

Thoughts That We Hate

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Sixth Annual John S. Knight Lecture

Jan. 11, 1994 Kresge Auditorium Stanford University

The John S. Knight Fellowships and Lecture

The 1993-94 academic year marks the 28th year of professional journalism fellowships at Stanford. The John S. Knight Fellowships are named for a distinguished American journalist whose major concern throughout a long career was the editorial quality of newspapers.

The Knight Fellowships program each year awards fellowships to 12 professional journalists

from the U.S. and up to seven from other countries. These journalists take a leave of absence from their jobs to spend the year at Stanford studying and attending special seminars. In 1988, with the help of the Knight Foundation, the Knight Fellowships Program began an annual lecture series aimed at bringing distinguished journalists and authors to campus.

Anthony Lewis

Anthony Lewis is a native of New York City and a graduate of Harvard University. He went to The New York Times in the late 1940s and has spent nearly his entire career there.

The only other newspaper for which he worked was the Washington Daily News, where in 1955 he won the Pulitzer Prize for his articles on the federal government's loyalty security program. The citation from the Pulitzer Board said that Lewis's reporting was directly responsible for clearing a U.S. Navy Department employee against unjust charges of being a security risk. The employee, who had been fired by the Navy, got his job back as a result of the articles.

Lewis moved to the New York Times Washington bureau, where he won a second Pulitzer Prize in 1963, for his coverage of the U.S. Supreme Court, and in particular of the court's legislative reapportionment decisions.

Lewis reported from Europe for eight years as the New York Times bureau chief in London. While in London he began writing a regular column, which appears twice a week on the Times' op-ed page. He frequently writes about international affairs, but he also deals with

U.S. domestic issues, including politics, law, and a variety of social issues. In 1973, he returned to the U.S. and now is based in Boston.

Although he is not a lawyer, he is an authority on U.S. constitutional law, especially free speech and free press issues. For 15 years, he was a lecturer at Harvard Law School, and since 1983 he has been the James Madison visiting professor at Columbia University.

He is the author of three widely-read and influential books: "Gideon's Trumpet" (1964), "Portrait of a Decade: The Second American Revolution" (1964), and "Make No Law: The Sullivan Case and the First Amendment" (1991).

In addition to delivering this address, Lewis was on the Stanford campus for two weeks, in residence at the Knight Fellowships program as the first Lee Hills Senior Fellow — meeting with the Knight Fellows, talking with classes and other groups. Lee Hills, chairman of the John S. and James L. Knight Foundation, was instrumental in the Knight Foundation's decision to give the professional journalism fellowships program at Stanford the endowment grant that enabled it to become self-supporting.

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By Anthony Lewis

Jim Risser, ladies and gentlemen: It is a great pleasure for me to be here at Stanford with the Knight Fellows and to be delivering this John S. Knight Lecture. The Knight Fellowships give journalists a rare opportunity, and I think an essential one, to lift their eyes from the immediacies that beset our profession and reflect on our world: reflect and read and learn. Walter Burns, the ruthless managing editor in "The Front Page," would surely not agree; but journalists can actually benefit from education.

Nearly 200 years ago Thomas Jefferson wrote to a friend: "I deplore the putrid state into which our newspapers have passed, and the malignity, the vulgarity and mendacious state of those who write them. These ordures are rapidly depraving the public taste. It is however an evil for which there is no remedy; our liberty depends on the freedom of the press, and that cannot be limited without being lost."

Jefferson was that rare creature, a politician who really was prepared to live with criticism he detested. But of course it is not just politicians who must do so in a free society; it is all of us. Justice Holmes put it that, in a regime of freedom, what matters is "not free thought for those who agree with us but freedom for the thought that we hate."

It takes a good deal of self-confidence to accept the principle of freedom for the thought that we hate. A society that lives by that ideal defines itself as a self-confident society. The United States bound itself to the principle of free speech when the First Amendment was added to the Constitution in 1791. Its words were about as straightforward, as sweeping as one could invent: "Congress shall make no law . . . abridging the freedom of speech, or of the press." But we should have no illusion that our country has lived up to the principle ever since. To the contrary, it has again and again displayed not

confidence but fear in its treatment of speech and speakers disliked by the majority.

Just a few years after the adoption of the First Amendment the Federalist Party, which then controlled Congress and the Presidency, played on fear of Jacobin terror in revolutionary France. Federalists spoke of the opposition, supporters of Thomas Jefferson, as "the French party." In the election of 1800, when Jefferson opposed President John Adams, Federalist politicians denounced him as an atheist, a dangerous revolutionary. Federalist Congressmen in 1798 passed a Sedition Act to suppress criticism of President Adams and of themselves.

The attempt to identify the Jeffersonians with French terror was an early example of what Richard Hofstadter called "the paranoid strain in American politics." There have been episodes, again and again, in which dissenters were painted as not just wrong but treasonous, and punished for their thoughts. This century has been by far the worst in its disregard for the commitment to free speech. During World War I pacifists and other opponents of the war were prosecuted for uttering the mildest objections to official policy. In 1920 Attorney General Palmer in a single night rounded up thousands of supposed radicals, and through the 1920s and 1930s suspected anarchists and Communists were prosecuted under a variety of laws against dangerous speech. In my lifetime the Red Scare flourished with the activities of several Congressional committees, with Federal prosecutions of Communist Party members and with blacklists of actors and artists supposedly associated with communism.

Through all that history, from the 1790s to the 1950s, the forces of repression in this country were on the political right: McCarthy, Palmer, the Federalists, all of them. But today we have a new and striking phenomenon: pressure from

elements of the left to limit freedom of speech. At universities around the country, groups usually associated with the liberal side of politics have pressed for action against what they term “hate speech”: words that denigrate people because of their race or religion or sexual orientation or other status. And a considerable number of universities have adopted speech codes to protect groups they deem to be historically oppressed from such hateful speech. Then we have a segment of the women’s movement calling for suppression of speech it considers denigrating to women. The leader in this effort is Professor Catharine MacKinnon, whose new book, “Only Words,” argues that pornography—which she defines very broadly—threatens women and should be censored.

These new movements to restrict free speech have in common the view that our freedom to think what we wish and say what we think has to be balanced against other values: in particular the value of equality, which is recognized in the 14th Amendment. That is, Americans of different groups will be more equal if speech offensive to one or another is suppressed. The argument is put in terms of equality. But I think its real premise is one familiar from our history: that certain speech is not protected by the First Amendment because it is harmful. I noticed with interest a recent letter about Professor MacKinnon’s book. The letter suggested that if women had written the First Amendment, it might have protected “the right to hold and express various political beliefs, but not necessarily the freedom to utter harmful speech.” Of course the hard questions, which that statement begs, are what speech is harmful and who is to define it.

One of the leaders of the movement to enforce rules against “hate speech” is Professor Richard Delgado of the University of Colorado Law School. The issues involved were clarified for me when I heard Professor Delgado speak last year. He referred to what he sarcastically called “the mighty First Amendment.” Freedom of speech, he said, “advantages only the dominant” forces in society. “You find that your words are not free if you attack the wealthy or powerful.”

I think Professor Delgado’s assertion—that freedom of speech serves only the powerful and

is not available to the weak in our society—is historically false and politically dangerous. By way of proof I offer the case of *New York Times Co. v. Sullivan*, the subject of a recent book of mine. The Sullivan case is known as a great libel decision, and it is that. In my business, the press, it is revered as the case that liberated journalism from fear and encouraged it to take a more critical view of government and politicians. But it is much more than a libel case, and it is not for the press alone: far from it. The Sullivan decision is about free speech in the United States: what it has meant historically and why we should care about it today. And I believe it is a definitive answer to the notion that the disadvantaged would be better off if we did away with freedom for speech that offends this group of Americans or that.

The Sullivan case arose from the civil rights movement of the 1960s: the effort to undo the racist system that controlled life in the American South. We have short memories in this country—sometimes I think America is an ahistorical society—so I had better remind you what the South was like just 30 years ago. For blacks, it was not much different from living under apartheid in South Africa. In the Deep South blacks could not vote. To attempt to register was to risk one’s job, one’s home, one’s life. In 1960, six years after the Supreme Court decision in *Brown v. Board of Education*, not a single black child attended a desegregated public school or even university in Alabama, Mississippi, Georgia, Virginia, Louisiana. Blacks were forbidden to enter most restaurants or to sit at lunch counters. Department stores had segregated drinking fountains, bathrooms and elevators. In Birmingham, blacks could not ride in “white” taxis: a legal rule exactly the same as one that I remember as an example of the absurd lengths to which racial separation was carried in Johannesburg. Ambulances and police paddy wagons were segregated.

Dr. Martin Luther King Jr. set out to change that system by speech: by words and the symbolic speech of peaceful demonstrations. He and his colleagues did not break windows or destroy newspapers, much less attack people. They made speeches. They wrote letters from Birmingham jail. They marched. Dr. King, following the

teachings of Gandhi, believed that if Americans across the country knew the cruel reality of racism, they would change it. That is he thought the people of this country had a conscience that would respond if they understood. And it is true that few in the North really knew what was going on in the South until Dr. King's movement dramatized the truth. When we read about sheriffs beating up or threatening people who wanted only to vote, when we learned that peaceful marchers in behalf of racial justice were killed we were outraged. Television had its particular impact. Professor Alexander Bickel of the Yale Law School, writing in 1962 about confrontations over school desegregation in Little Rock and New Orleans, said:

"Compulsory segregation, like states' rights and like 'The Southern Way of Life,' is an abstraction and, to a good many people, a neutral or sympathetic one. These riots, which were brought instantly, dramatically and literally home to the American people, showed what it means concretely. Here were grown men and women furiously confronting their enemy: two, three, a half dozen scrubbed, starched, scared and incredibly brave colored children. The moral bankruptcy, the shame of the thing, was evident."

In other words, ladies and gentlemen, Dr. King and the movement were doing exactly what Professor Delgado says cannot succeed: using speech to challenge the dominant forces in the society in which they lived. They were a perfect example of the historically disadvantaged minority that supposedly loses when the First Amendment protects freedom of speech and press. But Dr. King thought otherwise.

That was the setting of the Sullivan case. On March 29, 1960, The New York Times published a full-page advertisement on behalf of Dr. King and the civil rights movement. The ad spoke of brutal tactics used against the movement by Southern white officials, and it appealed for support. It did not name any officials, instead speaking of them generically as "Southern violators of the Constitution." Nevertheless one official, L. B. Sullivan, a city commissioner of Montgomery, Alabama, sued The Times for libel. He claimed that, though he was not named, the ad's charges of police brutality would reflect on him and lower his reputation because one of his duties was to

supervise the Montgomery police.

The libel suit was brought in an Alabama state court and tried before a judge, Walter B. Jones, who was a great admirer of the Confederacy and on the anniversary of its founding seated the jurors in his courtroom in Confederate military uniforms. In the trial The Times conceded that some statements in the advertisement were inaccurate. For example, the ad said Dr. King had been arrested seven times, but it was only four. The ad said some protesting students had stood on the steps of the State Capitol in Montgomery and sung "My Country 'Tis of Thee," but they had actually sung "The Star-Spangled Banner." Because of such mistakes Judge Jones charged the jury—an all-white jury—that the advertisement was false. He ruled also that it was damaging. The jury awarded Commissioner Sullivan all the damages he had demanded: \$500,000, at the time the largest award in Alabama history.

Other Alabama officials also sued over the Times advertisement, including the Governor. Altogether The Times was set to lose \$3 million in libel damages, which may not sound enormous now but in those days was enough to put the paper out of business. And across the South officials began suing national newspapers and magazines and broadcast networks over reports on the racial struggle. So what was happening was far more than a threat to The New York Times. It was an attempt to intimidate the national press out of covering the civil rights struggle in the South. If that strategy had worked, Americans would not have seen police dogs attacking in Birmingham or little children being menaced by foaming racists in Little Rock.

Looking at the case today, in hindsight, it seems obvious that the attempt to stop national coverage of the civil rights struggle violated the free speech and press provisions of the First Amendment. But when Judge Jones entered judgment against The Times, it was far from obvious. For libel had always been considered outside the protection of the First Amendment. It was universally understood by lawyers that libel was a matter of state law, having nothing to do with the Federal Constitution. No libel judgment in our history, no matter how large or strange, had ever been found unconstitutional.

When the Supreme Court decided *New York Times v. Sullivan*, in 1964, it ended that exemption of libel cases from the reach of the First Amendment. Justice Brennan, writing the opinion of the Court, went back to the beginning to show why this advertisement was protected by the Constitution.

Justice Brennan looked to the political controversy stirred up by the Sedition Act passed in 1798, as I mentioned earlier, by the Federalist majority in Congress. The act made it a crime to publish false, malicious comments about the President or Congress. You will note that it did not condemn nasty comments about the Vice President. He was Thomas Jefferson, the leader of the political opposition. The act was partisan legislation, openly so. The Federalists planned to use the Sedition Act to silence the main Jeffersonian newspapers in the run-up to the Presidential election of the year 1800. In fact the act in its own terms was to expire on the next Inauguration Day, March 4, 1801.

The editors and owners of the main Jeffersonian papers were prosecuted. But the first Sedition Act prosecution was brought against a member of the House of Representatives, Matthew Lyon of Vermont, and it shows the real nature of the act. Lyon had written a letter to the editor of the Vermont Journal saying that President Adams was engaged in “a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation and selfish avarice.” That was tame slanging by the rough standards of the 18th century. But an indictment charged that Lyon’s words were “scurrilous, feigned, false, scandalous, seditious and malicious.” He was convicted and sentenced to four months in prison and a fine of \$1,000: an enormous sum in those days and one that Lyon could not pay. He remained in prison.

When the Sedition Act was passed, Jefferson and James Madison, the author of the First Amendment, tried to arouse opposition to it in state legislatures. They worked in secret, for fear that they themselves would be prosecuted: the Vice President and a leading member of Congress. Madison wrote what came to be called the Virginia Resolutions, a landmark of our freedom passed by the Virginia legislature.

The Sedition Act, Madison said, “ought to

produce universal alarm, because it is leveled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.” Madison’s rhetoric may sound old-fashioned, but his thought is as vital today as ever: here or in Moscow or Beijing. The right to examine public characters and measures—that is, to criticize public officials and their policies—is crucial to democracy. Madison went on to make a fundamental point about our political system. In this country, he said, “the people, not the government, possess the absolute sovereignty.” He was drawing a distinction from Britain, where people were then—and still are—not citizens but subjects, and where Parliament is the absolute sovereign. Madison’s point was that if all of us are the ultimate rulers, it follows that we must be able to examine and criticize those whom we choose to govern us from time to time.

The Sedition Act was never tested in the Supreme Court before it expired. But as a political tactic it turned out to be a boomerang. It aroused popular outrage and helped the Jeffersonians in the election of 1800. Large numbers of Americans learned the lesson that freedom of speech has a crucial role in a democracy.

Jefferson defeated Adams. On taking office he pardoned all those who had been convicted under the Sedition Act. He explained why a few years later in a letter to Abigail Adams. “I considered that law to be a nullity,” he said—that is, unconstitutional—“as absolute and palpable as if Congress had ordered us to fall down and worship a golden image.” Isn’t it wonderful, by the way, that they corresponded despite their political differences? I can tell you that Mrs. Adams was as strong a supporter of the Sedition Act as her husband. Jefferson and John Adams also wrote each other, continuing after they left office until the day they both died: July 4, 1826, the fiftieth anniversary of the Declaration of Independence.

After the Sedition Act of 1798 it was more than a century before Congress again passed a law that punished political speech. In 1917, when the United States entered World War One and the country’s mood was violently jingoistic, Congress

passed an Espionage Act that among other things made it a crime to obstruct recruitment of men for the armed forces. In 1918 Eugene V. Debs, a socialist and pacifist who was five times the Socialist Party's candidate for President, was prosecuted under that clause.

Debs had made a speech in Canton, Ohio, that was mostly about socialism. But he also expressed sympathy for three men who were in jail nearby for helping others who refused to register for the draft. He said that they were paying a penalty for "seeking to pave the way to better conditions for all mankind." For those words, Debs was convicted of violating the Espionage Act and sentenced to 10 years in prison. He ran for President the next time from a Federal penitentiary. Debs took his case to the Supreme Court, arguing that his conviction violated his right to free speech under the First Amendment. But the Court unanimously rejected his argument.

If you think about the *Debs* case, you know that something has happened since then to the Supreme Court's understanding—and our understanding—of freedom of speech. No one could be sent to prison today for mere words in opposition to a war. In fact there has been a remarkable historical process, beginning just a few months after the *Debs* decision. The Supreme Court decided another Espionage Act case, this one involving anarchists who threw leaflets from the top of buildings in the Garment District in New York opposing President Wilson's dispatch of troops to Russia after the Bolshevik Revolution. They were convicted and sentenced to 20 years in prison—convicted, mind you, for what was plainly political criticism. The Supreme Court again upheld the convictions. But this time Justice Holmes, joined by Justice Brandeis, dissented. Holmes said:

"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and you want a certain result with all your heart, you naturally express your wishes in law and sweep away all opposition . . . But when men have come to realize that time has upset many fighting faiths, they may come to believe even more than the foundations of their own conduct that the ultimate good desired is better reached by free

trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. . . . While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death."

Over the next 10 years Justice Holmes and Brandeis dissented again and again in free speech cases. Gradually they persuaded the country—and the Court. Beginning in the 1930s the Supreme Court began to reverse, as violations of the First Amendment, convictions of speakers whose words were offensive to those in authority: Jehovah's Witnesses, Communists and the like. One notable case was that of Angelo Herndon, a black man who was a Communist organizer in Georgia. You may remember that early in this talk I quoted Professor Delgado as saying that the First Amendment was no help to the powerless in society. But who could be more powerless than a black Communist in Georgia in the 1930s, more repugnant to those in power?

That was the history to which the Supreme Court turned in the *Sullivan* case. Justice Brennan described the struggle over the Sedition Act of 1798. He quoted Madison's Virginia Resolutions. He concluded that although the Sedition Act had never come before the Supreme Court, "the attack upon its validity has carried the day in the court of history." With that, the Court in effect retrospectively held unconstitutional a statute that expired 163 years earlier. As I indicated earlier, the Court threw out the libel judgment against *The New York Times*. But the decision in the *Sullivan* case did far more. More than any previous case, it gave full meaning to the premise of the First Amendment that Americans would be free to speak and publish their views, however offensive to those in power.

As a result of the decision, Dr. King and his colleagues were free to carry on civil rights struggle without fear of punitive legal actions against them. And the national press was free to cover the movement. The American people saw the cruelty of official racism in the South and rejected it. Members of Congress heard from their constituents, and Congress began to pass

meaningful civil rights legislations. Blacks in the Deep South were able to vote, and the political situation there was transformed. Blacks were elected to many offices. There was—there is—even a black Congressman from Mississippi, something unimaginable even a dozen years ago. Ladies and gentlemen, the system—James Madison’s system, Thomas Jefferson’s system—worked.

The distinguished chairman of Harvard’s Department of Afro-American Studies, Professor Henry Louis Gates Jr., wrote recently that the First Amendment—I quote—“licensed the protests, the rallies, the organization and the agitation that galvanized the nation” in the years of progress against racial discrimination in the south. The civil rights movement was the greatest peaceful revolution in my lifetime, and its achievements should not be overlooked because racism persists in this country, as we all know. It was a victory of the voteless, the dispossessed, the downtrodden against the forces that had controlled Southern politics for generations. Yet Richard Delgado, and I am sure many who share his views, tell us with a straight face that the First Amendment is of no use to those whom society marginalizes. I put it to you, without any attempt at academic politesse, that the argument is a joke: a bad joke, an insult to history and to all those who struggled to make the promise of free speech in this country come true.

Now let us return to the contemporary demand that the freedom of speech and press guaranteed by the First Amendment be curtailed when it comes to certain kinds of “harmful” speech. Professor Delgado argues this position with a passionate sincerity that demands our respect, as do such other leading figures as Professors Mari Matsuda and Charles Lawrence III, and Professor MacKinnon. I want to consider, first, the practical effectiveness of banning what they call hate speech.

We all know that words can be hateful assaults. To hear someone shout “Kike” at you, or “Nigger,” or a dozen other ugly epithets, is painful. But I watched the effects of legislation intended to limit the harm, and it didn’t work. That was in Britain, where I was a correspondent for years. In the mid-1960s the British Government, as part of a race relations bill, made it a

crime to speak in a way that would arouse racial hatred. The intention was noble. But the Government did not invoke the law against the most notorious, the most deadly example of racist agitation in that decade: the speech by Enoch Powell, a right-wing member of Parliament, predicting that blood would flow if Britain did not stop admitting non-white immigrants to the country. And then I noticed another thing: The prosecutions that were brought under the act were against leaders or black power groups. In other words, a law that we thought was designed to protect blacks against verbal assault was being used against blacks.

Now I learn from Professor Gates of Harvard that the same experience has occurred elsewhere. The University of Michigan had a code against hate speech until a Federal court held it unconstitutional. During the year in which it was enforced, more than 20 blacks were charged by whites with hate speech; and not a single instance of white racist speech was punished. Canada, adopting the hate speech idea, made one of its first targets a book by the black feminist scholar Bell Hooks, “Black Looks: Race and Representation”; copies were confiscated by Canadian police last June as possible “hate literature.”

Canada has also adopted a form of Professor MacKinnon’s theory that anything arguably pornographic should be prohibited as a menace to women. The very first action taken in Canada under that view of the law was a raid on a gay and lesbian bookshop in Toronto. I put it to you that when you open up holes in the armor of protection for freedom of speech and press, repressive law will not hit the targets you expect.

In answer to that concern, Professor Matsuda proposed—and a number of universities adopted—a rule that hate speech should be punished only if it was—I quote—“directed at a historically oppressed group.” Now what are the historically oppressed groups in our society? Blacks first and foremost, Jews, Catholics, women, homosexuals. One would have to add a number of immigrant groups that not so long ago were denounced as racially inferior, notably Asians and people from Southern and Eastern Europe. What it seems to come down to is that one is prohibited from directing hateful speech at anyone except a straight white male Protestant of

Anglo-Saxon origins. Or so I thought, until Professor Gates, who grew up in a West Virginia mill town, suggested that poor whites from the Appalachians qualified as historically oppressed. He also foresaw that under the Matsuda theory a black woman in Chicago would be guilty of hate speech for calling a white policeman a “dumb Polak,” since Polish immigrants were plenty oppressed in Chicago. Ladies and gentleman, the theory is unworkable—as well as politically and morally unacceptable. The law cannot play favorites among victims.

Stanford has what amounts to a speech code, as this audience surely knows: an interpretation of the University’s Fundamental Standard of behavior. In fairness, I should say that the Stanford definition of forbidden speech is careful and narrow. It covers what it calls “harassment by personal vilification.” It requires, for a violation of the rules, not an inadvertently wounding remark but an intent to insult an individual or small group on the basis of race and so on, using so-called “fighting words.” The explanation adds that the target of an insult cannot make it into one likely to provoke violence by himself threatening violence.

The Stanford rules are so careful that, as I understand it, they have not resulted in any disciplinary action since they were adopted in 1990. That is a reason to praise Stanford’s care. But it is still a matter for regret that this great university lent the weight of its reputation to the speech code movement. For others have not been so careful. The examples of overkill in campus speech regulations are endless, and often ridiculous. One noted recently by Nat Hentoff arose at the University of California, Riverside. A fraternity distributed a T-shirt showing a man with a serape and sombrero, with an inscription from an anti-racist Bob Marley song: “It doesn’t matter where you come from, as long as you know where you are going.” The fraternity was charged with “dehumanizing” the Mexican people, found guilty and suspended for three years—until the university was sued. Then it agreed to undo the suspension, and to have its administrators take First Amendment sensitivity training.

I sometimes wonder why American skins have become so thin. But we do not have time to

explore that tantalizing question. Let me just say that there is a profound reason to doubt the wisdom of creating exceptions to the First Amendment so that categories of “harmful speech” can be censored or punished. Judge Richard Posner observed recently that communism “has done more harm to more people than pornography,” so it should follow that anything tainted with communism should fall outside the protections of the First Amendment. But it is in cases about communism, going back to Angelo Herndon in 1937, that some of the most important legal battles for freedom have been fought, as Professor MacKinnon herself acknowledges. I can hardly imagine anything more dangerous to the whole atmosphere of freedom in this country than to have judges or legislators decide what speech and writing was harmful. It would not stop with Playboy Magazine, Professor MacKinnon’s target.

A commitment to freedom, to repeat what Justice Holmes said, is a commitment to allow what we hate. And Holmes’s point is that in the marketplace of thought even the hateful may contain important truths. I can illustrate that point with a story. The first great press case decided by the Supreme Court was *Near v. Minnesota*, in 1931. Mr. Near put out a nasty scandal sheet, *The Saturday Press*, which among other things was crudely anti-Semitic. The Minnesota courts banned it, but the Supreme Court said the First Amendment entitles Mr. Near to keep publishing. Many years later Fred Friendly of the Ford Foundation was writing a book on the *Near* case. He talked about it at lunch, and he was overheard by Irving Shapiro, at the time the chairman of the du Pont Corporation and a member of the Ford Foundation board. Mr. Shapiro said: “I knew Mr. Near.” Irving Shapiro’s father owned a dry-cleaning shop in Minneapolis. Gangsters came and demanded that he pay them protection money. When he refused, they sprayed the clothes with acid. The police did nothing, and the regular Minneapolis newspapers wrote nothing about that or similar incidents. But Mr. Near came and interviewed the Shapiros and published a story, the police acted, the criminals were prosecuted—young Irving testified—and they were convicted. So in the nastiest forms of free expression there may be

good.

Once judges and legislators begin balancing the value of free speech against the claims of equality or decency or good taste—which is what the arguments of Professor Delgado and MacKinnon and the others really mean—the freedom that makes this country so distinctive will be at constant risk. Victory in the long battle to make the First Amendment live up to James Madison’s vision—a victory largely won in our time—will be undone. I think the advocates of equality over freedom, if that day came to pass, would look on their work and despair.

I hope that those who have been trying to graft on to the First Amendment an exception for “harmful speech” will think again and abandon their dangerous project. I shall end by mentioning cases that I think make the point as bluntly as

it can be made: the Supreme Court’s decisions in 1989 and 1990 on flag-burning. In each case someone had burned the American flag to express disagreement with government policy, and had been convicted of an offense for doing so. The Court reversed those convictions. Justice Brennan, speaking for the majority in the first case, said: “If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” When the issue came back, Justice Brennan again spoke for the Court, in one of his last opinions before retiring. He understood, he wrote, that burning the flag was deeply offensive to many Americans. But to punish that desecration would “dilute the very freedom that makes this emblem so revered, and worth revering.” □