Hate Group Speech in the Public Forum: Free Speech or Free for All?

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The question of whether so-called "hate speech" deserves First Amendment protection arises from a need to balance competing narratives about the American value system. In one narrative, America is a nation that values freedom of expression above all, tolerating unpopular points of view even when (perhaps especially when) those points of view are downright hateful to the majority. The opposing narrative is one of equality and tolerance - less for differing viewpoints than for differing sensibilities. In this second narrative free speech is also valued greatly, but that value is coupled with a concomitant responsibility to racial and gender equality. As Shiffrin writes, "Often these stories and ideals can innocently be held out as mutually consistent. In the racist speech context, however, they seem to compete, and innocence is no longer possible."[1]

Relatively recent "outsider jurisprudence"[2] has tended to favor the latter story, insisting on the need for legal remedies to address "words that wound," particularly racist and homophobic speech.[3] In this essay

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[1] Steven H. Shiffrin, *Dissent, Injustice, and the Meanings of America* Princeton: NJ: Princeton University Press, 1999) 65.

[2] This term describes legal scholarship from practitioners that belong to "outgroups ... who have suffered historical under-representation and silencing in the law schools." Mari Matsuda, "Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground," 11 Harv. Women's L.J. 1, 1 n.2 (1988); see also Richard Delgado, "The Inward Turn in Outsider Jurisprudence," 34 Wm. & Mary L. Rev. 741, 767 (1993); Brian Owsley, "Black Ivy: An African-American Perspective on Law School," 28 Colum. Human Rights L. Rev. 501 (Spring 1997); Carolyn Grose, "A Field Trip To Benetton ... And Beyond: Some Thoughts On 'Outsider Narrative' In A Law School Clinic," (Fall 1997) 4 Clinical L. Rev. 109; and Richard Delgado and Jean Stefancic, " Bibliography: Critical Race Theory: An Annotated Bibliography 1993, A Year Of Transition, 66 U. Colo. L. Rev. 159 (Winter 1995).

[3] Feminists have proposed similar arguments for restrictions on pornography that demeans women as a class; while many of the issues raised by feminist

I will address the question of prohibitions on racist speech from a perspective that attempts to take the competing stories about America into account. While I do not pretend that an easy balance of these stories is possible, I will argue that restrictions on speech will not further the goals of outsider jurisprudence, and may be completely counterproductive in the end.

What Is Hate Speech?

Outsider jurisprudence insists upon the harms caused by hate speech, particularly racist speech. Mari Matsuda, in her proposal for criminalization of racist hate speech, proposes a "narrow definition" of racist speech that may be criminalized. In her estimation, speech that meets all three of the following criteria may be outlawed without offending the First Amendment: (1) the message must be one of "racial inferiority." (2) the message must be "directed at a historically oppressed group," and (3) the speech must be "persecutorial, hateful, and degrading."[4] One can readily imagine a similar set of standards applied to create a definition of criminalizable homophobic or sexist hate speech.

A few simple examples of such speech should be introduced in order to clarify the breadth of activities covered under such definitions. Obvious examples might include cross burning, the display of swastikas, or the uniforms of the KKK. Such symbolic expression might be targeted (e.g. the burning of a cross on a black family's lawn) or nontargeted (e.g. the display of swastikas during a march of the American Nazi Party). More controversial examples of such hate speech might include the use of incendiary racial epithets (the "N-word"), the distribution of flyers warning that if a particular group of people move into the neighborhood, the neighborhood would be plagued by "rapes, robberies, knives, guns, and marijuana,"[5] or the vitriolic expression of racist or homophobic sentiment in popular cultural products (e.g. Eminem).

Harms of Hate Speech

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antipornography ordinances are similar to those raised here, pornography raises a host of other issues best left for another day.

[4] Mari J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," *Michigan Law Review* (August 1989) 2320-2381.

[5] *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

Outsider jurisprudence generally outlines several interests at stake in the prohibition of hate speech.[6] First, such speech causes immediate psychological injury to individuals. Opposition to hate speech is not about mere floccinaucinihilipilification; most commentators would agree that *targeted* hate speech can cause specific and measurable harm to individuals. Burning a cross on someone's lawn is clearly an expression intended to cause emotional distress. As such, the speech is clearly actionable under traditional laws against harassment.[7] Defenders of speech codes, of course, argue that the legislature should target hate speech for specific remedies due to the significance of the psychological damage such speech inflicts.

A second harm of hate speech is the "offense" created by certain words and symbols for those who hear them. One can probably distinguish the intent of the speaker based on context - for example, the use of the "N-word" in a pamphlet about white supremacy vs. the use of it in a hip-hop song - but the standard of "offensiveness" seems dependent more on the auditor than the speaker.

A third harm of hate speech is the threat of an immediate breach of the peace. The risk of violence seems to place some hate speech squarely within the Supreme Court's unprotected category of "fighting words." Of course, while the fighting words doctrine allows the criminalization of certain symbolic expressions which threaten a breach of the peace, the Court has been fairly strict about interpreting *Chaplinsky v. New Hampshire* as only allowing the prohibition of fight-provoking words which tend "to incite an immediate breach of the peace."[8]

A fourth harm of hate speech is the "long-term reinforcement of negative social attitudes (such as racism, sexism, and homophobia)."[9] From this perspective, hate speech laws are advocated as a means of social reform. Hate speech harms individuals by reinforcing attitudes

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[6] The list used here is adapted from Kent Greenawalt, *Speech, Crime, and the Uses of Language* (New York: Oxford University Press, 1989) 145-48 and 292-301.

[7] Criminal statutes against intimidation, harassment, "stalking," and disturbing the peace all may be applicable depending on the specific circumstances.

[8] *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Cohen v. California*, 403 U.S. 15 (1971).

[9] Thomas L. Tedford, *Freedom of Speech in the United States* Third Edition (State College, PA: Strata Publishing, 1997) 174.

of inferiority ("internalized racism," for example) and harms the social world by legitimizing and consolidating hierarchical cultural attitudes.

Further, hate crimes laws are seen by supporters as symbolic manifestations of the values of the community. A legislature that suppresses hate speech thereby indicates the importance of equality and respect for diversity in its hierarchy of social values. Taslitz, for example, argues that "Hate crimes legislation thus helps to dismantle group-based status hierarchies that are inconsistent with the egalitarian spirit of our modern constitutional culture."[10]

Remedies for Hate Speech

There seem to be three general categories of remedies for "words that wound."

First, group libel law. In 1952 the Supreme Court placed "group libel" outside the protection of the First Amendment in the decision *Beauharnais v. Illinois*.[11] That case upheld an Illinois statute that outlawed messages portraying "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed, or religion," or which exposed "citizens of any race, color, creed, or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots." Ruth McGaffey has argued that group libel laws might offer a promising remedy for the harms posed by hate speech.

Beauharnais, however, is unlikely to authorize contemporary hate speech statutes, especially given the Court's reluctance to review the Illinois appellate court decision in *Collin v. Smith*, the Skokie Nazi march case.[12] While *Smith v. Collin* did not explicitly overrule *Beauharnais* (since it was a decision only to deny certiorari), it is

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[10] Andrew E. Taslitz, " Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong," *Boston College Law Review* (May 1999) 762. (40 B.C. L. Rev 739)

[11] *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

[12] *Collin v. Smith*, 578 F.2d 1197 (1978); *cert. denied* 439 U.S. 916 (1978); *Smith v. Collin* 436 U.S. 953 (1978).

pretty clear that the case "pulled the rug out from under *Beauharnais*."[13]

A second approach to remedying the harms of hate speech is civil action. Some plaintiffs have successfully used civil remedies from tort law, specifically the "intentional infliction of emotional distress," to recover damages for injuries that are the result of acts of hate speech.[14] Such proposals, on their face, seem more likely to pass constitutional muster than group libel laws, but they are probably unlikely to deal with the problems posed by nontargeted hate speech.

A third approach, following the "fighting words" doctrine, seeks to criminalize particular kinds of hate speech (e.g. racist and homophobic speech). Such an approach is advocated by Mari Matsuda, among others. While this approach has the merit of establishing the legislature's insistence that hate speech is repugnant to the social life of the community, it was pretty firmly rejected by the Supreme Court in *R.A.V. v. St. Paul.*[15] As Greenawalt notes, "*R.A.V.* seems to foreclose for the near future the possibility of any broad law against hate speech - one that reaches beyond fighting words."[16]

The R.A.V. case began when a group of white teenagers burned a cross on a black family's lawn in St. Paul, Minnesota. R.A.V., the defendant, was prosecuted under St. Paul's hate speech ordinance, which read as follows:

> Whoever places on public park or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the

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[13] Stone et al., Constitutional Law 1301 (1996). The Court's reluctance to revisit *Beauharnais*, except through inaction, is noted with some consternation in the dissent of Justices Blackmun and White in *Smith v. Collin* 439 U.S. 916 (1978) and in the dissent of Justices Blackmun and Rhenquist in *Smith v. Collin* 436 U.S. 953 (1978). (Note: the latter denied an injunction; the former denied cert.)

[14] See Richard Delgado, "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling," 17 *Harvard Civil Rights Civil Liberties Law Review* 151-7 (1982).

[15] *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

[16] Kent Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech* (Princeton: Princeton University Press, 1995) 62.

> basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor. (112 Sup. Ct. 2541).

Justice Scalia's majority opinion rejected the constitutionality of the St. Paul statute because it prohibited speech on the basis of content. The statute only prohibited certain kinds of fighting words, not fighting words in general, and thus amounted to a content discrimination, "precisely what the First Amendment forbids."

Defenders of such statutes argue that they prohibit certain forms of expression, not content or point of view; Scalia argues that this ignores the complicity of form and content in speech. Such statutes go beyond content discrimination, as they give power to a particular point of view. He wrote: "One could hold up a sign saying, for example, that all 'anti-Catholic bigots' are misbegotten; but not that all 'papists' are, for that would insult and provoke violence 'on the basis of religion.' St. Paul has no such authority to license one side of a debate to fight freestyle while requiring the other to follow Marquis of Queensbury Rules." While fighting words in general may be prohibited, prohibiting them only for certain expressions of opinion is repugnant to the First Amendment.

For Scalia, it is the "realistic possibility that official suppression of ideas is afoot" that offends the First Amendment. And he is surely right that the ordinance at issue in *R.A.V.* presents a realistic possibility of such official suppression. Content and point-of-view discrimination, according to Scalia, is only permissible for reasons other than the legislature's disagreement with the ideas.

As Steven Shiffrin points out persuasively, Scalia here engages in hypocrisy of the highest order. "This description of the case law," he writes, "breathes new life into the expression about ostriches hiding their heads in the sand. When the government outlaws threats against the president, casino gambling advertisements, lottery advertisements, or the burning of draft cards, or when it engages in a campaign of zoning adult theaters out of neighborhoods, no one but a person wearing a black robe and possessing a strong will to believe or befuddle could possibly suppose that 'there is no realistic possibility that official suppression of ideas is afoot. Point-of-view discrimination arguably permeates these categories."[17]

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[17] Shiffrin, 57.

It is instructive to compare the Court's treatment of obscenity with its treatment of racist speech. In *R.A.V.*, the Court employed the "strict scrutiny" standard while examining the stated government interest in restricting speech. Yet with obscene speech, and even merely "indecent" speech, the Court has given wide judicial deference to the stated government interest in its restriction. At times this deference reached the point of absurdity, as in the recent decision on nude dancing, *Erie v. Pap's A.M.*,[18] where the majority accepted the government's claim that pasties fight crime.

As Shiffrin argues, "To distinguish between decent sex and morbid sex is obviously point-of-view discrimination."[19] Laws against obscenity are nothing if not "official suppression of ideas," and it is "word-play" to claim otherwise. For the sake of consistency the Court must either invalidate most obscenity law (or at least apply the strict scrutiny standard when it comes up) or it must show that racist speech is "political" whereas obscene speech is not. The Court, of course is unprepared to do the former ("and Justice Scalia is adamant on the subject"[20]) and unable to do the latter (since the arguments for suppression of obscenity - whether based in feminist critique or community morality - clearly implicate politics in the same ways as the arguments for suppression of hate speech).

Ultimately, laws like the St. Paul ordinance are in fact point of view discrimination, but their goal is not simply, as Scalia would have it, "that of displaying the city council's special hostility toward the particular biases thus singled out. This is precisely what the First Amendment forbids." As Shiffrin continues, "St. Paul's interest ... is not in allowing its city council to have a special moment of pique. Rather, it is to establish not only that religious, racial, and gender epithets are particularly harmful but also that, as a matter of public morality, such epithets are a public disgrace."[21] Practitioners of outsider jurisprudence have hailed such goals, pointing out that such legislation might lead to a more humane society in the long term. Taslitz, for example, argues persuasively:

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[18] *Erie v. Pap's A.M.*, 98-1161 (2000); Available: WWW. URL: http://supct.law.cornell.edu/supct/html/98-1161.ZS.html.

[19] Shiffrin, 61.

[20] Shiffrin, 61.

[21] Shiffrin, 65.

> Even more importantly, the fact is that hate crimes legislation embodies the judgment that group hatred-motivated violence is fundamentally inconsistent with a republican government and culture. All societies must battle criminal violence, but a republican society must in particular battle violence stemming from group animus because such violence centrally defines the master-slave relationship. To tolerate such violence is to let the seeds of slavery in fact, if not in law, take root in a way that is inconsistent with a coherent republicanism. An incoherent republicanism smacks of illegitimacy, at least among the groups victimized by the violence. That illegitimacy is far more divisive than the welcoming attitude toward individual group identification that hate crimes legislation reflects.[22]

I am very much in sympathy with the practitioners of outsider jurisprudence when they highlight the harms of racist and other hate speech, and it is clear to me that the majority opinion in *R.A.V.* presents a flawed rationale for outweighing these harms with First Amendment concerns. In addition, I think it is fair to say that symbolic expressions of the type outlawed in the St. Paul ordinance advance few, if any, of the traditional free speech goals of truth in the marketplace of ideas, self-government, and expressive autonomy.

Nevertheless, I would still **not** support such legislation, and I feel that the First Amendment should protect such expressions where they are nontargeted and do not present the danger of an immediate breach of the peace. Practitioners of outsider jurisprudence who support such legislation, I believe, are misguided in their support of such laws.

Severely abusive and targeted speech acts such as burning a cross on someone's lawn can easily be prohibited by laws that do not single out speech. Nontargeted speech, however - burning a cross as part of a demonstration - is a more difficult matter, one that I think needs to be tolerated, at least legally speaking. First, how does the state determine the intent of speech? While intent should be obvious in most cases, there have been notable cases in which artists with

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[22] Taslitz, 782.

identifiably non-racist and even anti-racist messages have been censored for racism.[23]

Second, how does the state justify banning cross burning without also outlawing the burning of Republican effigies? How does the state regulate the use of the "N-word" in hateful contexts without also regulating its use in hip-hop music? How can the state criminalize the speech of a Klansman without also criminalizing the speech of a Black Muslim? History shows that the power to restrict speech is rarely used to benefit historically disadvantaged minority groups.[24]

One answer to this question is define hate speech narrowly in order to specify which groups merit the protection of hate speech ordinances. Matsuda, for example, limits her definition of hate speech that falls outside the purview of the First Amendment as that "directed at a historically oppressed group."[25] Such a definition is justified, she argues persuasively, because hate speech directed at dominant groups simply doesn't have the power to wound that hate speech directed at subordinate groups has.

While Matsuda's meaning is clear to both myself and to most practitioners of outsider jurisprudence, the category "historically oppressed group" will spur taxonomic hiccups at every level of interpretation. Arguably, poor whites with racist views represent a "historically oppressed group." Catholics, Episcopalians, Appalachians and Melungeons certainly could claim special status within this category. Should calling a white Catholic a "filthy cracker" be actionable or just calling her a "filthy papist"? Must the courts develop a hierarchy of historically oppressed classes in order to ensure that the

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[23] Andres Serrano's 1990 series on the Klan, for example, was attacked as being racist. And Barbara Bullock and Lee Ann Mitchell's 1993 piece "The Dream Deferred," which featured lynchings of white and black dolls, was removed from display in an office building in downtown Memphis after complaints that it was racist. See National Campaign for Freedom of Expression, *Handbook*. Available: WWW URL: http://www.ncfe.net/ncfe/handbook/chapter1.html.

[24] For one example (fighting words cases involving comments addressed to police officers during dubious arrests of minorities) see Stephen W. Gard, "Fighting Words as Free Speech," 58 Wash. U.L.Q. 531 (1980); and Dawn Christine Egan, "'Fighting Words' Doctrine: Are Police Officers Held to a Higher Standard, or per *Bailey v. State*, Do We Expect No More from our Law Enforcement Officers than We Do from the Average Arkansan?" 52 Ark. L. Rev. 591 (1999).

[25] Matsuda

insult "dirty Jew" receives less First Amendment protection than the insult "dirty Scientologist"?

Additionally, the category loses clarity when the offending speaker is anything but white. How would Matsuda's proposed ordinance stack up, for example, against African American rapper Ice Cube's hip-hop song, "Black Korea"?[26] The lyrics not only obviously demean Koreans and pose an intimidating threat; a convincing argument could be made that they encourage violence against Korean shopowners. Such incitement, appearing on an album that threatened "Watts Riot 1991" not long before the Rodney King riots in which a number of Korean grocery stores were burned to the ground, surely embodies precisely the kind of racist speech Matsuda would like to prevent.

But blacks are arguably more "historically oppressed" than Koreans, and there is a *strong* argument to be made that the lyrics *do* advance First Amendment goals by making a political statement relevant to self-government. Ice Cube, after all, singles out for invective not simply Koreans but Korean *shopowners* who are perceived as ripping off the black community and threatening its self-determination.

Also, what of racist speech against groups which are not historically oppressed but which nonetheless threatens to provoke an immediate breach of the peace? Khalid Abdul Muhammed's incendiary comments at the "Million Youth March" in Harlem presents a case in point. Such speech arguably raises many of the concerns of violence as a result of hate speech directed at historically oppressed groups with none of the remedies.

Of course, such speech does not raise the dangers of stigmatization and structural violence that makes hate speech against oppressed groups uniquely odious. I raise this example only to address the question of the threat of imminent violence - which, in this case, the primary victims of that violence were the very black youths Muhammed's speech was supposed to provoke.

I am not, of course, siding with Rudy Giuliani's brutal and swift censorship of Muhammed's speech. The speed at which the police

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[26] "Don't follow me/up and down your market/or your little chop-suey ass will be a target/of a nationwide boycott/juice with the people, that's what the boy got/so pay respect to the black fist/or we'll burn your store right down to a crisp/and then we'll see ya/coz you can't turn the ghetto/into black Korea." "Black Korea," *Death Certificate* (1991).

descended upon the marchers suggests that their attack was planned rather than a response to an imminent breach of the peace. And there is little doubt that Muhammed encouraged such an attack - prior to the march, when asked what he would do if Giuliani denied him the permit to march, Muhammed publicly taunted the mayor: "We'll march whether the city approves it or not, little cracker."

This comment suggests an important difficulty with hate speech prohibition. The real demagogues who such legislation is supposed to protect us from will most often ignore such legislation and may even martyr themselves defying it. It seems to me that prohibitions on hate speech will give such demagogues important symbolic ammunition by allowing them to portray themselves as victims of censorship.

Here I agree with Shiffrin that "American society may be so thoroughly racist that nontargeted racist speech regulations would be counterproductive."[27] Additionally, while such regulations might deter some openly racist demonstrations, much of it would "not be wholly deterred but rather transformed into an even more effective yet unprosecutable Willie Horton-like 'code' speech."[28]

I would take this last point a step further than Shiffrin, however. It seems to me that the "code speech" Shiffrin refers to may be far more dangerous in terms of perpetuating racist power structures than open hate speech. While the subtle racism of everyday American policy discourse (for example, the "crack baby" myth,[29] or statements like

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[27] Shiffrin, 85. "Self-styled 'patriots' who think that racist speech sanctions violate the very meaning of America would be induced to defy the regulations; they would act on the belief that whiteness is part of the core of America, and that the First Amendment necessarily protects expressions of white superiority," 84.

[28] Shiffrin, 81.

[29] The "crack baby" phenomenon is put into its proper historical and cultural context in Reeves and Campbell (1994, pp. 208-216). Crack babies come to symbolize the pathologized black unwed mother, whose delinquency "was literally inscribed on the body and in the genes" (p. 210). This "chemical scapegoating of social ills born of economic deprivation" extends to the babies themselves, who are seen as "permanently and genetically damaged" (p. 211). One reporter dubbed them the "bio-underclass," fixing their social and economic condition in irreparable biological circumstances (Gardner, 1989, p. 10). This widespread demonization of crack babies "evolved in the absence of any credible scientific evidence.... [T]his furor ... obscures in the public mind any debate regarding society's responsibility for other conditions,

this from John Dilulio: "All that's left of the 'black community' in some pockets of urban America is deviant, delinquent, and criminal adults surrounded by severely abused and neglected children, virtually all of whom were born out of wedlock."[30]) may not have the immediate sting of a burning cross or the "N-word," it probably does far more damage to individual blacks as well as to the society at large.

Klansmen can be socially ostracized, at least in the public sphere, whereas the well-intentioned racism of the crack-baby scare and the malicious but intellectual racism of Dilulio has a direct and disproportionate impact on public policy. And the more subtle racism that pervades American popular culture is far more effective at encouraging privately held racist views and resentment against people of color than open expressions of white supremacy.

Ultimately, then, I find myself unable to support any broad regulations on nontargeted hate speech. I agree with the practitioners of outsider jurisprudence that such speech adds little to the marketplace of ideas. And I agree with such scholars that the harm to human dignity certainly outweighs whatever free speech values might be forwarded by hate speech. Nonetheless, any attempt to define hate speech will be unconstitutionally overbroad.[31]

More importantly, however, restrictions on hate speech in the U.S. is likely to undermine the very goal of transforming the social in a manner that affirms the dignity of all persons. While speech codes might deter some racist speech, they will deter very little of it, and will greatly exacerbate the resentment that already exists among whites against minority groups who are seen as having too many "privileges." Openly racist sentiment tends to be much easier to refute than the subtle racist messages that pervade society. What is needed is an

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such as lack of access to prenatal or pediatric care, malnutrition, measles, or lead poisoning, which jeopardize the development of many impoverished American children, whether substance-exposed or not." Zuckerman (1992), quoted in Reeves and Campbell (p. 221). See also Mayes (1992). Slotkin's (1998) study finds far more fetal brain damage associated with the mother's use of nicotine than crack cocaine, but the public discourse surrounding the "crack baby menace" has only escalated, with rhetors justifying greater police measures directed at crack babies who will soon be teenagers (Woodward, 1995).

[30] John Dilulio, "Say Amen," *The National Review* (26 June 1995).

[31] And not "underbroad," as Scalia would have it; see Justice White's dissent in *R.A.V.*

open dialogue on institutionalized racism rather than laws that cede the moral "high ground" to openly racist demagogues.

Practitioners of outsider jurisprudence should hesitate before considering hate speech laws as a victory. As Justice Black pointed out in his dissent in *Beauharnais*, "another such victory and I am undone."