabled

409. *Id.*

410. *Id.*

411. *Game Over*, THE TIMES (London), February 2, 1999, at 17.

412. *Id.*

413. *Id.*

414. Matt Dickinson, Michael Harvey & Adrian Lee, *Hodde Sacked for ‘Serious Error,’* THE TIMES (London), February 3, 1999, at 1.

415. *Id.*

416. *Id.*

417. *Id.*

Supporters Association said Hoddle had “hurt not just disabled people but their carers and families.”⁴¹⁸ Mencap called his dismissal “a victory for fair play in football and among people with learning disability. It is only right that the English coach pays a just penalty for comments which caused great offence and fuelled more bigotry to those who already face prejudice.”⁴¹⁹ *The Times* agreed: “Both what Hoddle said and the way in which he tried to pretend that he hadn’t said it made his position untenable.”⁴²⁰

If rejecting an inadequate apology preserves the victim’s moral superiority, extending forgiveness without receiving any apology may further enhance the victim’s moral stature. Pope John Paul II publicly forgave his attempted assassin, Mehmet Ali Agca.⁴²¹ After Kathleen Gingrich said on television that her son Newt had called Hillary Clinton a “bitch,” both Gingriches refused to apologize.⁴²² Hillary responded by offering them a personal tour of the White House. A Gingrich aide eagerly accepted, conceding that this “gracious” response “showed a lot of class.”⁴²³

VII. DILEMMAS OF REMEDIATION

A. Ambiguity

This approach to speech harms raises several difficult questions. First, the meaning of speech—and hence both its blessings and burdens—vary with context: the speaker’s motive, the identities and relationship of speaker and audience, their history, and the medium. Audiences who read the message differently will disagree

418. *Id.*

419. *Id.*

420. Matt Dickinson, Michael Harvey & Adrian Lee, *Hoddle Sacked for ‘Serious Error,’* THE TIMES (London), February 3, 1999, at 1.

421. Gustav Niebuhr, *For Cardinal and Accuser, A Profound Reconciliation*, N.Y. TIMES, January 7, 1995, §1, at 1.

422. Jane Hall & Greg Braxton, *CBS Defends Airing the Chung Interview Despite Attacks*, L.A. TIMES, January 6, 1995, at F1.

423. *In a Word, the First Lady Forgives*, January 7, 1995, at A17; Stephen A. Holmes, *Liberals: Bitter Attacks on the President*, N.Y. TIMES, January 7, 1995, §1, at 8.

about the proper response. When the University of Chicago Press suggested a jacket design for my book *Speaking Respect, Respecting Speech*, I showed the photo of a black "lawn jockey" to my law school colleagues. The whites were either perplexed (because age or provenance left them unequipped to read the symbol) or amused. But all the professors of color were hurt. Kimberlé Crenshaw, an African American colleague, remembered, as a teenager, venturing with friends into the white side of her racially segregated midwestern city to spray-paint the black lawn jockeys white. At her suggestion, I had Chicago do that on my book jacket (though few readers, I fear, get the point).

As an African-American five-year-old, Carolivia Herron loved her uncle to make up stories about why she had "the kinkiest, the nappiest, the fuzziest, the most screwed-up, squeezed-up, knotted-up, tangled-up" hair.⁴²⁴ As a literary scholar, Dr. Herron taped those stories and used them in writing "Nappy Hair," a critically applauded children's book. But when Ruth Sherman, a white teacher, assigned it to her Brooklyn third-graders, parental protests persuaded the district superintendent, Felix Vazquez, to pull her out of the classroom for not having sought approval from her principal, Felicita Santiago. The United Federation of Teachers supported Sherman, arguing the book "was meant to encourage appreciation of our cultural diversity and ethnic uniqueness."⁴²⁵ Some of the protesting parents "saw only a few pages, taken out of context" or reacted to the title alone.⁴²⁶ The (African American) school board president agreed that black-and-white photocopies of the color illustrations were "different from the way it looks in the book."⁴²⁷ He reiterated that Ms. Sherman should have cleared the book with her principal: "she would have been told

424. Dinitia Smith, *Furor Over Book Brings Pain and Pride to Its Author*, N.Y. TIMES, November 25, 1998, at B10.

425. Lynnette Holloway, *School Officials Support Teacher on Book That Parents Call Racially Insensitive*, N.Y. TIMES, November 25, 1998, at B10. See Dinitia Smith, *Furor Over Book Brings Pain and Pride to Its Author*, N.Y. TIMES, November 25, 1998, at B10; *Teacher in Racial Flap Seeks Transfer*, L.A. TIMES, December 1, 1998, at A18; Lisa Meyer, "Nappy Hair" Still Touchy Class Subject, L.A. TIMES, March 25, 1999, at A5.

426. *Id.*

427. *Id.*

that's not the best way to do it."⁴²⁸ A spokesperson for the Board of Education insisted: "We're not censoring the book. We're not saying it should be banned."⁴²⁹ The (African American) director of research and development at Columbia's Teachers College Reading and Writing Project said she had recommended the book to hundreds of teachers and would continue doing so.

I would like to talk to the parents and ask them, "What is it about your hair that you are offended by?" There are things that blacks say in their homes about their hair and this is bringing it to the public. I'm surprised, astonished and appalled. A line from the book says a lock of the child's hair is the only perfect circle. What's so bad about that?⁴³⁰

The incident struck Dr. Herron "deeply in the heart," though she felt honored to join the pantheon of banned writers: "I thought of Ovid, who was sent into exile because he was writing against Emperor Augustus."⁴³¹ When Ms. Sherman telephoned to ask "did she make a mistake?" the author felt just the opposite: "here was a teacher doing what many don't have the nerve to do, to bring her students books of their own culture. I admire what she desired to do." But the author added that the teacher "doesn't know about that pain, that ache that preceded her into the room."⁴³²

Although Vazquez reassigned Ms. Sherman to the classroom, she was frightened into requesting a transfer out of Brooklyn after attending a meeting at which angry parents threatened: "you better watch out" and "we're going to get you."⁴³³ And four months later, Dr. Herron, touring schools and libraries to explain the book, was barred from both Ms. Sherman's former Brooklyn school and her new

428. *Id.*

429. *Id.*

430. *Id.*

431. Dinitia Smith, *Furor Over Book Brings Pain and Pride to Its Author*, N.Y. TIMES, November 25, 1998, at B10.

432. *Id.*

433. Lynnette Holloway, *School Officials Support Teacher on Book That Parents Call Racially Insensitive*, N.Y. TIMES, November 25, 1998, at B10.

Queens school. Professor Roni Natov, who had invited Dr. Herron to address her Brooklyn College English class, said: "the decision lacks sense and moral courage. They could have made a learning opportunity out of the situation."⁴³⁴ Highlighting the power of context, Dr. Herron described reading her book to a fifth-grade class in which the only black child sunk down in shame when she came to the slave episode.

If I had not been able to get that little boy to sit up straight, proud and tall, in his chair, I would have stopped the story because it's not worth it to hurt the people for whom the book was written and out of whose culture it was written.⁴³⁵

It makes all the difference whether the speaker is the African American author or a white teacher, the medium is writing or speech, and the audience is primary school pupils or college students.

An African American woman is fighting her son's suspension from high school for addressing a black friend as "nigger."⁴³⁶ The school district claimed it had treated the word as a forbidden vulgarity, not the racial slur it would have been had the offender been white.⁴³⁷ African Americans reviled and threatened the white author, Carl Van Vechten, for his 1926 book "Nigger Heaven," although the noted black author, Langston Hughes, had endorsed his friend's choice of a title, and both the executive director of the NAACP and the black author Zora Neale Hurston praised the book.⁴³⁸ By contrast, few African Americans objected to Spike Lee's "Bamboozled," which

434. Lisa Meyer, "Nappy Hair" Still Touchy Class Subject, L.A. TIMES, March 25, 1999, at A5.

435. *Id.*

436. *Mother to Fight School's Action Over Race Slur*, L.A. TIMES, October 13, 2000, at A28. See the provocatively entitled NIGGER (2001), by Randall Kennedy, a Harvard law professor. See David D. Kirkpatrick, *A Black Author Hurls That Word As a Challenge*, N.Y. TIMES, December 1, 2001, at A15.

437. *Id.*

438. David Levering Lewis, Book Review, *Just Take the A Train*, N.Y. TIMES, April 22, 2001, §7, at 9 (reviewing REMEMBER ME TO HARLEM: THE LETTERS OF LANGSTON HUGHES AND CARL VAN VECHTEN (Emily Bernard, ed. 2001)).

parodies successful black entertainers and political poseurs while making extensive use of stereotypes like picaninnys, Aunt Jemima, Sambo, Rastus, and Jungle Bunny.⁴³⁹ Similarly, although American Indians resent the appropriation of names or symbols as team mascots, native Canadians gave the name Kisikawpisim Kamiyowahpahmikroot (the sun watches over in a good way) to the Prince of Wales when he visited them in Saskatchewan.⁴⁴⁰

Just as Woody Allen feels the same license to mock Jews that Spike Lee claims toward African Americans, so Jews can say hurtful things about each other they would never tolerate from non-Jews. Many European countries punish Holocaust denial. When Norman Finkelstein, an American child of Holocaust survivors, published a book denouncing *The Holocaust Industry* as “an extortion racket,” most Americans were critical but dismissive.⁴⁴¹ Germany, however, banned a television documentary about the author, and German historians denounced the book’s publication.⁴⁴² Far less offensive statements by African Americans provoke even stronger reactions. When the Creative Dance Outlet Theatre of Brooklyn performed “Telling Our Stories” for thousands of public school pupils during Black History Month, several teachers objected to a scene in which students wonder why they are discussing the Holocaust rather than slavery.⁴⁴³ Speakers invoke innocent motives to explain suspect behavior, but intent is far more opaque than identity. Historical collectors of Nazi memorabilia resent the decision by Yahoo! Auctions and eBay to ban such items for fear of facilitating neo-Nazi

439. Stephen Holden, *Trying On Blackface in a Flirtation With Fire*, N.Y. TIMES, October 6, 2000, at B14.

440. *Name that Prince*, N.Y. TIMES, April 30, 2001, at A9.

441. Roger Cohen, *Book Calling Holocaust a Shakedown Starts a German Storm*, N.Y. TIMES, February 8, 2001, at A13; See also DEBORAH LIPSTADT, *DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY* (1994); MICHAEL SHERMER & ALEX GROBMAN, *DENYING HISTORY: WHO SAYS THE HOLOCAUST NEVER HAPPENED AND WHY DO THEY SAY IT?* (2000); D.D. GUTTENPLAN, *THE HOLOCAUST ON TRIAL* (2001); RICHARD J. EVANS, *LYING ABOUT HITLER: HISTORY, HOLOCAUST, AND THE DAVID IRVING TRIAL* (2001).

442. *Id.*

443. Edward Wong, *Teachers Upset by Play’s Treatment of the Holocaust*, N.Y. TIMES, February 16, 2001, at B3.

movements.⁴⁴⁴ When “The Producers,” about the surprising success of a Nazi musical, won the 2001 Tony for Best Musical, Mel Brooks thanked “Hitler for being such a funny guy on stage.” But a German reviewer said “not everyone can suppress a certain discomfort.”⁴⁴⁵

Negotiating intent can be a painful, if instructive, political process. David Howard, the white director of volunteers in the successful campaign of African American District of Columbia mayoral candidate Anthony A. Williams, became the first openly gay appointee as director of the Office of the Public Advocate (or ombudsman).⁴⁴⁶ When Howard told two co-workers “I will have to be niggardly with this fund because it's not going to be a lot of money,” the white colleague accepted his explanation of the word, but the black colleague stormed out and would not be placated by a telephone conversation two days later.⁴⁴⁷ (He later said he had heard the word as “niggerly.”) Howard offered his resignation, conceding “bad judgment.” “It’s an arcane word ... and I can see how someone not familiar with the word could perceive it differently. You have to be able to see things from the other person’s shoes, and I did not do that.”⁴⁴⁸ Williams immediately accepted the resignation, comparing the word to “smoking in a refinery that resulted in an explosion.”⁴⁴⁹ A local (white) radio commentator noted that a recent *Washington Post* op ed piece reflected African American doubts that Williams was “black enough.”⁴⁵⁰

Observers were deeply divided. Rush Limbaugh (no champion of homosexuals) professed outrage: “Some poor overeducated slob

444. Lisa Guernsey, *Ban on Nazi Items Upsets Collectors*, N.Y. TIMES, May 10, 2001, at G11.

445. Alan Cowell, *Germans and Hitler Jokes: He Who Laughs Last...*, N.Y. TIMES, September 9, 2001, §4, at 5.

446. See Melinda Henneberger, *Race Mix-Up Raises Havoc For Capital*, N.Y. TIMES, January 29, 1999, at A10; Sam Fullwood, III, *D.C. Mayor Under Fire in War of Words Over Word Use*, L.A. TIMES, January 29, 1999, at A15; Maureen Dowd, *Niggardly City*, N.Y. TIMES, January 31, 1999, §4, at 17; Michael Janofsky, *About-Face in Washington in Furor on Misunderstood Word*, N.Y. TIMES, February 4, 1999, at A18.

447. Melinda Henneberger, *Race Mix-Up Raises Havoc For Capital*, N.Y. TIMES, January 29, 1999, at A10.

448. *Id.*

449. *Id.*

450. *Id.*

loses his job over a Swedish [sic] word and Bill Clinton keeps his job after perjury and obstruction of justice. Go figure.”⁴⁵¹ Twenty-two homosexuals protested to Williams: “If we fail to distinguish between decent people and bigoted people, if we acquiesce in treating the former like the latter, then we send a poisonous message to the people of this city, not to mention an illiterate message to our schoolchildren.”⁴⁵² One insisted: “David Howard is the one owed an apology.”⁴⁵³ The word comes from old Norse for stingy. But the past president of the (mostly black) National Bar Association asked: “Do we really know where the Norwegians got the word? And how would another ethnic group react if you came close to the line with a phrase inappropriate to that group?”⁴⁵⁴

The president of Howard University disagreed. People should “at least count to three” before jumping to conclusions. He regretted that “an official who as far as I can see has no history of this kind of conduct still has no opportunity to put this in context. It would appear there was no intent to inflict pain. Should this be fatal for a budding public official? I don’t think so.”⁴⁵⁵ N.A.A.C.P. chairman Julian Bond called the mayor “niggardly in his judgment on this issue. You hate to think you have to censor your language to meet other people’s lack of understanding.”⁴⁵⁶ *New York Times* writer Maureen Dowd defiantly captioned her column “Niggardly City,” suggesting that Patsy Cline’s song “Crazy” become the national anthem. This was “a niggardly scandal, given former Mayor Marion Barry’s copious escapades with crack and women.”⁴⁵⁷ History professor Roger Wilkins, an African American, noted that Williams, who had degrees from Harvard and Yale and wore bow ties, “is not a fellow who looks like he’s spent a lot of time hanging out with a bunch of black guys. There’s not the lingo, there’s not the body language. He calls himself

451. *Id.*

452. *Id.*

453. Melinda Henneberger, *Race Mix-Up Raises Havoc For Capital*, N.Y. TIMES, January 29, 1999, at A10.

454. *Id.*

455. *Id.*

456. *Id.*

457. Maureen Dowd, *Niggardly City*, N.Y. TIMES, January 31, 1999, §4, at 17.

a nerd, and nerdishness is not a part of the black culture.”⁴⁵⁸ Wilkins agreed with Jesse Jackson that Howard should be rehired but should not have used the word. “You’ve got to be pretty heavy to get into the Scandinavian roots of a word from two centuries ago.”⁴⁵⁹

Within a week Mayor Williams, acknowledging he should have investigated the context of the exchange, offered to reappoint Howard. Agreeing to accept a different job, Howard said the controversy was

really not about me or the use of the word “niggardly.” It was about feelings underneath the surface that a lot of people in Washington and the whole nation wanted to talk about. ... A lot of good came of this. It has fostered a discussion, not about racial tensions but about racial perceptions.⁴⁶⁰

B. The Values of Harmful Speech

The second problem confronting the task of remediation is that some speech harms occupy the core of any conception of free expression: religious controversy, political debate, and artistic creation. The degree of tolerance extended to ideas should vary with their abstraction; some affronts may be the irreducible price of freedom. Bronx community leaders protested a flier accusing Dominicans of “selling drugs to our kids” and “moving up to nice neighborhoods, making it unsafe and destroying what was once beautiful.”⁴⁶¹ But the New York Police Department Hate Crimes Unit (correctly) concluded that “the writing in that piece, although offensive, is not criminal.”⁴⁶² A Boulder elementary school science fair removed a (white) third grader’s project replicating the famous

458. *Id.*

459. *Id.*

460. Michael Janofsky, *About-Face in Washington in Furor on Misunderstood Word*, N.Y. TIMES, February 4, 1999, at A18.

461. Sherri Day, *Bronx Leaders Denounce Fliers Calling Dominicans Drug Sellers*, N.Y. TIMES, February 24, 2001, at B4.

462. *Id.*

experiment conducted by the (black) psychologist Dr. Kenneth Clark for the plaintiffs in *Brown v. Board of Education*.⁴⁶³ The girl found that the choice between the two dolls among nearly all 15 adults was influenced by the clothes the dolls wore, but 24 of the 30 fifth-graders preferred the white Barbie to the brown, regardless of dress. Parents of minority students agreed with a black father who worried that “for ... kids of color who may not be strong enough to be comfortable with who they are or where they come from, it could quite possibly have a devastating effect on them somewhere down the line.”⁴⁶⁴ But the experimenter’s father warned that if race “is discussed in a sterile manner, we cannot address all the aspects of race that the entire American culture is facing.”⁴⁶⁵ A distinguished law professor defended the Flag Protection Amendment (which would allow Congress to punish desecration) as an attempt to “restore a modest share of ... virtue, integrity, and honor” to the “halls of government.”⁴⁶⁶ But though patriots undoubtedly are pained by flag burning, an opponent properly characterized the amendment as an attempt to criminalize “symbolic patriotic incorrectness.”⁴⁶⁷

Works of artistic or historical importance may be inseparable from the prejudices of their time, place, and creator: anti-Semitism in Shakespeare’s “The Merchant of Venice” and Bach’s “St. John Passion,” racism in D.W. Griffith’s “The Birth of a Nation.”⁴⁶⁸ Wagner (a nineteenth-century anti-Semite whose music was adopted by the Nazis) has not been on a Israeli concert program since the

463. Michael Janofsky, *Removal of Pupil's Project About Race Ignites Debate*, N.Y. TIMES, March 4, 2001, §1, at 16.

464. *Id.*

465. *Id.*

466. Stephen R. Presser, Letter to the Editor, *Flag Amendment Would Restore Rights*, LEGAL TIMES, June 7, 1999, at 25. See also Jamin B. Raskin, *Amendment Would Establish Old Glory as a State Religion*, LEGAL TIMES, May 17, 1999, at 15; ROBERT JUSTIN GOLDSTEIN, FLAG BURNING AND FREE SPEECH: THE CASE OF *TEXAS V. JOHNSON* (2000).

467. Jamin B. Raskin, *Amendment Would Establish Old Glory as a State Religion*, LEGAL TIMES, May 17, 1999, at 15.

468. The board of the Directors Guild of America recently decided to delete Griffith's name from its lifetime achievement award. See Robert W. Welkos, *Debating an Icon's Genius, Racism*, L.A. TIMES, February 1, 2000, at A1; Tracy Wilkinson, *Lawmakers Want No Wagner in Israel*, L.A. TIMES, May 3, 2001, at A8; *Oust Wagner, Israeli Music Festival Urges*, L.A. TIMES, May 12, 2001, at A4.

founding of the state in 1948. When Zubin Mehta performed it as an encore in 1981, members of the audience fought, and an usher rushed the stage to display Nazi-inflicted scars. When Daniel Barenboim planned a Wagner concert in 2001, the Israeli Parliament convened in special session and unanimously urged cancellation. President Moshe Katsav and Jerusalem Mayor Ehud Olmert concurred. A Likud member of the Knesset declared: "Our brothers were slaughtered and strangled with Wagner's music as the requiem...[he] is a component in our collective memory that represents shame."⁴⁶⁹ A member from the National Religious Party added that "those who attend [the concert] must know they are stabbing Jewish history in the back."⁴⁷⁰ The Simon Wiesenthal Center of Los Angeles petitioned the Israeli Supreme Court to ban the concert. Bowing to pressure, the festival organizers asked Barenboim to drop Wagner.⁴⁷¹ Although he abandoned his plan to perform the first act of "Die Walküre," he asked the audience at the end of the concert if they wanted a Wagner encore. During the half hour debate some called him "fascist" and walked out, but most stayed and applauded the overture to "Tristan und Isolde." Nevertheless, President Moshe Katsav and Prime Minister Ariel Sharon rebuked Barenboim, Jerusalem Mayor Ehud Olmert accused him of being "brazen, arrogant, uncivilized and insensitive," and the Knesset education and culture committee urged the country to boycott the conductor. Barenboim retorted: "Not playing [Wagner] in Israel is like giving the Nazis one last victory."⁴⁷² The U.S. Court of Appeals for the Ninth Circuit held the Tempe, Arizona, school district potentially liable for "deliberate indifference" to a mother's complaints of "egregious public racial harassment" of her daughter.⁴⁷³ But acknowledging the First Amendment commitment to free speech, it dismissed the mother's companion claim that the school had aggravated the hostile racial environment by teaching Mark Twain's

469. Tracy Wilkinson, *Lawmakers Want No Wagner in Israel*, L.A. TIMES, May 3, 2001, at A8.

470. *Id.*

471. *Oust Wagner, Israeli Music Festival Urges*, L.A. TIMES, May 12, 2001, at A4.

472. Joel Greenberg, *Playing a Bit of Wagner Sets Off an Uproar in Israel*, N.Y. TIMES, July 9, 2001, at A4; *Israel: Sounds of Wagner, Echoes of Outrage*, N.Y. TIMES, July 25, 2001, at A10.

473. Harry Weinstein, *Ruling Widens School Liability for Racial Slurs*, L.A. TIMES, October 20, 1998, at A1

Huckleberry Finn and William Faulkner's *A Rose for Emily*, both of which contain the word "nigger."⁴⁷⁴

Proselytizers necessarily proclaim the superiority of their religion to all others and believe that disseminating its truth justifies any harm inflicted. The founder and president of the International Fellowship of Christians and Jews declared a boycott of the Southern Baptist Convention after their 1996 resolution called for the conversion of Jews.⁴⁷⁵ SBC president Reverend Paige Patterson responded: "I define religious liberty as a free marketplace of ideas. The only people who have to fear a free marketplace of ideas are people who are afraid their idea may not have enough currency."⁴⁷⁶ He rejected as intimidation a request not to send missionaries to Chicago. The Jewish Community Relations Council of New York commented: "We respect their religion and all we ask is for respect in return."⁴⁷⁷ Patterson retorted by quoting Jesus: "I am the way, the truth and the life; no one comes to the father except through me." "He's Lord and we have to do what he says, which includes witnessing."⁴⁷⁸

The Director of the Task Force on Missionaries and Cults of the Jewish Community Relations Council of New York, Inc. protested Patterson's participation in a Manhattan conference entitled "To the Jew First in the New Millenium," which included Jewish messianic organizations that exploited "our most sacred themes and symbols to the cause of conversion."⁴⁷⁹ A messianic Jew replied: "The reason we use Jewish symbols is we identify as Jews. I have as much right to the symbols as any other Jewish person."⁴⁸⁰ (This strikingly paralleled the claim of reform Jews, including women, to pray at the Western Wall

474. *Id.*

475. Gustav Niebuhr, *Baptists' Evangelism Concerns Jews*, N.Y. TIMES, September 25, 1999, at A8. See also Gustav Niebuhr, *Coalition of Jews Protests Southern Baptist Conversion Tactics*, N.Y. TIMES, November 9, 1999, at A19; Gustav Niebuhr, *Baptists Ardor for Evangelism Angers Some Jews and Hindus*, N.Y. TIMES, December 4, 1999, at A19.

476. Gustav Niebuhr, *Baptists Ardor for Evangelism Angers Some Jews and Hindus*, N.Y. TIMES, December 4, 1999, at A19.

477. *Id.*

478. *Id.*

479. Gustav Niebuhr, *Baptists' Evangelism Concerns Jews*, N.Y. TIMES, September 25, 1999, at A8.

480. *Id.*

and the more facetious boast of the Sisters of Perpetual Indulgence to be nuns.) Patterson added: "One group of Jews insists that I must desist from praying that my Jewish friends will understand that Jesus loves them, died for them and is the fulfillment of messianic prophecy. Another Jew [Jesus] has told me that I must do these very things out of the love and gratitude of my heart."⁴⁸¹

All four Jewish denominations and an umbrella organization of 60 Jewish groups complained to the SBC about messianic Jewish converts to Christianity who worshipped Jesus but claimed to remain Jews and continued to use prayer shawls and skullcaps.⁴⁸² The president of the Yeshiva University theological seminary declared: "The effort smacks of imperialism, which should have no place in the world of religious discourse."⁴⁸³ The SBC president called charges of deception "false and reckless" and invoked "absolute religious liberty."⁴⁸⁴ Contemporaneously, Hindus demonstrated at a Southern Baptist church in Texas to protest a booklet, published at Diwali (the most important Hindu holiday), praying for the conversion of Hindus who were "lost in the hopeless darkness" of their faith.⁴⁸⁵ The Secretary-Treasurer of the Council of Hindu Temples was "deeply saddened" by the mockery. "Hindus are proud of what they are and they are also proud of their form of worship."⁴⁸⁶

C. *The Necessity for Choice*

Liberalism responds to the harms of speech by retreating into process and aspiring to neutrality. But competition for respect is a zero-sum game; partisanship is unavoidable. It is impossible to honor both believers and skeptics, Jews and anti-Semites, minorities and racists, women and misogynists, gays and lesbians and homophobes. When the Russian Duma stood for a moment of silence on Holocaust

481. *Id.*

482. See Gustav Niebuhr, *Coalition of Jews Protests Southern Baptist Conversion Tactics*, N.Y. TIMES, November 9, 1999, at A19.

483. *Id.*

484. *Id.*

485. *Id.*

486. *Id.*

Remembrance Day, Vladimir V. Zhirinovsky, head of Russia's right-wing Liberal Democratic Party, refused to join his colleagues, complaining there were "too many holidays."⁴⁸⁷ Evolution and creationism cannot both be true. Nearly three-quarters of a century after the notorious Scopes trial, the Kansas Board of Education voted to eliminate evolution from state-wide tests and delete most curricular references not only to evolution but also to the big bang theory of the universe.⁴⁸⁸ After a committee of 27 scientists and professors had developed the curriculum, a conservative school board member (a veterinarian and former Republican Party state chairman) managed to strike any discussion of the origin of species (140 years after Darwin's book). He failed, however, to secure inclusion of the assertion that "the design and complexity of the design of the cosmos requires an intelligent designer."⁴⁸⁹ Another board member, a farmer, said "There's a liberal agenda to build up or glorify evolution in our schools."⁴⁹⁰ The presidents of the state's six public universities had warned that the move "will set Kansas back a century."⁴⁹¹ But the *Topeka Capital-Journal* editorialized: "creationism is as good a hypothesis as any for how the universe began."⁴⁹² Creationists have attained lesser victories in Alabama, New Mexico and Nebraska; and though they lost at the state level in Texas, Ohio, Washington, New Hampshire, and Tennessee, they have won in numerous local school districts. In 1982, however, courts struck down laws in Arkansas and

487. John Daniszewski, *Racist Killing Spurs Putin to Urge His Cabinet to Act*, L.A. TIMES, April 24, 2001, at A5. On Holocaust denial as status politics, see MICHAEL SHERMER & ALEX GROBMAN, *DENYING HISTORY: WHO SAYS THE HOLOCAUST NEVER HAPPENED AND WHY DO THEY SAY IT?* (2000).

488. See Pam Belluck, *Board For Kansas Deletes Evolution From Curriculum*, N.Y. TIMES, August 12, 1999, at A1; *Kansas School Board Says Evolution Is Not Science*, L.A. TIMES, August 12, 1999, at A25.

489. Pam Belluck, *Board For Kansas Deletes Evolution From Curriculum*, N.Y. TIMES, August 12, 1999, at A1.

490. *Kansas School Board Says Evolution Is Not Science*, L.A. TIMES, August 12, 1999, at A25.

491. *Id.*

492. Pam Belluck, *Board For Kansas Deletes Evolution From Curriculum*, N.Y. TIMES, August 12, 1999, at A1.

Louisiana requiring schools to teach creationism as well as evolution.⁴⁹³

Homosexuality and heterosexuality are either morally equal or unequal. A man who believed homosexuality was a sin successfully challenged the ban against harassment based on sexual orientation promulgated by the State College (Pennsylvania) Area School District.⁴⁹⁴ When the conservative Claremont Institute and the National Association for Research and Therapy of Homosexuality, which insist it is a curable illness, organized a conference in Los Angeles, protests persuaded the Beverly Hilton to cancel their reservation.⁴⁹⁵ All 15 members of the City Council signed a resolution denouncing the conference. The executive director of the Los Angeles Human Relations Commission noted that the conference was to be held "one week after Matthew Shepard was buried" (a gay man murdered by homophobes).⁴⁹⁶ When the Regal Biltmore accepted the conference, California Assembly Speaker Pro Tem Sheila Kuehl (D-Santa Monica) (the first openly lesbian member) sought to persuade the Democratic Party to boycott the hotel in its post-election victory parties.⁴⁹⁷

Even when not proselytizing, religious partisans seek respect at the expense of their adversaries. Kevin Smith, author-director of "Clerks" and "Chasing Amy," insisted his film "Dogma" was "from first to last always intended as a love letter to both faith and God almighty."⁴⁹⁸ And his studio, Miramax, described it as "a satire from a film maker who himself is a practicing Catholic with a solid foundation of love and reverence to faith."⁴⁹⁹ But Disney, which owns Miramax, was sufficiently fearful of Catholic anger that it forced the

493. *See id.*

494. Kate Zernike, *Free-Speech Ruling Voids School District's Harassment Policy*, N.Y. TIMES, February 16, 2001 at A10.

495. Caitlin Liu, *Conservatives' Meeting on Homosexuality Assailed*, L.A. TIMES, October 24, 1998, at B1.

496. *Id.*

497. *Id.*

498. Bernard Weinraub, *Disney and Miramax Collide Over Church Issues in New Film*, N.Y. TIMES, April 8, 1999, at C4.

499. *Id.*

studio to sell the film to its co-chairmen Bob and Harvey Weinstein, who sought another distributor.⁵⁰⁰

Three weeks after the *New York Post* headlined a story “Gay Jesus May Star on B’way,” claiming that Terence McNally’s “Corpus Christi” featured a Jesus-like character “who has sex with his apostles,” the Manhattan Theater Club (MTC) canceled the production.⁵⁰¹ It called the play a “unique view of the greatest story ever told,” in which the audience meet “a young gay man named Joshua on his spiritual journey and get to know the 12 disciples who choose to follow him...”⁵⁰² Characterizing the decision as “an issue of safety, not censorship,” the theater acted after receiving a telephone threat: “Again, message is for Jew guilty homosexual Terrence McNally. Because of you we will exterminate every member of the theater and burn the place to the ground. This is a message from National Security Movement of America. Death to the Jews worldwide.”⁵⁰³

William Donohue, president of the Catholic League for Religious and Civil Rights, independently had asked McNally to warrant that the play would not offend Christians and would “protect the celibacy” of Jesus.⁵⁰⁴ The playwright ignored the plea, explaining “that’s the end of art right there.”⁵⁰⁵ (Indeed, the draft of the play concluded: “If we have offended, so be it. He belongs to us as well as you”—just what Jews for Jesus say about skullcaps and Reform Jews about the Western Wall.) Donohue then wrote 144 federal, state and local officials, calling for “an immediate halt on public monies” to the

500. *Id.*

501. See Ralph Blumenthal, *Canceled Play May Be Staged*, N.Y. TIMES, May 28, 1998, at E1; Ralph Blumenthal, *New McNally Play Canceled After Protests and Threats*, N.Y. TIMES, May 23, 1998, at B9; Ralph Blumenthal, *Discord Mounts After Play Is Canceled*, N.Y. TIMES, May 27, 1998, at E1; Peter Applebome, *In Reversal, Theater Vows to Stage Play That Drew Threats*, N.Y. TIMES, May 29, 1998, at A1.

502. Peter Applebome, *In Reversal, Theater Vows to Stage Play That Drew Threats*, N.Y. TIMES, May 29, 1998, at A1.

503. *Id.*

504. Ralph Blumenthal, *Canceled Play May Be Staged*, N.Y. TIMES, May 28, 1998, at E1.

505. *Id.*

theater.⁵⁰⁶ (About \$250,000 of its \$10-12 million annual budget came from public funds, none for this production.) “If it is wrong to publicly fund a reverential tribute to Christianity on Broadway, then it should be equally wrong to fund an attack on it.”⁵⁰⁷ Although Donohue disavowed threats and violence, he was “delighted” by the cancellation. “While McNally has every legal right to insult Christians, he has no moral right to do so. ... if some other production company decides to pick it up, it had better not be thin-skinned: we’ll wage a war that no one will forget.”⁵⁰⁸ Trans World Airlines rescinded its \$25,000 grant to the MTC production.

Noted South African playwright Athol Fugard (whose work had been banned in his own country) then withdrew “The Captain’s Tiger” from the MTC “as the strongest possible protest.”⁵⁰⁹ Tony Kushner, author of “Angels in America,” called the cancellation “appalling” and decried the “medieval notion that the arts in the U.S. need to follow the Roman Catholic theological line.”⁵¹⁰ Playwright Craig Lucas, author of “Reckless,” called it “a very, very bad piece of news that in New York City an artist could be silenced with bomb threats and threats on his life. ... no one has a monopoly on views of Jesus.”⁵¹¹ Other prominent playwrights, including Wendy Wasserstein, Lanford Wilson, Edward Albee, Marsha Norman, Arthur Laurents, David Henry Hwang, and Larry Kramer, denounced the decision as “a capitulation to right-wing extremists and religious zealots.”⁵¹² The Williamstown Theater Festival and several other venues offered to stage the play.

Within a week MTC reversed itself, explaining: “We were outraged by a subsequent outcry which accused the Manhattan Theater Club of censorship. In our 25-year history, we have never censored a

506. Ralph Blumenthal, *New McNally Play Canceled After Protests and Threats*, N.Y. TIMES, May 23, 1998, at B9.

507. *Id.*

508. *Id.*

509. Ralph Blumenthal, *Discord Mounts After Play Is Canceled*, N.Y. TIMES, May 27, 1998, at E1.

510. *Id.*

511. *Id.*

512. Ralph Blumenthal, *Canceled Play May Be Staged*, N.Y. TIMES, May 28, 1998, at E1.

play or turned down a play because of content.”⁵¹³ Fugard said he “would be absolutely delighted to bring back” his play.⁵¹⁴ Thirty leading playwrights called the decision “brave and honorable.”⁵¹⁵ The Catholic League maintained that the play was a form of bigotry, which would never be tolerated against blacks or Jews. “If Jesus is portrayed as a sexual hedonist having promiscuous sex with his apostles, there's no context in which that's appropriate. If there were reports of a play that demeaned Martin Luther King or glorified Adolph Hitler it would be appropriate to oppose it as soon as news reached the public. We're dealing with the same kind of issue.”⁵¹⁶ (Of course, McNally did not think he was “demeaning” Jesus by portraying him as gay. And Catholics in New York in the 1990s are hardly as vulnerable as African Americans in the South in the 1960s or Jews in Nazi Germany.) Tony Kushner replied by calling it “absolutely essential that everyone in New York gets behind the theater club.”⁵¹⁷

David Horowitz, conservative convert from radicalism, placed advertisements in several college newspapers during Black History Month advancing “Ten Reasons Why Reparations for Slavery is [sic] a Bad Idea—and Racist, Too.”⁵¹⁸ (Of the 73 papers approached, 49 rejected the ad.) He declared, with deliberate provocation, that “only a tiny minority of white Americans ever owned slaves” and accused

513. Peter Applebome, *In Reversal, Theater Vows to Stage Play That Drew Threats*, N.Y. TIMES, May 29, 1998, at A1.

514. *Id.*

515. *Id.*

516. *Id.*

517. *Id.*

518. See Maria L. La Ganga, *College Paper Apologizes for Anti-Reparations Ad*, L.A. TIMES, March 2, 2001, at A3; Diana Jean Schemo, *Ad Intended to Stir Up Campuses More Than Succeeds in Its Mission*, N.Y. TIMES, March 21, 2001, at A1; Rebecca Trounson, *Agitation by Ad*, L.A. TIMES, April 10, 2001, at B1; Fred Dickey, *An Uncivil Discourse*, L.A. TIMES MAGAZINE, May 6, 2001, at 22.; *Complete Text of Faculty Letter to President Blumstein*, BROWN DAILY HERALD, April 4, 2001, at <http://www.browndailyherald.com/stories.cfm?ID=4468>; Nora Vincent, *No Payback: Campus Speech and the David Horowitz Ad*, THE VILLAGE VOICE, April 6, 2001, at <http://www.villagevoice.com/issues/0115/vincent.shtml>; David Horowitz, *Why I Won't Pay the Daily Princetonian*, April 16, 2001, at <http://www.salon.com/news/col/horo/2001/04/16/princetonian/index/index.htm> (last visited August 16, 2001).

“Black Africans and Arabs” of “enslaving the ancestors of African Americans.”⁵¹⁹ Students marched on the *Daily Californian* offices tearing up the issue and crying. An African American woman called it “disrespectful to the minority population at this university.”⁵²⁰ The Berkeley newspaper printed a brief front-page “formal apology,” regretting that “the ad allowed the Daily Cal to become an inadvertent vehicle for bigotry,” and a longer account by editor Daniel Hernandez.⁵²¹ But protesters called this inadequate, accused the newspaper of supporting racism, and demanded that the entire front page be devoted to apologizing. Hernandez promised to take a stronger line in the future on “what is tasteful, appropriate, bigoted or detrimental.”⁵²² On the other side, more than 1,000 e-mails accused the paper of capitulating to student pressure; many were hate mail directed at the editor. At the University of California Davis, the editor of the *California Aggie* called the ad “an embarrassment.”⁵²³

Students stole nearly the entire press run of the *Brown Daily Herald* and demanded that the paper donate the \$725 paid for the advertisement to the Third World Student coalition and give them free advertising space to refute Horowitz. Their leader accused the paper of having “profited from the deliberate distortion of history.”⁵²⁴ Another could not “sit down while blatant lies are being spread about us or our brothers and sisters who’ve watched their history be erased over and over.”⁵²⁵ Twenty-seven faculty members asked the president to “condemn the advertisement as a forum of harassment.”⁵²⁶ They defended the students’ “symbolic protest” against both the ad and the

519. See Maria L. La Ganga, *College Paper Apologizes for Anti-Reparations Ad*, L.A. TIMES, March 2, 2001, at A3.

520. *Id.*

521. *Id.*

522. Daniel Hernandez, Letter From the Editor, *Holding Ourselves Accountable*, THE DAILY CALIFORNIAN, March 7, 2001, available at <http://www.dailycal.org/article.asp?id=4763>.

523. Maria L. La Ganga, *College Paper Apologizes for Anti-Reparations Ad*, L.A. TIMES, March 2, 2001, at A3.

524. Diana Jean Schemo, *Ad Intended to Stir Up Campuses More Than Succeeds in Its Mission*, N.Y. TIMES, March 21, 2001, at A1.

525. *Id.*

526. *Complete Text of Faculty Letter to President Blumstein*, BROWN DAILY HERALD, April 4, 2001, at <http://www.browndailyherald.com/stories.cfm?ID=4468>.

paper's refusal to provide free speech "for a response to the ad's racist and assaultive statements."⁵²⁷ The BDH website reproduced anonymous attacks on "'Third World' ingrates" and "crybabies" who were "humiliating our school, and diminishing the value of our diplomas."⁵²⁸ The faculty warned that these events "have emboldened a group of students, who are now enagaging in bullying and threatening behavior directed against both faculty, staff and students of color, and against white faculty who have registered their opposition to the racist Horowitz ad."⁵²⁹ University of Wisconsin students demanded the resignation of the *Badger Herald* editor, who responded with a *Wall Street Journal* column defending Horowitz's right to buy the ad. Horowitz called the protesters "campus fascists" but admitted that he expected "some leftists would lift them from the boxes."⁵³⁰ He was contemptuous of black students who said "this hurts our feelings." "Come on, an argument hurts your feelings? Fight back."⁵³¹ Newspapers have no legal or moral obligation to accept advertisements and have a moral obligation not to publish bad history. At the same time, universities have an obligation to teach the history of slavery and encourage ethical debate about reparations while protecting students and faculty from harassment.

D. Confronting the Dilemmas

Two recent controversies illustrate the complexity and intractability of struggles for respect. Truong Van Tran, who fled Vietnam by boat at 19, displayed a Ho Chi Minh photograph and a Vietnamese flag in his video rental and repair store in Westminster (known as "Little Saigon"), the center of the 200,000-strong Vietnamese-American community in Orange County, California.⁵³²

527. *Id.*

528. *Id.*

529. *Id.*

530. Diana Jean Schemo, *Ad Intended to Stir Up Campuses More Than Succeeds in Its Mission*, N.Y. TIMES, March 21, 2001, at A1.

531. *Id.*

532. See Tini Tran, *Protest Over Ho Chi Minh Poster Continues*, L.A. TIMES, January 20, 1999, at B3; Tini Tran & Harrison Sheppard, *Ho Chi Minh Picture Must Go, Judge Says*,

Convinced by recent visits to Vietnam that the regime was reforming, Tran wished to support normalizing trade. (It was unclear how flaunting communist emblems advanced that goal). He claimed to be honoring and emulating Martin Luther King, Jr. by exercising his civil rights on the eve of King's birthday (but he had initiated the display months earlier). When someone complained about the display to an employee, Tran faxed an anti-Communist group, challenging them "to come over and clear me out."⁵³³ (The obscurity of his motives was accentuated by his claim that Ong Tam, head of the Vo Vi meditation movement, boasting millions of adherents, had recognized Tran as enlightened, leading him to proclaim himself a god.)

Hundreds of Vietnamese demonstrated outside the shop for days, hanging Ho Chi Minh in effigy and displaying a coffin draped with the South Vietnamese flag and filled with photographs of Vietnamese soldiers killed in the war. "This is like putting up a picture of Hitler in the Jewish community," said one.⁵³⁴ Four days after the protests began, a judge ordered Tran to remove the symbols in response to a lawsuit by his landlord claiming they violated the lease and created a public nuisance. The 400 demonstrators cheered the news, singing South Vietnamese victory songs and doing a traditional dragon dance. One called this "a victory. We hope that any Communist sympathizers learned a lesson here and won't do this again."⁵³⁵ Another, who had demonstrated all four days, said: "my

L.A. TIMES, January 22, 1999, at B1; Don Terry, *Passions of Vietnam War Are Revived in Little Saigon*, N.Y. TIMES, February 11, 1999, at A20; Tini Tran, *Merchant Wins Free Speech Ruling*, L.A. TIMES, February 11, 1999, at B1; *Protest in Little Saigon*, L.A. TIMES, February 16, 1999, at B3; Don Terry, *Protesters Block Store Where Vietnamese Man Wants Poster Hung*, N.Y. TIMES, February 16, 1999, at A12; Tini Tran, *A Lightning Rod With a Stormy History*, L.A. TIMES, February 25, 1999, at A1; Nancy Wride & Harrison Sheppard, *Little Saigon Vigil Protests Vietnam Human Rights Violations*, L.A. TIMES, February 27, 1999, at B1; Don Lee & Tini Tran, *Little Saigon Rallies Unify Community*, L.A. TIMES, February 28, 1999, at B7; Robert A. Jones, *Searching for Tran*, L.A. TIMES, February 28, 1999, at B1; *Store Owner to Leave*, N.Y. TIMES, March 12, 1999, at A20.

533. Don Terry, *Passions of Vietnam War Are Revived in Little Saigon*, N.Y. TIMES, February 11, 1999, at A20.

534. Tini Tran, *Protest Over Ho Chi Minh Poster Continues*, L.A. TIMES, January 20, 1999, at B3.

535. Tini Tran & Harrison Sheppard, *Ho Chi Minh Picture Must Go, Judge Says*, L.A. TIMES, January 22, 1999, at B1.

throat hurts from yelling for freedom and human rights.”⁵³⁶ The landlord’s lawyer pronounced: “you can’t go into a community that harbors such strong emotional feelings with respect to the Communist government of Vietnam and parade a flag and just challenge people, which he essentially did, to come take it down.”⁵³⁷ The ACLU condemned the decision.

Three weeks later the judge rescinded her order. The ACLU, which now represented Tran, applauded this “ringing victory for free speech.”⁵³⁸ But when he restored the photo of Ho, Tran was reviled and fell to the ground after a protester wiped spit on his face (strong evidence that respect was the pivotal value). Demonstrators draped him with the South Vietnam flag and shouted “Down with Communism” and “I hope you die.”⁵³⁹ Tran’s landlord served him with a notice to quit. In subsequent confrontations with dozens of police (many in riot gear), several of the hundreds of protesters were arrested. Some said they would die before allowing the symbols to be displayed. Unable to protect Tran, the police persuaded him to stay away for a day. Over the next two weeks the number of protesters grew to 15,000, organized by more than 20 Vietnamese groups and five religious denominations. A huge South Vietnamese flag covered Tran’s entire storefront, obscuring the symbols. After the protesters stopped Tran from entering his store for several weeks he surrendered and accepted eviction.⁵⁴⁰

536. *Id.*

537. *Id.*

538. Don Terry, *Passions of Vietnam War Are Revived in Little Saigon*, N.Y. TIMES, February 11, 1999, at A20.

539. *Id.*

540. See *Protest in Little Saigon*, L.A. TIMES, February 16, 1999, at B3; Don Terry, *Protesters Block Store Where Vietnamese Man Wants Poster Hung*, N.Y. TIMES, February 16, 1999, at A12; Tini Tran, *A Lightning Rod With a Stormy History*, L.A. TIMES, February 25, 1999, at A1; Nancy Wride & Harrison Sheppard, *Little Saigon Vigil Protests Vietnam Human Rights Violations*, L.A. TIMES, February 27, 1999, at B1; Don Lee & Tini Tran, *Little Saigon Rallies Unify Community*, L.A. TIMES, February 28, 1999, at B7; Robert A. Jones, *Searching for Tran*, L.A. TIMES, February 28, 1999, at B1; *Store Owner to Leave*, N.Y. TIMES, March 12, 1999, at A20.

An Oakland exhibit of 35 lithographs of Ho by an American artist drew more than 1,500 Vietnamese American protesters to the opening; a month later a man broke into the

The second story is better known. In September 1999 the Brooklyn Museum of Art opened an exhibit provocatively entitled "Sensation: Young British Artists from the Saatchi Collection."⁵⁴¹ Reacting to the catalogue (without seeing the exhibit), Mayor Rudolph W. Giuliani called it "sick stuff" and declared: "You don't have a right to government subsidy for desecrating someone else's religion."⁵⁴² (The city contributes \$7 million to the museum's \$23 million operating budget and had promised \$20 million for capital improvements.) Giuliani objected principally to a painting by the Nigerian-English artist Chris Ofili of the Holy Virgin Mary, in which one breast was molded of elephant dung and tiny cutouts of female genitalia from porn magazines decorated the background. The exhibit had elicited both raves and criticism at the Royal Academy in London two years earlier, attracting record-breaking crowds there and in Hamburg. (British protesters had thrown ink and eggs at a portrait of Myra Hindley, convicted of the 1960s "moor murders" of children.)

Although Brooklyn Museum Director Arnold L. Lehman insisted "it is part of a museum's job to support the right of artists to express themselves freely," he clearly hoped to create the "sensation" of his title and justify the exhibit's \$1 million cost (the highest ever, though Charles Saatchi contributed \$160,000—provoking another

gallery with an ax, apparently intending to vandalize it. *Man Flees After Breaking Into Ho Chi Minh Portrait Display*, L.A. TIMES, April 14, 2000, at A41.

541. See generally Don Barry & Carol Vogel, *Giuliani Vows To Cut Subsidy Over "Sick" Art*, N.Y. TIMES, September 23, 1999, at A1; Abby Goodnough, *Mayor Threatens to Evict Museum Over Exhibit He Dislikes*, N.Y. TIMES, September 24, 1999, at B6; Margaret O'Brien Steinfelds, *Artists Have Rights and So Do Taxpayers*, N.Y. TIMES, September 25, 1999, at A27; Elizabeth Jensen, *Patrons Drawn to Brooklyn "Sensation"*, L.A. TIMES, October 2, 1999, at A4; Elisabeth Bumiller, *Giuliani Says He'd Defend Other Faiths Against Offensive Art*, N.Y. TIMES, October 5, 1999, at B8; Barbara Stewart, *Some Arts Groups Silent on Museum Dispute*, N.Y. TIMES, October 11, 1999, at E3; Ronald Smothers, *Newark Archbishop Joins Brooklyn Art Dispute*, N.Y. TIMES, October 16, 1999, at B5; Elisabeth Bumiller, *For Giuliani, Making Most of Artful War With Elite*, N.Y. TIMES, October 16, 1999, at B1; Robert D. McFadden, *Disputed Madonna Painting In Brooklyn Show Is Defaced*, N.Y. TIMES, December 17, 1999, at A1; David Barstow, *"Sensation" Closes as It Opened, to Cheers and Criticism*, N.Y. TIMES, January 10, 2000, at B3; Alan Feuer, *Giuliani Dropping His Bitter Battle With Art Museum*, N.Y. TIMES, March 28, 2000, at A1.

542. Don Barry & Carol Vogel, *Giuliani Vows To Cut Subsidy Ovr "Sick" Art*, N.Y. TIMES, September 23, 1999, at A1.

controversy about whether he was using the exhibit to inflate his collection's value).⁵⁴³ Damien Hirst's dismembered carcasses succeeded in outraging People for the Ethical Treatment of Animals, who called him a "shock jock" (though the artist claimed to use animals who had died for other reasons). The museum required parents to accompany children under 17, warning facetiously: "The contents of this exhibition may cause shock, vomiting, confusion, panic, euphoria and anxiety. If you suffer from high blood pressure, a nervous disorder or palpitations, you should consult your doctor."⁵⁴⁴

Ofilii, a Roman Catholic, sought to explain: "As an altar boy I was confused by the idea of a holy Virgin Mary giving birth to a young boy. Now when I go to the National Gallery and see paintings of the Virgin Mary, see how sexually charged they are. Mine is simply a hip-hop version."⁵⁴⁵ But William A. Donohue, president of the Catholic League for Religious and Civil Rights, was unconvinced. "The whole city should picket the show. This exhibition is designed to shock, but instead it induces revulsion."⁵⁴⁶ The director of the Association of Art Museum Directors was "appalled" by this response. "We've been through this war before, not only with Mapplethorpe but with Serrano and others, and we've won. It just doesn't play in the political arena."⁵⁴⁷

She was overconfident. Giuliani threatened to evict the museum from its city-owned building (terminating a 106-year lease) and even take over the board of trustees. The mayor offered the clichéd dismissal of contemporary art: "If I can do it, it's not art, because I'm not much of an artist. And I could figure out how to put this together. You know, if you want to throw dung at something, I could figure out how to do that."⁵⁴⁸ (Many New Yorkers consider him a past master.) Bishop Thomas V. Daily of the Brooklyn Diocese urged him to cut off city funds. The Archbishop of Newark called the painting "dangerously close to the mentality that produces hate

543. *Id.*

544. *Id.*

545. *Id.*

546. *Id.*

547. *Id.*

548. Abby Goodnough, *Mayor Threatens to Evict Museum Over Exhibit He Dislikes*, N.Y. TIMES, September 24, 1999, at B6.

crimes” and accused the museum of “colossal insensitivity.”⁵⁴⁹ The editor of the Catholic magazine *Commonweal* said “elephant dung smeared on a church, synagogue or mosque would get the perpetrator arrested.”⁵⁵⁰ (Not quite the same thing.)

At the exhibit’s opening the museum made visitors walk through metal detectors and distributed fliers quoting the First Amendment.⁵⁵¹ The New York Civil Liberties Union held a rally, and Susan Sarandon and Wendy Wasserstein defended free speech. A poll by the New York *Daily News* and cable news channel New York 1 showed that residents supported the exhibit 2:1. But Giuliani called it “pedophiles on parade. I believe that the use of public funds to have a portrait of a pedophile glorified is disgusting.”⁵⁵² The museum responded by suing Giuliani for threatening its constitutional rights. The mayor retorted by cutting off city funds and suing to terminate the lease. He compared Ofili’s painting to desecration of a Mogen David or dung flung at an image of Martin Luther King. George W. Bush, candidate for the Republican presidential nomination, and New York Governor George E. Pataki both declared that public money should not be used to denigrate religion. House and Senate Republicans passed non-binding resolutions calling for elimination of federal funds to the museum. But a U.S. District Judge sided with the museum.

Although other museums initially were silent, 22 of the 33 members of the city’s Cultural Institutions Group denounced Giuliani’s actions as a “dangerous precedent,” which could inflict “lasting damage.”⁵⁵³ Still, there were notable abstentions (including Carnegie Hall and Lincoln Center, both heavily dependent on city funds); and the Holocaust Museum and the Museum of the City of New York backed Giuliani. The Mayor charged the “alleged intellectual elite” with “monumental ... intellectual dishonesty” in

549. Ronald Smothers, *Newark Archbishop Joins Brooklyn Art Dispute*, N.Y. TIMES, October 16, 1999, at B5.

550. Margaret O'Brien Steinfelds, *Artists Have Rights and So Do Taxpayers*, N.Y. TIMES, September 25, 1999, at A27

551. Elizabeth Jensen, *Patrons Drawn to Brooklyn “Sensation,”* L.A. TIMES, October 2, 1999, at A4.

552. *Id.*

553. Barbara Stewart, *Some Arts Groups Silent on Museum Dispute*, N.Y. TIMES, October 11, 1999, at E3.

declaring that “in the name of art, people can put excrement on walls.”⁵⁵⁴ They were the real “barbarians.” He also accused Hillary Rodham Clinton, against whom he was then running for Senator, of having shown “hostility to America’s religious traditions.”⁵⁵⁵ An editor at the Manhattan Institute (one of the mayor’s favorite conservative think tanks) defined the intellectual elite as “the museum directors, *The New York Times*, the folks who work for the big newsweeklies and the big networks, the guys who have the pulpits at the big mainstream Protestant churches, the folks who work at the Ford Foundation, the people who take it for granted that Giuliani is being a total philistine.”⁵⁵⁶

During the exhibit’s third month 72-year-old Dennis Heiner vandalized Ofili’s painting, which he called blasphemous, by smearing much of it with white paint. His wife explained: “This painting is your mother, the painting of the Blessed Mother, the mother of Christ.”⁵⁵⁷ The museum was able to clean it without permanent damage. At the exhibit’s closing, Catholic protesters prayed, according to one to “send this picture back to hell whence it came.”⁵⁵⁸ A young artist retorted: “Art is freedom.” Another visitor, who had joined the institution on opening day, added: “part of that was I felt like, ‘Hey, that’s my museum, Mayor, take your hands off of it.’”⁵⁵⁹ The museum estimated it had attracted 180,000, making it by far the most successful contemporary art exhibit in its history. Two months after it closed, both sides dropped their lawsuits. The chairman of the museum’s board of trustees declared that “the events of the past six months have only made our institution stronger and more dedicated to our mission.”⁵⁶⁰ The city’s corporation counsel retorted that “part of the

554. Elisabeth Bumiller, *For Giuliani, Making Most of Artful War With Elite*, N.Y. TIMES, October 16, 1999, at B1.

555. *See id.*

556. *Id.*

557. Robert D. McFadden, *Disputed Madonna Painting In Brooklyn Show Is Defaced*, N.Y. TIMES, December 17, 1999, at A1.

558. David Barstow, “*Sensation*” *Closes as It Opened, to Cheers and Criticism*, N.Y. TIMES, January 10, 2000, at B3.

559. *Id.*

560. Alan Feuer, *Giuliani Dropping His Bitter Battle With Art Museum*, N.Y. TIMES, March 28, 2000, at A1.

exhibit was obviously religion-bashing” and insisted it is not “a victory for anybody. ... It is not a question of anybody backing down.”⁵⁶¹ Unfortunately, once face has been implicated it rarely is possible to save that of both adversaries.

A year later, however, Giuliani again attacked the museum for exhibiting the “disgusting,” “outrageous,” and “anti-Catholic” “Yo Mama’s Last Supper” by Renée Cox, a color photograph of the black woman artist, nude, posing as Christ with the (clothed) disciples.⁵⁶² The mayor vowed to create a “decency standards” commission for museums receiving City money, composed of “basically decent people.”⁵⁶³ Bronx borough president Fernando Ferrer, running to succeed Giuliani, said “that sounds like Berlin in 1939.”⁵⁶⁴ The museum director insisted that “throughout history, the artist’s responsibility has been to make us think.”⁵⁶⁵ Acknowledging that the museum showed such works “to get more attention,” Giuliani nevertheless declared that “if you allow people to continue to do it and not react to it, then it’s just going to get worse and worse and worse and worse ... If you want to desecrate religion in a disgusting way, if you want to promote racism, if you want to promote anti-Semitism, if you want to promote anti-Catholicism, then do it on your own money.”⁵⁶⁶ The Catholic League for Religious and Civil Rights denounced the work as “shock art.” In a debate with its president, William Donohue, Cox declared: “I have a right to interpret the Last Supper just as Leonardo da Vinci created the Last Supper with people who look like him.”⁵⁶⁷ She planned to send the Catholic League a

561. *Id.*

562. See Elisabeth Bumiller, *Affronted by Nude “Last Supper,” Giuliani Calls for Decency Panel*, N.Y. TIMES, February 16, 2001, at A1; Nichole M. Christian, *Amid Strong Debate, Mild Curiosity at Exhibition*, N.Y. TIMES, February 17, 2001, at B3; Monte Williams, *“Yo Mama” Artist Takes On Catholic Critic*, N.Y. TIMES, February 21, 2001, at B3.

563. Elisabeth Bumiller, *Affronted by Nude “Last Supper,” Giuliani Calls for Decency Panel*, N.Y. TIMES, February 16, 2001, at A1.

564. *Id.*

565. *Id.*

566. Nichole M. Christian, *Amid Strong Debate, Mild Curiosity at Exhibition*, N.Y. TIMES, February 17, 2001, at B3.

567. Monte Williams, *“Yo Mama” Artist Takes On Catholic Critic*, N.Y. TIMES, February 21, 2001, at B3.

“note at the end saying, ‘Thanks for all the free publicity.’”⁵⁶⁸ The Metropolitan Museum of Art warned that a decency panel would “erode the reputation of New York City as a global capital of culture.”⁵⁶⁹ Giuliani’s nominees for the decency panel included members of his administration (one, Henry J. Stern, facing charges of discrimination), friendly clergy, the founder of the Guardian Angels, and the mayor’s divorce lawyer. It would create guidelines for art that could “defame, destroy or attack religions, ethnic groups.”⁵⁷⁰ The Association of Art Museums, representing 175 institutions, denounced the proposal.

Such confrontations were not limited to New York. A display by the Museum of International Folk Art in Santa Fe of Alma Lopez’s “Our Lady,” a computerized photo collage of Our Lady of Guadalupe wearing a modest two-piece bathing suit of roses, provoked demonstrations, a letter of concern by the local members of the state legislature, and a proposed vote by the museum board on whether to remove the work.⁵⁷¹ Ms. Lopez, who is Catholic, said she wanted to show Mary as a strong woman in contrast with the “young, passive” traditional image.⁵⁷² But Michael J. Sheehan, archbishop of Santa Fe, called the work “deeply insulting and disrespectful to the sentiments of many people. It’s even more insulting for her to say, ‘I’m Catholic, so it’s O.K.’”⁵⁷³

The Royal Academy of Arts in London, which had initiated the “Sensation” show, followed it with “Apocalypse: Beauty and Horror

568. *Id.*

569. Elisabeth Bumiller, *Affronted by Nude “Last Supper,” Giuliani Calls for Decency Panel*, N.Y. TIMES, February 16, 2001, at A1.

570. Elisabeth Bumiller, *Giuliani Makes Choices for a Decency Panel on Art*, N.Y. TIMES, March 31, 2001, at B1.

571. *See Museum Defends Its Virgin Mary in Bikini*, L.A. TIMES, March 28, 2001, at A10; Elisabeth Bumiller, *Giuliani Makes Choices for a Decency Panel on Art*, N.Y. TIMES, March 31, 2001, at B1; Michael Janofsky, *Uproar Over Virgin Mary in a Two-Piece Swimsuit*, N.Y. TIMES, March 31, 2001, at A11; John J. Goldman, *No Longer in Eye of Beholder*, N.Y. *Art in Eye of Storm*, L.A. TIMES, April 7, 2001, at A12; *Critics Slam Collage of Virgin in Bikini*, L.A. TIMES, April 17, 2001, at A14.

572. Michael Janofsky, *Uproar Over Virgin Mary in a Two-Piece Swimsuit*, N.Y. TIMES, March 31, 2001, at A11.

573. *Id.*

in Contemporary Art.”⁵⁷⁴ This included Maurizio Cattelan’s “The Ninth Hour,” a waxworks Pope John Paul II knocked to the ground by a meteor that had crashed through a skylight. The British press were humorously dismissive. But when it opened in Warsaw two members of Parliament, invoking legislative immunity, removed the rock and tried to stand the pontiff upright. They also demanded that the prime minister, minister of culture and minister of justice fire the gallery director, a “civil servant of Jewish origin.”⁵⁷⁵ Soon thereafter 90 members of Parliament concurred in order to restore “a stately face to Polish national culture.”⁵⁷⁶ The director, Anda Rottenberg, praised the work as “an egalitarian monument.”⁵⁷⁷ Polish President Aleksander Kwasniewski and two local priests called it an allegory of the pontiff’s heavenly burden. Rottenberg resigned after receiving hate mail telling the “Yiddish whore” to “go back to Israel.”⁵⁷⁸ (She was a Soviet-born Polish citizen.) The artist (presumably raised Catholic) was pleased that the controversy propelled photographs of the work into 100 newspapers and Webzines. “We live in a world of images, and I’m just an image selector.”⁵⁷⁹ He embraced the charge of being an ad man. “I want to step toward pure, straightforward communication. Who cares about art? Art is such a little world.”⁵⁸⁰

In each confrontation the speakers’ motives were ambiguous and mixed. Tran may have supported free trade but he also seemed to crave notoriety and martyrdom. Ofili was engaged in artistic creation informed by his Catholic upbringing; but he (like Lehman) was also determined to “épater les bourgeois,” attract attention, and make some money. Saatchi (who made his fortune in advertising) was both art patron and savvy investor. The museums sought visitors. Giuliani may have been outraged, but he also was playing to the Catholic and

574. Apollinaire Scherr, *A Fallen Pope Provokes a Sensation in Poland*, N.Y. TIMES, May 13, 2001, §2, at 25.

575. *Id.*

576. *Id.*

577. *Id.*

578. *Id.*

579. *Id.*

580. Apollinaire Scherr, *A Fallen Pope Provokes a Sensation in Poland*, N.Y. TIMES, May 13, 2001, §2, at 25.

upstate vote in his Senate race with Hillary Clinton, and other politicians were engaged in populist demagoguery.

Both principal conflicts quickly became legalized, with American judges properly protecting the speakers. Yet opponents of speech also mobilized legal rhetoric and arguments. Those seeking to suppress the communist Vietnamese symbols claimed to be “yelling for freedom and human rights.” The New York Mayor, New York and Texas Governors, and Members of Congress all denied any “right” to government subsidy for offensive art.

Efforts to silence expression perversely amplified it. When persuasion, symbolic retaliation, economic pressure, and law failed, people resorted to violence. Honor was profoundly implicated: protesters spitting at Tran, causing him to collapse physically; protesters willing to die for the cause; the centrality of scatological images; Catholics complaining of blasphemy in New York, New Mexico and Warsaw and raising the pope from the floor. The insulted likened their adversaries to the ultimate evils of Hitler and Nazism. Protesters decontextualized, falsely analogizing Ofili's painting to “elephant dung smeared on a church, synagogue, or mosque,” desecration of a Mogen David, “hate crimes.” They disregarded or distorted motive. The cultural elite smugly flaunted their connoisseurship (like the Venice Biennale director); Giuliani lashed out at intellectuals, the real barbarians.

Catholic artists felt entitled to address Catholic themes, but Catholic audiences granted them no such dispensation and may have been especially hurt by the betrayal of a co-religionist. Polish Catholics were openly anti-Semitic toward their Jewish museum director, New York Catholics more guarded toward theirs. But dominance and subordination were complex and contradictory. Vietnamese Americans are clearly a subordinated minority, but those among them urging an opening to Vietnam are an even smaller, more subordinated minority. The Brooklyn Museum, Charles Saatchi, and their supporters may all be elite (if in very different ways); but the Nigerian-English, Mexican-American and Catalan artists are not (yet). The Roman Catholic Church is hardly subordinated in New York, New Mexico, or Poland. There was no middle ground in these conflicts: respect had to be accorded either to anti-communists or Tran, artists or Catholics.

VIII. A LUTA CONTINUA

Although many deplore the cultural wars, denouncing “political correctness,” complaining of battle fatigue and calling for a truce, there is no light at the end of this tunnel, peace is not in sight. The subordinated rightly demand respect. The dominant are understandably reluctant to surrender their superiority. The struggle continues; this revolution is permanent.

That is one of the most powerful arguments for diversity: prejudice feeds on ignorance and increases with social distance. The dehumanizing tenets of religious dogma, xenophobic anger, racist ideology, patriarchal fear, heterosexual anxiety, and able-bodied phobia tend to dissolve through direct interaction with the “other.” Outsiders can exert pressure through criticism and ostracism of communities that persist in tolerating or even endorsing harmful speech. Governments can condition financial support on minimum standards of respect and fund programs designed to enhance dignity. Officials and celebrities can lead public opinion. And (except in the contemporary United States) governments can outlaw the most egregious harms of speech.

But any constraints on speech should vary inversely with community size. As the regulatory jurisdiction expands, the increasingly momentous consequences of silencing dissent should prompt caution—another argument against state prohibition. If pluralistic regulation frustrates the attainment of uniformity, it also allows people to hear many different messages and speak in fora that embrace divergent norms. Those dissatisfied with what they can say or hear in one community and unable to effect change can move to another. As the costs of mobility rise, so does the justification for regulation. But every society may need a Hyde Park speaker’s corner, where anything can be said but no one has to listen.⁵⁸¹

I have argued for extending equality from the realm of production to that of reproduction, from the material to the cultural, from wealth and power to respect. Public representations and

581. John Michael Roberts, *The Enigma of Free Speech: Speakers' Corner, The Geography of Governance and a Crisis of Rationality*, 9 *SOCIAL & LEGAL STUDIES* 271 (2000).

absences enhance the status of some at the expense of others. Daily interaction enacts relations of respect. Resistance to subordination takes the form of demands for visibility, attacks on stereotypes, and complaints about personal affronts. Once awakened, the aspiration to equality cannot easily be stifled or satisfied by compromises. If progress is fitful and costly, it is important to remember how many forms of status degradation, long taken for granted, have been delegitimated. I am heartened that so few could decipher the black "lawn jockey" vandalized with white graffiti on my book jacket. Racist, anti-Semitic and sexist slurs that routinely infected public discourse have been banished to the margins of deviance. Segregated "krewes" banned from Mardi Gras are eager to integrate.⁵⁸² Crude stereotyping by politicians or the mass media is sufficiently rare to startle and shock, provoking public outcry, which usually compels retraction and apology. Hegemonic religion is yielding to pluralistic tolerance.⁵⁸³ Public disapproval is gradually curtailing sexual harassment. The physically different, long forced to hide, beg, or sell themselves as "freaks," have gained greater access to public life.⁵⁸⁴ Even homophobia is in retreat. Collective campaigns to equalize respect build on these small victories in the unending struggle for a more humane society.

582. Jeffrey Gettleman, *Parade Has Passed by One Carnival Tradition: Race-Based Clubs*, L.A. TIMES, February 27, 2001, at A5.

583. See *THE POLITICS OF TOLERATION IN MODERN LIFE* (Susan Mendus ed., 2000).

584. In response to a billboard advertisement declaring that "when the aliens come, they will eat the fat ones first," San Francisco has joined Santa Cruz, the District of Columbia, and Michigan in prohibiting discrimination based on size. Tom Ammiano, the San Francisco County Supervisor who wrote the ordinance, deplored the fact that the overweight are stigmatized for "laziness, low intelligence, gluttony, bad health." The National Association to Advance Fat Acceptance created the Fat Activist Task Force to persuade Hallmark Cards to stop ridiculing fat people. Evelyn Nieves, *New San Francisco Ordinance Decrees That All Sizes Fit*, N.Y. TIMES, May 9, 2000, at A20.