2021

Race and the First Amendment: A Compendium of Resources

Solomon F. Worlds
Leonard M. Niehoff
University of Michigan Law School, lniehoff@umich.edu

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By Solomon Furious Worlds and Len Niehoff

This article provides summaries of law review articles and books that consider the complex relationship between racial justice and free speech. It seeks to assist law students, legal scholars, judges, and practitioners to think more deeply about the intersection between these critically important values. It describes scholarship that views these values as complementary, but also scholarship that views them as conflicting.

This article discusses a few pieces that reflect the traditional view—that the First Amendment has historically provided and continues to provide an essential tool in the pursuit of civil rights and in the advancement and empowerment of racial minorities. But it places much greater emphasis on recent works that take a substantially more critical view of First Amendment doctrine. This more recent scholarship argues that First Amendment doctrine rests on faulty assumptions about how the world actually works, that it amplifies the voices of those in power, and that racists have weaponized that doctrine against people of color in harmful and horrific ways.

We intentionally chose this balance. We worked from the assumption that the readers of this publication would already know (and probably subscribe to) the traditional view. We want to introduce new perspectives that challenge the orthodox paradigm and urge readers to ask themselves whether they really believe that First Amendment doctrine has gotten things right. It would be profoundly ironic if First Amendment lawyers, of all people, were unwilling to participate in some pointed and provocative competition in the marketplace of ideas.

These works certainly break no new ground insofar as they explore the connection between racial justice and free speech. As early as 1965, Harry Kalven wrote in his book *The Negro and the First Amendment* about how the civil rights movement had shaped First Amendment doctrine and how expressive liberty had promoted racial justice. But today's scholarship explores fresh territory nevertheless.

In their 2017 book *Free Speech on Campus*, Erwin Chemerinsky and Howard Gilman noted that polls of college-age students showed that they no longer have the reverence for the First Amendment that prior generations embraced. The authors offered several explanations for this trend. Among them was that these students had not witnessed the important role that free expression played during the civil rights movement of the 1960s. Three years later, this once-sound assessment is almost certainly wrong.

In 2020, the slayings of George Floyd, Breonna Taylor, and Tony McDade shifted the ground underneath many of us. Their killings prompted massive demonstrations in the United States and around the world. Many people were already engaged in anti-racist movements sparked by prior killings of unarmed Black people. Suddenly, however, the role of protests in the struggle for racial justice had immediate relevance again and was no longer the stuff of history books, documentaries, and the dusty memories of Baby Boomers.

At the same time, the murders of Floyd, Taylor, and McDade called foundational questions about our

social systems and structures. Over the summer following their deaths, cities saw months of continuous protests—some even had land seized by citizens frustrated by their government's inaction. Law students across the country demanded[1] that their schools facilitate more robust discussion of the ways in which our laws and legal system perpetuate white privilege and oppress people of color. In the view of these students, every component of our legal architecture must answer to this charge, and the First Amendment does not get a pass.

This article is divided into two parts. The first part, written primarily by Solomon Furious Worlds, looks at timely law review articles that have considered these issues. The second part, written primarily by Len Niehoff, looks at recent books that have done so. We end this unique project with a brief two-part personal afterword.

Law Review Articles

Articles Offering Traditional Defenses

Timothy Zick
The Dynamic Relationship between Freedom of Speech and Equality
12 Duke J. Const. Law & Pub. Pol'y 13 (2017)

Timothy Zick, professor of law at William & Mary Law School, succinctly explains the "dynamic," "bi-directional" relationship between the First Amendment's freedom of speech clause and the Fourteenth Amendment's Equal Protection Clause by examining the "race equality movement" of the 1950s and '60s and the "LGBT equality movement."[2] He argues that "free speech, along with rights of assembly and press, are powerful means of advocating for, and to some extent achieving, equal treatment under [the] law"[3] because earlier First Amendment court victories served as the precursor to later advancements in "substantive equality" and equal protections under the law.[4] Zick uses cases like *NAACP v. Alabama ex rel. Patterson*,[5] from the racial equality movement's mid-20th century wave,[6] and juxtaposes them to cases within the LGBT equality movement, like *Doe v. Reed*.[7] He also compares and contrasts the legal treatment of both movements,[8] and explores challenges each movement confronted.[9]

The article then examines the relationship in the other direction, exploring how the Equal Protection Clause affects the First Amendment. After discussing the First Amendment's strong "neutrality" principle, Zick contends that the "commitment to neutrality ultimately advanced equality, in part by helping to create a political process that was free from government bias."[10] Zick also explains that the neutrality principle is rooted in equality insofar as it attempts to foster the "central meaning" of the First Amendment, which is to allow for "'uninhibited, robust, and wide-open'"[11] debate by all voices on "public issues."[12]

Zick points out that the LGBT movement's focus on rights of association also connects equal protection doctrine with the First Amendment. And he notes that the LGBT equality movement "relied on" advancements made "during the civil rights era."[13] Zick concludes the article with an overview of intersections between the First and Fourteenth Amendments;[14] a discussion of differences between the two social movements;[15] and suggestions as to how the history of the "race equality" and "LGBT equality" movements may inform current efforts in the trans equality movement.[16]

Leonard M. Niehoff
Policing Hate Speech and Extremism: A Taxonomy of Arguments in Opposition
52 U. Mich. J. L. Reform 859 (2019)

Leonard Niehoff, professor from practice at the University of Michigan Law School and coauthor of this article, wrote *Policing Hate Speech and Extremism: A Taxonomy of Arguments in Opposition* to outline the barriers within traditional First Amendment doctrine to punishing hate speech and association. In the piece, he seeks to "highlight doctrinal problems, convey cautionary tales, and clarify matters so that we do not waste any more time doing things that do not work, that courts will not uphold, and that could lead to pernicious results."[17] The article then proceeds by discussing the link between the doctrines of free speech and association, describing three common categories of arguments against hate speech regulation, and, finally, considering whether it is wise to adopt anti-extremism measures. "Spoiler alert: [Niehoff] think[s] not."[18]

In linking the doctrines of free speech and association, Niehoff notes that "the Supreme Court inferred the right of free association from the right of free expression" through a string of cases, starting with *NAACP v. Alabama*.[19] The Court has therefore inextricably linked freedom of association, at least in this form, with freedom of speech.

Niehoff then turns to the three categories of arguments raised against legal restrictions on hate speech and extremist association, which he labels as definitional, operational, and conscientious. Definitional arguments focus on the vagueness and overbreadth problems that such restrictions often encounter. He argues that, under existing Supreme Court precedent, such laws tend to be "unworkably vague, leaving people to speculate whether the statute prohibits the behavior in question, and . . . overly broad, encompassing speech and association we want to protect along with that we want to proscribe."[20]

Operational arguments focus on the implementation stage of laws. Niehoff argues that at this stage, "we may discover that a law specifically targeting extremism turns out to be unnecessary." He further contends that when these laws are deployed, they may "end up harming the very populations they were intended to protect."[21]

Conscientious arguments, Niehoff argues, rest on the only right the Supreme Court has described as "absolute"—the freedom to "'believe.'"[22] He contends that hate speech or extremist association regulations can infringe on this absolute freedom. And he questions whether we want to adopt laws that infringe on the sanctity of the individual conscience.

Niehoff is sympathetic to the considerations that drive the desire to restrict hate and extremist speech. He begins his conclusion by acknowledging that "[t]olerance of hate speech and extremist association comes at a real and substantial cost" and that "[h]onorable impulses and commonsense intuitions tell us that we need to do something to address them and their consequences."[23] He concludes, however, by stressing that such efforts must account for the various doctrinal contours and arguments he discussed throughout this article. Niehoff warns that such regulation could become "another form of extremism, another tool of oppression, and another whipcord driving human hearts and minds toward orthodoxy and, finally, 'the unanimity of the graveyard.'"[24]

Articles Offering Critical Challenges

Justin Hansford
The First Amendment Freedom of Assembly as a Racial Project
127 Yale L.J. F. 685 (2018)

In this article, Justin Hansford, an associate professor at Howard University School of Law, argues that "the First Amendment is a racial project [that] results in predictable racialized outcomes that redistribute

resources along racial lines."[25] Hansford sets the tone of this article by detailing how he came to focus on assembly rights after being handcuffed and forced in the back seat of a police vehicle during a protest.[26] Hansford makes his argument by connecting America's past to America's present, revealing that conditions have not changed—only transformed.

Hansford discusses the history of Black people assembling in America, reminding the reader of who was originally included in the phrase "We the People" and the various slave codes that explicitly restricted the assemblage of Blacks.[27] Hansford continues by explaining that the First Amendment victories of Black people in the 1950s and '60s always occurred when the Supreme Court had an independent interest in granting the rights; he calls this the "theory of interest convergence."[28] In sum, he argues that the Court refused to recognize the rights of Blacks except where it had a separate agenda.

Using this theory, Hansford argues that the Court decided *Brown v. Board of Education* as it did in order to stymie anti-capitalist propaganda efforts in communist nations.[29] Hansford continues by pointing out that the Supreme Court had no such independent reason to support Black activists during sit-in protests in the mid to late 1960s, so it refused to extend First Amendment protections in those cases. He cites *Adderley v. Florida*,[30] where the Court upheld the convictions of more than 30 protesters under a Florida trespass law, as an example.

Pivoting to the present, Hansford "describes how law enforcement imposes its own will on protesters with little interference from the courts until after the fact."[31] Hansford notes that those protesting for racial justice are teargassed, arrested, and surveilled.[32] All of these actions, Hansford argues, produce a powerful chilling effect because they put the protester's life, liberty, and economic prospects at risk.[33] Hansford recounts a speech the attorney general gave—soon after a white man who was part of a Facebook group titled "Alt-Reich Nation" stabbed a Black student near the University of Maryland—praising white supremacist groups that engage in hate speech.[34] Then, he highlights the fact that those engaged in hate speech often receive taxpayer-funded protection,[35] while, at the same time, Black protesters and people protesting in support of racial equality receive no protection.[36] Hansford concludes with proposals for ways to better protect protest rights for those fighting racial injustice.[37]

Charlotte H. Taylor
Hate Speech and Government Speech
12 U. Pa. J. Const. L. 1115 (2010)

Dr. Charlotte Taylor—then law clerk to the Hon. Robert Katzmann on the U.S. Court of Appeals for the Second Circuit and currently a partner with Jones Day[38]—wrote "Hate Speech and Government Speech" to "explore the possibilities and limitations of using government speech to reduce the incidence of hate speech and so offer a way out of the impasse scholarly discussion has so far reached."[39]

Taylor's article has four sections. The first surveys the positions taken by those who subscribe to traditional views of First Amendment doctrine and those who are more critical of it with regard to hate speech, which Taylor labels "the free speech and anti-subordination camps," respectively.[40] The second section "lays out a typology of forms of government speech that are constitutionally permissible that might be used to deter or undermine the force of hate speech," and the third evaluates those forms of government speech.[41] The final section "briefly draws out some conclusions based upon this exploration."[42]

Section I, titled "The Impasse,"[43] details the main arguments of both First Amendment critics and traditionalists, along with the doctrinal response to those arguments. Taylor claims that the anti-

subordinationists believe that "the First Amendment, as currently understood, is an active impediment to achieving equality in the United States" and that "[h]ate speech causes harms that are a direct affront to equality norms" because, "[w]hen it targets an individual, that person is made to feel inferior and vulnerable on the basis of her membership in a group."[44] She explains that some in the anti-subordination camp base their arguments for regulating hate speech in the Thirteenth and Fourteenth Amendments.[45]

Next, Taylor outlines arguments of the free speech camp, who "take[] it as fundamental that free speech is 'indivisible'"—meaning that "regulators will not be able to draw lines cordoning off speech that expresses a particular viewpoint, however discredited and invidious, without opening the way for the suppression of any speech that legislators happen to disfavor."[46] Other arguments employed by the free speech camp include the difficulties associated with word reclamation tactics often used by marginalized groups (e.g., reclamation by many in the African-American community of the word "nigger") and the possibility of overzealous government censorship.[47] Taylor suggests that legislative attempts to regulate hate speech will have a very difficult time withstanding a constitutional challenge, given the Court's opinions in *R.A.V. v. City of St. Paul*[48] and *Virginia v. Black*.[49]

Government speech, according to Taylor, is a powerful tool that may "offer[] something to both the anti-subordination and the free speech camps."[50] Taylor outlines five types of "constitutionally permissible forms of government expression that could be used to intervene against hate speech": "1) precatory and hortatory speech by government officials and bodies, 2) commemorative expression, 3) public education, 4) government subsidies of private speech and selective control of expression in non-public fora, and 5) advisory and investigatory statements."[51]

After further describing each type of government speech,[52] Taylor addresses the anticipated concerns of the anti-subordination and free speech camps. She predicts the two primary complaints from the anti-subordination camp: First, "government speech is inadequate as a form of intervention." And second, these tactics will "promote backlash as perceived instances of the government favoring 'special interest' groups."[53]

Taylor addresses both concerns by creating hypothetical situations where government speech could have made a dramatic difference. For example, she submits, "Imagine the public reaction if President Bush had spoken out consistently against anti-gay hate speech, standing shoulder-to-shoulder with gay-rights activists and calling on citizens for toleration of same-sex relationships and gender non-conforming individuals."[54]

Taylor also cites historical instances when government speech worked to change behavior—for example, how "[Attorney General] Edwin Meese's Commission on Pornography [prompted] 7-Eleven stores and other retailers to pull adult magazines from their shelves."[55]

Turning to the free speech camp, Taylor argues that its members would likely argue that "any intentional manipulation of private speakers' expression by the government is suspect" and that "many of the proposed measures go far beyond benign admonition and amount to reprehensible, if technically doctrinally permissible, censorship."[56] Taylor responds that such manipulation is appropriate when "the Fourteenth Amendment value of equality" is pitted against First Amendment values, as is true with respect to hate speech.[57] Essentially, "when [there] is another constitutional value" in opposition, the "First Amendment concerns should not be allowed to dictate our conclusion."[58]

Taylor argues that "precatory government speech, commemorative speech, and education should all be used more extensively as means of intervening against hate speech."[59] She further contends that the

benefits of "the most apparently coercive forms of government speech—advisory and investigatory statements"—likely would not "outweigh the detriments" of such tactics.[60]

Petal Nevella Modeste
Race Hate Speech: The Pervasive Badge of Slavery That Mocks the Thirteenth Amendment
44 How. L.J. 311 (2001)

Petal Nevella Modeste, who currently serves as associate dean of student affairs administration at Columbia Law School, wrote "Race Hate Speech: The Pervasive Badge of Slavery That Mocks the Thirteenth Amendment" to "explore[] the protection granted to race hate speech under the First Amendment of the United States Constitution and how it affects the meaning and spirit of the Thirteenth Amendment."[61] Modeste maintains that "the only way to protect victims of race hate speech from its ill effects is to criminalize its dissemination altogether."[62] Her article "discuss[es] the phenomenon of race hate speech"; "examines the treatment of hate speech in international law and the jurisprudence of other countries as an indication of how the rest of the world views this phenomenon"; and "focuses on the First and Thirteenth Amendments to the U.S. Constitution" and the "unique commitment to protecting race hate speech, suggesting that the confusing nature of First Amendment jurisprudence has practically imprisoned lawmakers and jurists, who continue to ignore other portions of the Constitution."[63]

Modeste argues that "[t]he potency of race hate speech is in its ability to exclude, subordinate, discriminate, and create a second-class citizenship for entire groups of people."[64] In describing race hate speech, she contends it shares philosopher Jacques Ellul's four basic characteristics of propaganda: "(1) simultaneous manipulation of the individual and mass populations; (2) totality of reach; (3) power brokering, organization, continuity, and duration; and (4) orthopraxy, which is defined by Ellul as an action that leads directly to a goal, and which does not rely on logic or rational argument."[65] Like propaganda, race hate speech is so invasive that it "operate[s] on an individual at some unconscious level" and its effects on "the target group cannot be overstated"—all the more reason to regulate it.[66]

Next, Modeste examines international responses to race hate speech, starting with the third clause of Article One of the United Nations Charter, which "states that member nations vow to achieve international cooperation in solving international problems of economic, social and cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all, without distinction as to race, sex, language, or religion."[67] Though the United States has ratified various international agreements, it "refus[es] to accept obligations to restrict 'rights to freedom of speech, expression and association.'"[68]

To demonstrate the "contrast" between the United States and other common law nations with respect to hate speech regulation,[69] Modeste discusses a Canadian Supreme Court case that upheld legislation criminalizing hate speech. She concludes this section by pointing out, when it comes to regulating "hate speech, which perpetuate doctrines of racial supremacy," the United States is the only common law nation "unwilling to sacrifice its notion of free speech to protect individuals' human rights."[70] Modeste signals a common theme among First Amendment critics: the United States' free speech doctrine makes it a human rights outlier.

Modeste then provides an overview of First Amendment jurisprudence[71] and the history of the Thirteenth Amendment.[72] She argues that "[r]ace hate speech is certainly a 'badge of slavery'"[73] within the Thirteenth Amendment's proscriptions. And she contends that "Congress' responsibility to uphold its obligations under the Thirteenth Amendment [has been] sacrificed for the noble ideal of [pure free] speech."[74]

Modeste next addresses four common arguments raised against regulating speech—what she calls the "pressure valve," the "minorities' best friend," the "more speech," and the "reverse enforcement" arguments. She contends that such "arguments against regulating race hate speech fall away when the speech is characterized as a badge of slavery."[75]

She concludes by emphasizing that "[t]olerance of hate speech is not tolerance borne by the community at large, it is a psychic tax imposed on those least able to pay"—namely, African Americans.[76] According to Modeste, ending protections for race hate speech is necessary to "make America entirely free."[77]

Zahra N. Mian
Note, "Black Identity Extremist" or Black Dissident?: How United States v. Daniels *Illustrates FBI Criminalization of Black Dissent of Law Enforcement, from COINTELPRO to Black Lives Matter*
21 Rutgers Race & L. Rev. 53 (2020)

Zahra N. Mian, a recent graduate of Rutgers Law School,[78] wrote this note to "examine how the [Black Identity Extremist or] BIE assessment criminalizes African-American dissent."[79] The BIE classification was created by the Federal Bureau of Investigation (FBI) to describe individuals it claimed to "possess a propensity for violence towards law enforcement," which, Mian notes, is similar to the FBI Counter Intelligence Program, or COINTELPRO. "COINTELPRO was a series of covert intelligence operations conducted by the FBI from 1956–1971" and were intended to "[eradicate] all progressive political activity in American society."[80]

In the first section of this note, Mian "explore[s] the targeting and surveillance of Black civil rights activists by the FBI from the COINTELPRO era of the 1960s through contemporary surveillance of Black Lives Matter."[81] Next, she "analyzes the accuracy of the BIE assessment and the impact of discriminatory FBI tactics on Black Lives Matter, and dissects the merits of the criminal prosecution of Christopher Daniels, commonly referred to as the first 'Black Identity Extremist' prosecuted.'"[82] Mian then "examines the disparate treatment of Black civil rights activists and White Supremacists by the FBI" and "offers a racially neutral framework for FBI surveillance of domestic terror threats going forward."[83]

The FBI's COINTELPRO program's purpose was "to 'expose, disrupt, misdirect, discredit, or otherwise neutralize the activities of [B]lack [N]ationalist, hate-type organizations and groupings, their leadership, spokesmen, membership, and supporters, and to counter their propensity for violence and civil disorder,'" which included individuals like Martin Luther King Jr. and groups like the Black Panther Party.[84] Mian writes that "COINTELPRO operations targeting alleged 'Black Nationalist' groups employed a variety of techniques and methods in order to neutralize anyone they deemed a threat to the established order"; in fact, "FBI documents indicate Hoover had no qualms about utilizing violence to neutralize targets."[85]

Today's Black activists, she argues, face a "post-Patriot Act expansion of domestic surveillance," through which "[p]rivate security firms work[] with the government" to "conduct surveillance of activists through the use of aerial technology, social media monitoring, [] direct infiltration" and "counterinformation campaigns to influence public opinion of activists."[86] She notes that documents "depict how the FBI manipulates the actions of lone wolf offenders to impute a presumption of violence onto other Black activists," which promotes the "unfettered surveillance of these activists"—an approach the agency has taken "since the early twentieth century."[87]

The BIE assessment used by the FBI feeds the legitimate concerns in the African-American community regarding police brutality and the murder of unarmed Black men by law enforcement agents.[88] Mian argues that by interpreting genuine critiques of law enforcement tactics as fuel for extremism, the FBI is

able to justify "unconstrained surveillance of Black activists without any underlying factual support for doing so, under the guise of being proactive in the investigation of BIE violence."[89]

Mian argues that if the FBI wants to fairly investigate threats to law enforcement in a race-neutral and fair manner, then the FBI must ensure that domestic terrorism investigations rest on evidence of criminal wrongdoing and not on acts of civil disobedience in the context of protest and demonstration.[90] She contends that, at present, "FBI assessments allow agents to begin investigating targets without 'probable cause' or 'reasonable suspicion.'"[91] She also notes that the FBI "hesitate[s] to bring federal charges against White Supremacists," sometimes only doing so after "increase[ed] social pressure force[s] them to act."[92] She concludes by arguing that "discontinuing the problematic BIE assessment and pursuing domestic terror threats through a racially-neutral framework, will allow the FBI to eradicate problematic surveillance techniques" and reduce the amount of state-sanctioned danger many contemporary activists face.[93]

Books

Book Offering Traditional Defenses

Timothy C. Shiell
African Americans and the First Amendment (2019)

Timothy Shiell is professor of philosophy at the University of Wisconsin–Stout. As a reader would expect, Shiell has a keen interest in the complex conceptual problems presented by the intersections of free expression and race. But this book does not consist of a philosopher's abstract ruminations; to the contrary, it mainly explores these issues through the vehicles of legal doctrine and case law.

Shiell's central thesis is that "First Amendment values, particularly freedom of expression, have been—and continue to be—essential allies in the struggle for racial equality and justice."[94] He grants that liberty and equality do come into conflict in some cases. But, he argues, the underlying values that each of these ideas serves are not in conflict—and the misconception that they are leads to dangerously misguided conclusions.

Shiell develops his argument over four chapters. In the first, he turns to the period from the colonial era to 1930, which he describes as one of "American apartheid." Of course, the robust body of First Amendment doctrine that we know today did not exist at that time. Nevertheless, he contends, the advancement of equal rights for Blacks was inextricably intertwined with speech. The "defiant exercise of liberty (First Amendment values) against the status quo inequality played a critical role in the racial progress that was achieved."[95] And, in turn, restrictions on liberty buttressed the prevailing inequality.[96]

The second chapter takes a close look at *Herndon v. Lowry*.[97] In that case, Herndon, a Black communist, was arrested in Atlanta, Georgia, and charged under state law with inciting insurrection. His cause gained widespread support, and he ultimately prevailed in a decision that marked the first time the Supreme Court protected a Black man's dissenting speech.[98] Shiell sees in the *Herndon* case "a critical first step in the civil rights movement, a milestone in the debate over race-neutral versus race-conscious strategies, and a paradigmatic example of the use of mass politics and mass protest to advance liberty and equality."[99]

The third chapter focuses on the civil rights era of the 1960s and '70s. Shiell argues that this period highlights the symbiotic relationship between free speech and civil rights: Vigorous expression proved essential to advances in equality, and the movement toward equality proved integral to the expansion of

First Amendment rights. During this era, he maintains, "[l]iberty and equality were widely understood to be fundamental allies."[100]

The final chapter seeks to rebut current claims that we should afford certain categories of expression (like hate speech) little or no protection in the service of promoting equality. Among other things, Shiell rejects the argument that our jurisprudence should follow the lead of countries that have adopted laws punishing hate speech and related communications. That argument usually suggests that an international consensus in favor of punishing hate speech has emerged, leaving the United States as an extremist outlier.

Here, Shiell largely follows the arguments set forth in Nadine Strossen in *Hate*,[101] another important book in the traditional defense category. Shiell draws on points made by other leading First Amendment scholars as well, including Ronald Krotoszynski Jr. Specifically, Shiell contends that (1) scant, if any, empirical evidence exists that such laws are effective; (2) foreign governments have used broad hate speech bans to punish speech that deserves protection; and (3) no international consensus exists around free speech theory or what to do about hate speech; the United States simply reflects one set of choices among many others.

Books Offering Critical Challenges

Steven H. Shiffrin
What's Wrong with the First Amendment? (2016)

Steven Shiffrin teaches at Cornell University Law School and has written widely and creatively about the First Amendment. As he notes in the Introduction, after teaching First Amendment law for nearly 40 years, he arrived at the conclusion that "we have come to a point when it is *thinkable* that the First Amendment does more harm than good."[102] In this book, Shiffrin says, he aims "to provoke second thoughts about First Amendment worship."[103]

The "main problem" with the First Amendment, Shiffrin argues, "is that it overprotects speech," particularly insofar as it encompasses speech that undermines equality.[104] Over 11 chapters, he explores various dimensions of this theme. In the third chapter of the book, he turns specifically to issues of race.

Shiffrin begins with a paradox: We know that racist speech causes harm, and yet the courts have held that the First Amendment protects it. Of course, the government can punish *some* racist speech without running afoul of the Constitution. For example, laws that criminalize threats and "fighting words" will reach some speech that is racist in nature. But, under current First Amendment doctrine, the government cannot punish speech simply because it reflects a racist or hateful point of view.

Shiffrin argues that this principle puts the United States "out of step with the rest of the world."[105] Focusing on the Canadian model, he contends that it is possible for a legal system to recognize the values generally served by free speech (in discovering truth, facilitating self-expression, and advancing the interests of democracy) while also acknowledging that hate speech does little or nothing to further those values. Our doctrines regarding content- and viewpoint-based discrimination, however, preclude such reasoning.

Shiffrin contends that it does not have to be this way. He argues that the United States "could have joined Canada and other countries in condemning hate speech through law."[106] And he points out that the Supreme Court actually upheld a state law prohibiting racist speech as late as 1952, in *Beauharnais v. Illinois*.[107] In short, Shiffrin asks us to consider whether our free speech exceptionalism has gone beyond

the formalistic to the fetishistic, putting us out of sync with the arc of reasoned jurisprudence.

Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado, and Kimberlè Williams Crenshaw
Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment (1993)

Some of the most severe criticisms of existing First Amendment doctrine have come from scholars associated with the Critical Legal Studies (CLS) and Critical Race Theory (CRT) movements. CRT resists a simple definition and is not monolithic in nature, but in essence it maintains that, despite our society's ostensible dedication to equal protection, racism and white supremacy remain defining characteristics of our culture and our legal system. CRT scholars take a profoundly skeptical and deconstructive approach to claims that our laws promote the interests of racial minorities, arguing that they instead institutionalize and perpetuate allocations of power that favor whites.

This book provides a useful overview of CRT's critiques of First Amendment doctrine, written by some of the key figures in those movements. It begins with an introduction that summarizes the history and principal elements of CRT. It then describes some of the ideological confrontations that have taken place between CRT advocates and "First Amendment hard liners."[108] And the introduction concludes with a brief reflection on how the First Amendment "arms conscious and unconscious racists—Nazis and liberals alike—with a constitutional right to be racist."[109]

In the chapters that follow, the authors focus on specific issues within the broader subject of the conflict between equality and liberty. In chapter 2, Mari J. Matsuda—professor at the University of Hawaii William S. Richardson School of Law—discusses "the victim's story," taking a close look at the effects of hate speech on its targets and documenting the ways in which such speech does "real harm to real people."[110] Along the way, she addresses what she calls "hard cases," the problem areas that emerge if one embraces the principle that racist speech should be legally actionable.

In her essay, Matsuda alludes to "the special case of universities."[111] In chapter 3, Charles R. Lawrence III—who also teaches at the University of Hawaii—focuses on racist speech on campus and on institutional efforts to regulate it. Among other things, he argues that existing law allows for the restriction of "certain face-to-face racial vilification on university campuses," essentially through the extension and application of the "fighting words" and "captive audience" doctrines.[112]

In chapter 4, Richard Delgado—professor at the University of Alabama Law School—argues for the recognition of a tort claim he calls "racial insult." The claim would require the plaintiff to prove that the defendant directed language toward the plaintiff that was "intended to demean through reference to race," that the plaintiff understood it as such, and that a reasonable person would recognize it as "a racial insult."[113] He anticipates and responds to objections to such a claim, including constitutional ones.

In chapter 5, Kimberlè Williams Crenshaw—professor of law at both the University of California Los Angeles School of Law and Columbia Law School—explores the concept of "intersectionality," specifically the ways in which the subordination of individuals on different bases (here, race and gender) overlap. To demonstrate the phenomenon, she draws from numerous examples in popular culture, including films and music. She focuses especially on controversies around the music of 2 Live Crew.[114]

The book concludes with a brief epilogue by Matsuda and Lawrence discussing *R.A.V. v. City of St. Paul*,[115] where a unanimous Supreme Court struck down St. Paul's Bias-Motivated Crime Ordinance and reversed the conviction of a teenager who had burned a cross on the lawn of an African-American family. The epilogue points toward a disconnection between the result in the case and the central theory behind

our doctrine of free expression: "Burning crosses do not bring to the table more ideas for discussion, and the Court's failure to see this is part of a long history of not seeing what folks on the bottom see. We hold faith that a critical view of law can reconstruct the first amendment to bring the voices of the least to the places of power."[116]

Richard Delgado & Jean Stefancic
Must We Defend Nazis? (2018)

In this book, Richard Delgado is joined by Jean Stefancic, a University of Alabama Law School colleague and fellow CRT scholar. Perhaps particularly because of Delgado's early influence on the CRT movement, *Must We Defend Nazis?* has been cited as an important text in the debate over the relationship between speech and race. And, indeed, it does raise provocative and important points.

Nevertheless, those seeking a fully developed and evidentiarily supported analysis of the tension that can exist between free expression and equal protection may struggle to find it here. Indeed, at points it is difficult to tell how strong a critical claim Delgado and Stefancic seek to make about the problems with existing First Amendment doctrine. More on this momentarily.

The book raises a number of intriguing questions that First Amendment traditionalists need to take seriously. For example, the authors challenge the conventional "safety valve" argument often raised in defense of free expression. Sure, the authors say, engaging in "[h]ate speech may make the speaker feel better, at least temporarily, but it does not make the victim safer."[117] To the contrary, they argue, the evidence suggests that allowing hate speech simply has the effect of fostering it, along with the attendant violence.

They similarly challenge the merits of the "marketplace of ideas" theory in this context. Do we really think that a virulent racist is going to change his mind when confronted with reasoned counterargument? And, perhaps more importantly, do we think it safe for members of racial minorities to engage in such confrontations or fair to burden them with the responsibility of doing so? A defense of existing First Amendment doctrine requires a thoughtful response to these important questions.

Still, *Must We Defend Nazis?* seems unlikely to satisfy many readers, regardless of their doctrinal predisposition. Traditionalists may question a number of claims for which the authors offer scant support. For example, the authors suggest that courts have been "smuggling in" a cause of action against hate speech despite the constitutional obstacles, including through defamation claims; but in the sole defamation case on which the authors appear to rely, the court rejected such a claim. A litany of other objections to their arguments can be found in Timothy Shiell's book, discussed above, and Alan Dershowitz's article "Dubious Arguments for Curbing the Free Speech Rights of Nazis."[118]

On the other hand, those looking for a radical rethinking of First Amendment doctrine may not find what they want, either. Many of the authors' prescriptions for future direction are so vague and abstract that it is difficult to tell exactly what they entail. And their more specific suggestions—like relying on the "fighting words" doctrine or using a hateful motive as the basis for enhancing the punishment for an underlying wrong—are of limited utility and do not appear to require much if any change in existing doctrine. Such a surgical identification of extant loopholes hardly seems like the kind of bold and paradigm-challenging thinking that CRT often exhibits.

Conclusion

The scholarship summarized above reflects a broad array of perspectives, from the traditional to the critical. During this time in our history, when events have called foundational questions about our social and legal structures, a closer look at existing First Amendment doctrine is required. The works cited provide an excellent introduction to the issues and viewpoints involved.

Personal Afterword by Solomon Furious Worlds

When Len Niehoff reached out to me and asked if I wanted to coauthor this piece with him, I became emotional; not because I was excited to call for his role in my life to shift from professor to colleague, but because I realized the deaths of Tony McDade, Breonna Taylor, George Floyd, and so many others have had a significant impact on how the world views the lives of Black people in America. On February 26, 2012, my 17th birthday, Trayvon Martin, age 17 at the time, was killed. I began to wonder what my life—a 17-year-old Black kid's life—was truly worth in the eyes of mainstream America. Since that day, I have watched over and over as this nation has moved from outrage to complacency after a number of people were unjustly killed. I also watched this nation ignore the deaths of so many others—people like 92-year-old Kathryn Johnston,[119] 37-year-old Tanisha Anderson,[120] and 7-year-old Aiyana Mo'Nay Stanley-Jones,[121] to name a few.[122,123] I stopped expecting mainstream society to care long enough for individuals' perceptions and actions to change; but Len Niehoff's reaching out to me to coauthor this piece, new people joining the movement in large numbers,[124] and the movement's sustained intensity[125] helped me to understand that something has changed for the collective zeitgeist. This year, finally, America is realizing that the lives of Black, indigenous, and people of color are worthy of a massive, sustained uprising.

Personal Afterword by Len Niehoff

In most respects, I subscribe to the traditional view of the First Amendment. But I also take seriously the reality that free expression does not impose the same costs on all groups or people. And I recognize that we traditionalists have often been callous in our disregard of that fact and precipitous in our flight to the comfortable shelter of "settled doctrine." Nothing should be settled that we are not prepared to defend, and strong and sensible voices are challenging us to explain why protecting hateful, racist, misogynistic, anti-Semitic, and countless other forms of individually and socially corrosive speech has anything to recommend it. In my view, we smugly dismiss those challenges at our peril, consigning our present First Amendment doctrine to irrelevancy and finally abandonment.

I am grateful to have students who are asking tough questions. And I am grateful to Solomon Furious Worlds for agreeing to explore this complex and troubled territory with me. In this endeavor, I am as much his student as he has been mine.

Solomon Furious Worlds is a 3L at the University of Michigan Law School who intends to lead a career as a public interest attorney—and, perhaps, a professor. Len Niehoff co-chairs the Media & Entertainment law group at Honigman and serves as professor from practice at the University of Michigan Law School, where he teaches First Amendment and Media Law.

Endnotes

1. *OPEN LETTER: Demands from the Black Law Students Association*, The Daily Campus (June, 25 2020), https://www.smudailycampus.com/opinion/open-letter-demands-from-the-black-law-students-association; *Harvard's*

Black Law Student Association's Letter to the Administration Regarding Black Lives, Harv. Black L. Students Ass'n (June 5, 2020), https://orgs.law.harvard.edu/blsa/2020/06/05/harvards-black-law-student-associations-letter-to-the-administration-regarding-black-lives; Karen Sloan, "*This Is the Civil Rights Movement of My Lifetime": Black Law Students Demand Action*, Law.com (June 18, 2020), https://www.law.com/2020/06/18/this-is-the-civil-rights-movement-of-my-lifetime-black-law-students-demand-action/?slreturn=20200804081955 (discussing that "Black law students groups at 17 schools in New York, Connecticut and New Jersey have signed an open letter to their deans asking them to take concrete steps toward racial justice"); Isha Trivedi, *Black Law Students Launch Petition for "Institutional Change" at Law School*, The GW Hatchet (July 6, 2020), https://www.gwhatchet.com/2020/07/06/black-law-students-launch-petition-for-institutional-change-at-law-school (regarding a petition launched by the George Washington University Law School's Black Law Students Association); Hannah Taylor, *The Empty Promise of the Supreme Court's Landmark Affirmative Action Case*, Slate (June 12, 2020), https://slate.com/news-and-politics/2020/06/grutter-v-bollinger-michigan-law-diversity-racism.html (regarding the University of Michigan Law School's history with affirmative action and the school's Black Law Student Association's list of demands).

2. Timothy Zick, *The Dynamic Relationship between Freedom of Speech and Equality*, 12 Duke J. Const. Law & Pub. Pol'y 13, 14 (2017).

3. *Id.*

4. *Id.* at 19–20.

5. 357 U.S. 449 (1958) (holding that the State of Alabama could not access the state's NAACP affiliate's membership list because it would chill the exercise of the First Amendment–based right to freedom of association).

6. Zick, *supra* note 2, at 18–19, 23.

7. *Id.* at 20, 23–24; Doe v. Reed, 561 U.S. 186 (2010).

8. Zick, *supra* note 2, at 28–29 (discussing "Identity Speech" protections).

9. *Id.* at 33 (discussing the "right to exclude").

10. *Id.* at 45–47. I must note that I find this to be a dubious, one-sided argument that ignores the extra-judicial consequences that many people—especially people of color—deal with in an attempt to exercise their *inalienable* rights. *See* Counterterrorism Div., Fed. Bureau of Investigation, Intelligence Assessment: Black Identity Extremists Likely Motivated to Target Law Enforcement Officers (2017).

11. Zick, *supra* note 2, at 48 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273 (1964)).

12. *Id.*

13. *Id.* at 51.

14. *Id.* at 57–68.

15. *Id.* at 68–69.

16. *Id.* at 71–74.

17. Leonard M. Niehoff, *Policing Hate Speech and Extremism: A Taxonomy of Arguments in Opposition*, 52 U. Mich. J. L. Reform 859, 862 (2019).

18. *Id.* at 864.

19. *Id.* at 864–65; *see also* NAACP v. Alabama, 357 U.S. 449 (1958).

20. Niehoff, *supra* note 17, at 867–69.

21. *Id.* at 886.

22. *Id.* at 893.

23. *Id.* at 900.

24. *Id.* at 901.

25. Justin Hansford, *The First Amendment Freedom of Assembly as a Racial Project*, 127 Yale L.J. F. 685, 690–91 (2018).

26. *Id.* at 687–88.

27. *Id.* at 692.

28. *Id.* at 694.

29. *Id.* at 694–95; Brown v. Bd. of Educ., 347 U.S. 483 (1954).

30. Hansford, *supra* note 25, at 696–98; Adderley v. Florida, 385 U.S. 39 (1966).

31. Hansford, *supra* note 25, at 700–01.
32. *Id.* at 701–02, 706–07.
33. *Id.* at 702.
34. *Id.* at 705–06 (recounting the attorney general's defense of white nationalists in a Georgetown University Law Center speech).
35. *Id.* at 706 (discussing the amount of money needed to protect Milo Yiannopoulos, Richard Spencer, and their supporters when they speak at college campuses).
36. *Id.* at 706–07.
37. *Id.* at 708–14.
38. Charlotte H. Taylor, *Hate Speech and Government Speech*, 12 U. Pa. J. Const. L. 1115 (2010); *see, also*, *Charlotte H. Taylor | Lawyers*, Jones Day, https://www.jonesday.com/en/lawyers/t/charlotte-taylor?tab=overview (listing her current occupation as partner within Jones Day, a large, international corporate law firm).
39. Taylor, *supra* note 38, at 1121.
40. *Id.* at 1123.
41. *Id.*
42. *Id.* at 1124.
43. *Id.*
44. *Id.* at 1126.
45. *Id.* at 1130–33.
46. *Id.* at 1133.
47. *Id.* at 1135–36.
48. 505 U.S. 377 (1992).
49. 538 U.S. 343 (2003); Taylor, *supra* note 38, at 1137–38.
50. Taylor, *supra* note 38, at 1142.
51. *Id.* at 1143.
52. *Id.* at 1146–76.
53. *Id.* at 1175.
54. *Id.* at 1177–78.
55. *Id.* at 1180. For further discussion of Edwin Meese's commission, see Nadine Strossen, *Feminist Critique of the Feminist Critique of Pornography, A Essay*, 79 Va. L. Rev. 1099 (1993).
56. Taylor, *supra* note 38, at 1183.
57. *Id.* at 1186–87.
58. *Id.* at 1187.
59. *Id.* at 1187–88.
60. *Id.* at 1188.
61. Petal Nevella Modeste, *Race Hate Speech: The Pervasive Badge of Slavery That Mocks the Thirteenth Amendment*, 44 How. L.J. 311, 312 (2001).
62. *Id.*
63. *Id.* at 312–13.
64. *Id.* at 317.
65. *Id.* at 317–18.
66. *Id.* at 319.
67. *Id.* at 321–22.
68. *Id.* at 324.
69. *Id.* at 325–29.
70. *Id.* at 330.
71. *Id.* at 330–37.
72. *Id.* at 337 (title of Part III.B, "The Forgotten Thirteenth Amendment").
73. *Id.* at 341.

74. *Id.* at 342.
75. *Id.* at 343–45.
76. *Id.* at 347.
77. *Id.* at 348.
78. 2020 Virtual Graduate Recognition Ceremony—Rutgers Law School, Newark Location (2020), https://law.rutgers.edu/sites/law/files/Virtual%20Ceremony%20Program_Newark%202020_0.pdf.
79. Zahra N. Mian, Note, *"Black Identity Extremist" or Black Dissident?: How* United States v. Daniels *Illustrates FBI Criminalization of Black Dissent of Law Enforcement, from COINTELPRO to Black Lives Matter*, 21 Rutgers Race & L. Rev. 53, 55 (2020).
80. *Id.* at 54–55.
81. *Id.* at 56.
82. *Id.*
83. *Id.*
84. *Id.* at 57.
85. *Id.* at 59, 61.
86. *Id.* at 63.
87. *Id.* at 66.
88. *Id.* at 67.
89. *Id.* at 72–74.
90. *Id.* at 89.
91. *Id.* at 90.
92. *Id.* at 91–92.
93. *Id.* at 92.
94. Timothy C. Shiell, African Americans and the First Amendment, at x (2019).
95. *Id.* at 11.
96. *Id.*
97. 301 U.S. 242 (1937).
98. Shiell, *supra* note 94, at xii.
99. *Id.*
100. *Id.*
101. Nadine Strossen, Hate: Why We Should Resist It with Free Speech, Not Censorship (2018).
102. Steven H. Shiffrin, What's Wrong with the First Amendment? 1 (2016).
103. *Id.* at 8.
104. *Id.* at 3.
105. *Id.* at 43.
106. *Id.* at 46.
107. 343 U.S. 250 (1952).
108. Mari Matsuda et al., Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment 11 (1993).
109. *Id.* at 15.
110. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story, in* Matsuda et al., *supra* note 108, at 50.
111. *Id.* at 44.
112. Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, *in* Matsuda et al., *supra* note 108, at 66–71, 86–87.
113. Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, *in* Matsuda et al., *supra* note 108, at 109.
114. Kimberlè Williams Crenshaw, *Beyond Racism and Misogyny: Black Feminism and 2 Live Crew*, *in* Matsuda et al., *supra* note 108, at 120–132.

115. 505 U.S. 377 (1992).

116. Mari J. Matsuda & Charles R. Lawrence III, *Epilogue: Burning Crosses and the* R. A. V. *Case*, *in* Matsuda et al., *supra* note 108, at 136.

117. Richard Delgado & Jean Stefancic, Must We Defend Nazis? 60 (2018).

118. Alan Dershowitz, *Dubious Arguments for Curbing the Free Speech Rights of Nazis*, Wash. Post, Feb. 1, 2018.

119. Brenda Goodman, *Police Kill Woman, 92, in Shootout at Her Home*, N.Y. Times (Nov 23, 2006), https://www.nytimes.com/2006/11/23/us/23atlanta.html.

120. Michelle Dean, *"Black Women Unnamed": How Tanisha Anderson's Bad Day Turned into Her Last*, The Guardian (June 5, 2015), https://www.theguardian.com/us-news/2015/jun/05/black-women-police-killing-tanisha-anderson.

121. Kate Abbey-Lambertz, *How a Police Officer Shot a Sleeping 7-Year-Old to Death* (Sept. 17, 2014), https://www.huffpost.com/entry/aiyana-stanley-jones-joseph-weekley-trial_n_5824684.

122. Notice that two of the names I mentioned were the names of Black women, and one was a Black girl. Black, indigenous, and people of color who are trans, nonbinary, or women are often left out of the conversation. As much as we remember George Floyd, we must remember Breonna Taylor and Tony McDade. *See* Shirley Ngozi Nwangwa, *When We Don't Say Their Names, We Deny Them Justice*, The Nation (June, 24, 2020), https://www.thenation.com/article/society/black-women-trans-lives-matter.

123. Black people are killed by law enforcement at an alarming rate in this country so that it is not possible to give a comprehensive list. To add to the pain, indigenous and non-Black people of color are also disproportionately killed by law enforcement, but their deaths often receive little or no public outcry. *See* Nora Mabie, "*We Have No Justice": Are Native Americans the Forgotten Victims of Police Brutality?*, Great Falls Trib. (June 22, 2020), https://www.greatfallstribune.com/story/news/2020/06/22/montana-native-american-police-brutality-george-floyd-protest-lives-matter/5334187002; Julissa Arce, *It's Long Past Time We Recognized All the Latinos Killed at the Hands of Police*, Time (July 21, 2020), https://time.com/5869568/latinos-police-violence.

124. *See* Isabella Simonetti, *5 First-Time Protesters on Why They Showed up for Black Lives Now*, Vox (July 2, 2020), https://www.vox.com/first-person/2020/7/2/21306987/black-lives-matter-protests-george-floyd-protesters-first-time.

125. *See* Helier Cheung, *George Floyd Death: Why US Protests Are So Powerful This Time*, BBC (June 8, 2020), https://www.bbc.com/news/world-us-canada-52969905; Politico Magazine, *It Really Is Different This Time*, Politico (June 4, 2020), https://www.politico.com/news/magazine/2020/06/04/protest-different-299050; Leila Miller, *George Floyd Protests Have Created a Multicultural Movement That's Making History*, L.A. Times (June 7, 2020), https://www.latimes.com/california/story/2020-06-07/george-floyd-protests-unite-black-activists-new-allies.