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## BOOK REVIEW

# WHAT IF *BROWN V. BOARD OF EDUCATION* WAS A HATE-SPEECH CASE?

Richard Delgado\*

NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD. By Randall Kennedy. New York: Random House, Inc. (Vintage Books), 2002.

### INTRODUCTION

In 1982, *Harvard Civil Rights-Civil Liberties Law Review* published the first article specifically on hate speech. Entitled *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*,<sup>1</sup> the article identified a number of harms associated with racial vituperation,<sup>2</sup> showed that courts were already beginning to afford relief under such theories as intentional infliction of emotional distress, assault, and defamation,<sup>3</sup> and proposed a new, freestanding tort.<sup>4</sup> A number of U.S. courts and the Canadian Supreme Court in a landmark decision followed suit.<sup>5</sup>

A few years later, Mari Matsuda, in a much-heralded article, urged that public law remedies, such as criminal prosecutions, also ought to be available to victims of hate speech.<sup>6</sup> And, a short time later, a third critical race theorist,

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1. Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) [hereinafter *Words that Wound*].

2. *Id.* at 135-49.

3. *Id.* at 149-64.

4. *Id.* at 179-81.

5. *E.g.*, *Monteiro v. Tempe Union Sch. Dist.*, 158 F.3d 1022 (9th Cir. 1998); *In re Michael M.*, 104 Cal. Rptr. 2d 10 (Ct. App. 2001); *Taylor v. Metzger*, 706 A.2d 685 (N.J. 1998); *see also Regina v. Keegstra*, [1990] 3 S.C.R. 697 (upholding national hate-speech law in the face of the objection that it impermissibly limited freedom of expression protected by Canadian Charter).

6. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*,

Charles Lawrence, in an exchange with ACLU president Nadine Strossen, added a new dimension to hate-speech analysis when he argued that *Brown v. Board of Education* was a hate-speech case.<sup>7</sup> When the Supreme Court ruled against school segregation because it sent a message of inferiority to black schoolchildren in a way unlikely to be undone, it implicitly decided that certain social messages should not be spoken. Accordingly, *Brown* stands as a precedent supporting measures such as campus hate-speech codes aimed at preventing much the same evil.<sup>8</sup>

Those three articles and a book growing out of them<sup>9</sup> laid the intellectual groundwork for a wave of anti-hate speech activism, followed by an equally powerful counterreaction that culminated in three court decisions striking down campus conduct codes at major universities.<sup>10</sup> The Supreme Court cast further doubt on official regulation of hate speech when it struck down a state cross-burning law in *R.A.V. v. St. Paul*.<sup>11</sup> Later, however, it breathed new life into the movement when it ruled, in *Virginia v. Black*,<sup>12</sup> that cross-burning with the intent to intimidate falls outside the First Amendment. Recent decisions striking down state sodomy laws<sup>13</sup> and upholding affirmative action at the University of Michigan<sup>14</sup> give further evidence of the Court's increasing mindfulness of the need to temper law to the imperatives of an increasingly diverse society.

In the middle of this ferment comes Randall Kennedy's book, *Nigger*,<sup>15</sup> with its startling thesis that *nigger* may be a loaded term—the worst in the lexicon of racist insults—but still does not warrant banishment from polite society. Because “a word is not a crystal, transparent and unchanged,”<sup>16</sup> but capable of bearing many meanings, we should not condemn *nigger* categorically or endow it with more power than it deserves. Instead, we should use the term casually, repeatedly, even laughingly, so as to deprive it of its

87 MICH. L. REV. 2320 (1989).

7. Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431.

8. *Id.* at 449-66.

9. MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993).

10. *Corry v. Stanford Univ.*, No. 1-94-CV-740309 (Cal. Super. Ct. Feb. 27, 1995); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989); *UMW Post, Inc. v. Bd. of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991).

11. 505 U.S. 377 (1992).

12. 538 U.S. 343 (2003).

13. *Lawrence v. Texas*, 539 U.S. 558 (2003).

14. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

15. RANDALL KENNEDY, *NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD* (Vintage 2002) [hereinafter *NIGGER*].

16. *Id.* at 44 (quoting *Towne v. Eisner*, 245 U.S. 418, 425 (1918)); see also *id.* at 76 (declaring that “it is important to remember that the N-word is not self-defining,” but is capable of bearing many meanings).

sting.<sup>17</sup> According to Kennedy, this jiu-jitsu approach will defang the word, reclaim it from bigots, and enable its former victims to elude its awesome power.<sup>18</sup>

On the way to developing his audacious proposal, Kennedy reviews the word's origin, history, and many uses,<sup>19</sup> including times when it has found its way into court proceedings.<sup>20</sup> He discusses the perils of fighting it and advocates the solution—using the word frequently and casually so as to weaken its impact—that many of his readers have found so startling.<sup>21</sup> The author of leading work on black crime<sup>22</sup> and the death penalty,<sup>23</sup> and a critic of contemporary racial movements,<sup>24</sup> Kennedy advances a number of familiar themes, many of them bracing, intellectually appealing, and in keeping with the feisty independence that marks his earlier work: the need to avoid dwelling on victimization and wounded feelings, an emphasis on colorblindness, and the need to avoid overreaction. He also places responsibility on the pro-regulation side to show that their problem is real and not the product of a herd mentality, increased racial sensitivities, or media hype.

I find more to praise in this book than the reader familiar with my past work might suspect. For one thing, Kennedy's scholarship is impeccable, his review of court cases in which the term *nigger* figures is comprehensive and tightly organized. One or two reviewers have complained that the chapter on court cases made their eyes glaze over;<sup>25</sup> mine did not. And Kennedy's stories of his own experiences with *nigger* are riveting and totally believable. Several of Kennedy's sections, in fact, greatly resemble parts of my own recent book on hate speech.<sup>26</sup> It is only in our conclusions about what should be done about that problem that we diverge widely.

17. *Id.* at 89-104 (explaining that everyone—whites and blacks—should be able to use the term); *id.* at 127-35 (approving of black comedians who use the term).

18. *Id.* at 139 (advocating that “people of all backgrounds . . . yank *nigger* away from white supremacists, . . . subvert its ugliest denotation, and . . . convert the N-word from a negative into a positive appellation.”).

19. *Id.* at 3-44 (describing the term's use by prominent whites and blacks).

20. *Id.* at 45-88.

21. *Id.* at 89-139.

22. RANDALL KENNEDY, *RACE, CRIME AND THE LAW* (1997).

23. Randall Kennedy, *McClesky v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988).

24. Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989).

25. *E.g.*, Ishmael Reed, *Sticks and Stones*, L.A. TIMES, Feb. 3, 2002, at R6 (book review) [hereinafter *Sticks and Stones*].

26. See RICHARD DELGADO & JEAN STEFANCIC, *UNDERSTANDING WORDS THAT WOUND* (2004) [hereinafter *UNDERSTANDING*].

## I. THE STRANGE CAREER OF A HATEFUL WORD

This short, compact, well-written book features a clear structure, exemplary research, and an easily grasped thesis. An introductory chapter sets out his central contention and recounts his own experiences, as an African American growing up in America, with the word *nigger*.<sup>27</sup> Chapter One (“The Protean N-Word”) describes how the word originated and came to find a place in the English language.<sup>28</sup> It shows how it subsequently seeped into many corners of American culture, including literature, judicial proceedings, and popular media.<sup>29</sup>

Chapter Two (“*Nigger* in Court”) discusses legal opinions in which the word *nigger* figures,<sup>30</sup> including the O.J. Simpson trial.<sup>31</sup> Chapter Three (“Pitfalls in Fighting *Nigger*”) warns against overreaction and urges blacks and their friends to avoid the twin evils of censoriousness and excessive anger.<sup>32</sup> In particular, civil rights activists should beware of solutions, such as speech codes, that give the word more prominence than it deserves.<sup>33</sup> Instead, they should take back the word by making it part of common parlance.<sup>34</sup> Black comedians and TV personalities should repeat it often; ordinary blacks should use it as a friendly form of address. Shorn of its unique meaning and implied threat, *nigger* will no longer serve racists and white supremacists as a powerful weapon in their arsenal.<sup>35</sup> With that battle won, blacks and other minorities will be able to turn their attention to measures that will advance civil rights more tangibly. A short, three-page final chapter (“How Are We Doing With *Nigger*?”) repeats the First Amendment case for tolerating the word *nigger*, reminds readers of its multiple uses, and counsels against overreaction.

27. NIGGER, *supra* note 15, at xvi-xvii.

28. *Id.* at 3-44.

29. *E.g., id.* at 5, 10, 18-23, 109-12.

30. *Id.* at 45-84, 87-88.

31. *See id.* at 85-87. He identifies four types of cases, beginning with ones in which a juror, lawyer, or judge uses the word. Generally, the word will only taint the result, constituting reversible error when a judge uses it. *Id.* at 47-57. In a second category, murder defendants claim provocation because of the victim’s use of the word. This argument has apparently never been successful. *Id.* at 57-64. A third type of case arises when a target sues for intentional infliction of emotional distress. These succeed only in egregious cases. *Id.* at 64-82. In a final group of cases, the judge must decide whether the jury should be allowed to know of a defendant’s or witness’s use of the word. *Id.* at 82-87. These cases have outcomes that result both ways.

32. *Id.* at 89-135.

33. *Id.* at 118-25.

34. *Id.* at 134-35 (urging independent thinking by blacks); *id.* at 139 (positing that blacks should take back the word); *see also id.* at 24-25 (describing its current use by black comedians).

35. *Id.* at 31-33, 134-35, 139, 145-48; *see also id.* at 36-40 (describing use of the term by rap musicians).

## II. KENNEDY'S SOLUTION: INOCULATION THROUGH REPETITION

If *nigger* is the most ubiquitous and serious epithet in U.S. history and culture, what should be done about it? According to Kennedy, the solution is for blacks—and perhaps white well-wishers—to repeat the word often and casually, thereby depriving it of its sting. According to Kennedy: “there is much to be gained by allowing people of all backgrounds to yank *nigger* away from white supremacists, to subvert its ugliest denotation, and to convert the N-word from a negative into a positive appellation.”<sup>36</sup> Indeed, this “process of flipping”<sup>37</sup> is well under way—many black people, particularly the young, greet each other warmly with the term; black comedians lace their humor with it.<sup>38</sup> In time, all people, whites and blacks, will be able to use the term nonpejoratively. By a process of intentional subversion, blacks and their sympathizers will deprive a hateful word of its ability to shock and wound.

A. *Advantages of Kennedy's Solution*

Kennedy's solution offers a number of formidable advantages. For one, it is a more-speech response. Unlike campus speech codes and tort suits which seek to silence or punish the hate speaker, Kennedy's suggestion that blacks fling the epithet around until it is trite does not trench on protected speech. It draws from accepted First Amendment doctrine holding that the best solution to bad speech is more speech.<sup>39</sup>

Further, to the extent that it is successful, Kennedy's approach would empower blacks. They would wield control over an instrument—hate speech—that, at least in one of its guises, harasses and subordinates them. This is highly desirable in a nation like ours struggling to surmount a history of slavery and Jim Crow.<sup>40</sup> If blacks could in fact divest the term *nigger* of its power in the way Kennedy suggests, this would weigh heavily in favor of his argument.

B. *Problems with Kennedy's Proposal*

Despite its potential advantages, several features of Kennedy's proposal warrant concern. These include its lack of empirical evidence or support in the social science of racism, and its placement of the burden on blacks to address their own victimization. It also overlooks the special interests of children, and,

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36. *Id.* at 139; *see also id.* at 41-42, 63-64, 100-05 (urging that anyone, including white movie directors, should be free to use the term).

37. *Id.* at 146.

38. *Id.* at 35-36, 127-35, 146; *see also id.* at 41-42, 103-05 (advocating use by nonracist whites).

39. *See* UNDERSTANDING, *supra* note 26, at 35, 207.

40. *See* JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 91-172 (2000).

if wrong, can easily compound racism, culminating in new atrocities. Kennedy is trapped by certain metaphors—such as speech as a pressure valve for hateful emotions—when the reality of hate speech is far more complex than these metaphors convey. He gives slight credence to a powerful means of controlling racism, the confrontation theory, and endorses a tough-love, let-it-roll-off-your-back approach that finds little support in scientific understanding of hate.

### 1. *Empirical validity*

Kennedy urges his readers to use the term *nigger* casually and often so that, over time, it will lose its power. But how do we know that this will happen? Kennedy somewhat inconsistently points out that a word's meanings are capable of change over time and from setting to setting. The word *nigger* on one occasion may be a hate-filled epithet, on another a friendly greeting. What assurance do we have that repetition of the word in one guise, say as a greeting or joke by a black comedian, will have any effect on its use in another—say, a hatemonger cussing out an African American for merely occupying his field of vision?

When used as an epithet, *nigger* stands on a different footing from other forms of address, like *Sir* (“Excuse me, Sir, are you the manager?”), that aim to identify the other person in a transaction, establish common ground (“I’m here to ask you a question”), and initiate a conversation (“Whom do I tell about a leaky faucet in my room?”). Used this way, *nigger* is not an invitation to a conversation. Instead it is a performative, a speech-act, one of those terms, like *I do* or *we have a deal*, that achieve their objective by the very act of being spoken. An epithet (“You -----”) conveys no information that the addressee did not know. It is scarcely an invitation to a discussion. Instead, it reorders or affirms social relations and hierarchy; the speaker lords it over the despised victim.

Kennedy’s suggestion that blacks repeat the term often in order to deprive it of efficacy does more than ignore its multifariousness. It places the onus on blacks to address their own susceptibility when it is used unequivocally as a term of hate. Imagine a community where a white supremacist places a burning cross on the front lawn of a black family’s house.<sup>41</sup> Would the solution be for all black families in that community to place similar burning crosses on their own front lawns? Even if doing so might conceivably reduce the impact of similar future incidents, one should hesitate to ask black families to remedy their own suffering in this way. If hate speech is a problem for the total community, it seems illogical and unfair to ask the victims of hate to change.

But Kennedy’s cure might operate in a second way: The hate speaker, noticing that the recipient seems not to care (because he, too, does the same

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41. See *id.* at 812-14 (describing cross burning as a tool of ethnic intimidation).

thing) might lose interest and leave the victim alone. But is it not equally likely that he will simply select a different epithet, such as *coon*, *darkie*, *jungle bunny*, *spade*, *spook*, or *boy*? Unless Kennedy expects African Americans to begin calling each other by all these terms, replicating the entire arsenal of race hate in their everyday parlance, his solution meets a formidable obstacle. Even if inoculation through repetition were to work for one term, say, *nigger*, the hate artist would only have to shift ground to regain the upper hand.

Finally, we have two-hundred years of experience with the word *nigger*. Has it begun to lose its virulence? Not appreciably, nor has this happened with terms like *kike*, *wop*, *spick*, and *chink*.<sup>42</sup> Of course, Kennedy might acknowledge that these words have been repeated many times, but by the wrong party—whites—and that if Jews, Italians, Latinos, and Asians had adopted his approach, their virulence would have decreased by now. But the few controlled experiments in which subjects were required to address each other abusively witnessed increased, not decreased, levels of animosity during the short period of the experiment.<sup>43</sup>

### 2. Evidentiary concerns

A second cause for concern is that Kennedy's proposal would deprive civil rights plaintiffs of a powerful evidentiary tool. As things stand, a victim of discrimination must demonstrate discriminatory intent before legal redress is possible.<sup>44</sup> If an employer says to an Asian worker, "I am firing you, you chink," discriminatory intent would not be hard to find. But suppose that Asian Americans take up Kennedy's solution and begin referring to each other as chinks, and a few whites follow suit. With the link between the term and racial animus now weakened, the employee faces a more difficult task in proving intent. The defendant may argue that he was merely adopting a form of address that Asians themselves use, and meant nothing by it.

### 3. The role of power

Kennedy's proposal also seems to overlook the operation of social

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42. See UNDERSTANDING, *supra* note 26, at 47-91 (discussing the history of these four words). Finally, consider the case of blasphemy (e.g., the exclamation "Jesus Christ!" uttered in front of a devout Christian), whose offensiveness to the community of the devout seems not to have diminished over time.

43. See, e.g., R. SINGER & W. STATSKY, THE RIGHTS OF PRISONERS 551 (1974) (reprinting Zimbardo's description of famous prison study, Craig Haney et al., *Interpersonal Dynamics in a Simulated Prison*, 1 INT'L J. CRIMINOLOGY & PENALOGY 69, 80-81 (1973)); see also Videotape: Quiet Rage: The Stanford Prison Study (Phillip G. Zimbardo 1991) (showing that experimental subjects assigned to the task of prison guards berated the mock prisoners so severely that the director felt obligated to terminate the study).

44. See *Washington v. Davis*, 426 U.S. 229 (1976).



power.<sup>45</sup> In our society, whites tend to have more power than blacks, and have had such power throughout history. Can a term of contempt coined and used by the majority change meaning when used by the disempowered minority? Consider two examples:

a. *Cases where the empowered group wishes to change the meaning of a term*

One can think of a number of cases in which an empowered group successfully sought to change the way in which a term was used. Consider, for example, the *gentleman's C*. At certain prestigious private schools, a grade of C, which formerly meant nothing more than a mediocre grade, over time came to bear a different meaning. These schools frequently enrolled the sons of patrician, well-off white families, who found it demeaning to strive for conventional success. Instead these students placed greater emphasis on sports, parties, and being well-rounded. When their grades suffered as an inevitable result, they began calling these grades *gentleman's C's*. Over time, the grade lost its association with intellectual mediocrity and became virtually a symbol of high status, at least when earned by the well-born.<sup>46</sup>

b. *Contrasting cases*

Imagine that the inmates of a jail or penitentiary decide that being a criminal is not so bad after all. Criminals have a bad rap—many rehabilitate themselves and go on to perform valuable services to society. Besides, many criminals are not bad, they are merely misunderstood. So, criminals decide to call each other *criminal* at every opportunity (“Hi criminal, how was your day?”) and to associate positive attributes with criminality (“How’s my favorite criminal?”). Would the term *criminal* begin to lose its sting? Of course not. Society, which has decided for what it considers good reasons to attach negative connotations to the term,<sup>47</sup> will go on using it as it has done.

45. See, e.g., Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813 (1992).

46. See, e.g., Zac Peskowitz, *Thoughts on the Next Ruling Class*, U. WIRE, Dec. 11, 2002; Rick Telander, *Right Time, Right Place for O’Neil*, CHI. SUN-TIMES, Mar. 11, 1997 (discussing the practice of awarding *gentleman's C's*); see also Christine Corcos, *Portia Goes to Parliament: Women and Their Admission to Membership in the English Legal Profession*, 75 DENV. U. L. REV. 307, 417 n.226 (1998); Jeffrey Lehman & Deborah C. Malamud, *Saying No to Stakeholding*, 98 MICH. L. REV. 1482, 1492 (2000) (book review).

47. Are the reasons good? Not necessarily. Few acts are inherently and always evil; rather, the decision to punish is a social decision. See, e.g., Regina Austin, “*The Black Community*,” *Its Lawbreakers and a Politics of Identification*, 65 S. CAL. L. REV. 1769 (1992); Regina Austin, *An Honest Living*, 103 YALE L.J. 2119 (1994) (explaining how the line between legality and illegality is drawn differently in different communities); Richard Delgado, *Rodrigo’s Eighth Chronicle: Black Crime, White Fears—On the Social*

Or suppose that graduates of community college programs decide that their Associate in Arts (A.A.) degrees should carry equal status with the Ph.D.s offered at the research university on the other side of town. When applying for jobs, for example as laboratory assistants, they draw themselves up and proudly declare that they are possessors of the Associate in Arts degree with a specialization in laboratory technology. Over time, would the term's meaning change? No, the employer, like the newly minted Ph.D., holds all the cards and will place the meaning he chooses on various degrees. If to him, the degree (like the status of criminal) seems objectively inferior, he is unlikely to change merely because community-college graduates aspire to a more elevated status.

Or, finally, consider the term *girl* used to mean a secretary or administrative assistant. ("I'll have my girl send the memo over by noon"). Suppose that the secretaries of a large organization become disgusted with being referred to this way, which they find demeaning. Instead of taking their grievance to the higher-ups, they start calling each other *girls*, hoping that their supervisors will get the message. Are the powers that be likely to mend their ways? Not without confrontation—but this is precisely the strategy Kennedy eschews.

Words derive meanings in two ways: from their use,<sup>48</sup> and from the speech community that deploys them a certain way.<sup>49</sup> Unless a small segment of that community has unusual power (like Yale undergraduates from wealthy backgrounds or media executives), it is unlikely to be able to change a term's meaning merely through an act of will. Of course, whites might decide one day to stop being racists, or to stop expressing racism through use of the word *nigger*. Or, they might decide to bond with each other by repeating some other term about blacks. But blacks' adoption of that term for their own use seems unlikely to change the power relationships between them and whites that give the term its malign efficacy.<sup>50</sup>

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*Construction of Threat*, 80 VA. L. REV. 503 (1994).

48. See LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* (1922) (explaining how a system of words can come to acquire meaning).

49. E.g., STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980) (explaining role of interpretive communities in contests over meaning).

50. And since, without structural reform, that power relationship is unlikely to change soon, see DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* (4th ed. 2000) [hereinafter BELL], whites will probably continue to deploy verbal tools and reaffirm racial lines. Might *nigger* follow a similar career path as *queer* and *dyke*, which the gay community began consciously using as affectionate or neutral terms in discussion within their own circles? With these terms, an interesting situation has developed: gay bashers, hate criminals, and other detractors continue using these terms as before, while some in the gay community use them in the new, neutral sense. See Francisco Valdez, *Foreword: Under Construction*, 85 CAL. L. REV. 1087 (1997) (comparing critical race, Latino, and queer jurisprudence). Will the second use swallow up the first? Probably not until gays achieve political power.

#### 4. *Self-determination*

Kennedy also sees use of the term as a strike for independence and against group-think. He writes that “much [is] to be gained by allowing people of all backgrounds to yank *nigger* away from white supremacists.”<sup>51</sup> In particular, black people who do so would show “bracing independence.”<sup>52</sup>

But people of color might exercise self-determination in a variety of ways, many of which offer more promise than addressing each other in demeaning fashion. For example: they might mobilize in opposition to disrespectful treatment. They might petition for narrowly tailored speech codes,<sup>53</sup> or sue institutions that tolerate a hostile learning environment.<sup>54</sup> They might demand that purveyors of hate speech mend their ways. Although these approaches are susceptible to criticism on various grounds, they each entail taking matters into one’s own hands. The victim exercises self-determination as surely as—and in many respects more straightforwardly than—one who repeats a hateful word in hopes that it will somehow go away.

#### 5. *Law’s progression*

For another measure of the degree of success that Kennedy’s suggestion is likely to register if widely adopted, consider the very law reports Kennedy describes in his second chapter. Anglo-American common law usually evolves in one direction only. At first, a speech-act is considered harmless and part of protected liberty. Then, the law recognizes a part of it, usually an egregious example, as actionable, then another, then another. Finally, a new broad category of actionable behavior, such as intentional infliction of emotional distress, emerges. We rarely deem an act actionable at one time, then later change our minds and decide it should not be actionable after all.<sup>55</sup> New harms usually follow an incremental course toward recognition. By urging that we repeat what has been deemed harmful in the hope that it will come to seem acceptable, Kennedy swims against the tide of history.

#### 6. *The special case of children*

Kennedy’s theory also fails to provide for the special case of children.<sup>56</sup>

51. NIGGER, *supra* note 15, at 139.

52. *Id.* at 135 (advocating this course over boring conventionality).

53. See, e.g., Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991).

54. See, e.g., cases cited *supra* note 5.

55. Compare William Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960), with Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (both describing law’s incremental evolution).

56. See UNDERSTANDING, *supra* note 26, at 93-109 (Chapter 5, “Hate Speech and

Peculiarly vulnerable to demeaning stereotypes and imagery, children are less capable than adults of ignoring hateful words that castigate them on account of who they are.<sup>57</sup> Social science studies of racial awareness have shown that children as young as three are aware of the meaning of race and know that it is better to be of certain races than others.<sup>58</sup> A few adults may be able to laugh off racist remarks; children rarely are. The idea that children will benefit from hearing more frequent use of the term *nigger* strains belief. And even if Kennedy is right that frequent repetition of the word *nigger* will deprive it, over time, of its sting, should we sacrifice a generation of children in order to reap this long-term benefit? Kennedy ought to have addressed these serious weaknesses in his theory.

### 7. *The risk of desensitization*

Recent scholarship has cast doubt on the idea that hate speech is essentially innocuous. Books such as Alexander Tsesis's *Destructive Messages*<sup>59</sup> show how a climate of hate speech contributed to practically every mass hate movement in history. Whom we would kill, we first demonize. If society were to take seriously Kennedy's suggestion and bring *nigger* back into common use, this might introduce serious risks. Although a second Holocaust or Rwandan massacre seems unlikely, this country's history of racial violence suggests that we ought to move slowly in adopting forms of address that could easily desensitize society to the evils of racism.<sup>60</sup> One of Kennedy's reviewers notes that one or two prominent blacks, including Richard Pryor upon his return from a visit to Africa, stopped using the term.<sup>61</sup> Might this concern have underlain their reason?

### 8. *Pressure valves and confrontation theory*

What is the best way of controlling racism? At times in his book, Kennedy seems to suggest that the world would be safer if racists could vent their anger harmlessly through speech.<sup>62</sup> Allowing a racist or hothead to let off steam will

Children: The Special Case of Youth"); KEVIN W. SAUNDERS, *SAVING OUR CHILDREN FROM THE FIRST AMENDMENT* (2003).

57. See *Words that Wound*, *supra* note 1, at 142-43, 147.

58. See, e.g., MARY ELLEN GOODMAN, *RACE AWARENESS IN YOUNG CHILDREN* 46-47, 55-60, 75, 129-31, 135-36, 159-64, 211, 232-39 (rev. ed. 1964).

59. ALEXANDER TSEISIS, *DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS* (2002).

60. See *id.* (showing how campaigns of denigration paved the way for later atrocities).

61. *Sticks and Stones*, *supra* note 25.

62. See *NIGGER*, *supra* note 15, at 92 (warning of dangers of "repression" of the term *nigger*); *id.* at 124-25 (writing that it is likely to spark justified resistance); see also *id.* at 115 (deploring sensitivity training for whites found to have used the word).

reduce the likelihood that he will do something genuinely harmful, perhaps murderous, later. We should hesitate to prohibit use of the N-word because prohibition could lead to an escalation of violence against blacks and other minorities.

This argument flies in the face of what social scientists have learned about prejudice and hate. Most people are more, not less, dangerous after giving vent to an angry or hateful remark.<sup>63</sup> And bystanders may come to believe that the victim deserves it and that it is permissible for them too to speak and act that way.<sup>64</sup> Most social scientists hold that the best way to restrain prejudice is to arrange social settings so that any outward expression of it is immediately noticed and checked.<sup>65</sup> A system of reminders, including codes, statutes, and reprimands, will communicate to the public that this form of behavior contradicts the American Creed. In time, the racist impulse will wither.<sup>66</sup> Because this model of human behavior underlies our current system of antidiscrimination law, Kennedy's proposal, which would chart an entirely different course, should be regarded skeptically.

### III. KENNEDY ON CAMPUS HATE-SPEECH CODES

If I take issue with his choice of remedy, I nevertheless give Randall Kennedy's treatment of the term *nigger*—especially the descriptive part<sup>67</sup>—high marks. Aware that the term is part of a larger controversy about hate-speech regulation, Kennedy also tries his hand at addressing that controversy. Since his treatment of the two problems—the specific (the term *nigger*) and the general (hate-speech codes)—is linked and exhibits some of the same strengths and weaknesses, I briefly consider his approach to the more general problem. Here, I give his treatment lower marks.

#### A. Kennedy on Hate Speech

When Kennedy broadens his focus to consider the hate-speech controversy generally, his position and ideological commitments emerge more clearly. Opponents of hate-speech regulation tend to fall into one of two camps. An absolutist camp, including the national organization of the ACLU, argues that hate speech is a form of communication and, as such, must be considered to fall

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63. See Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate-Speech Regulation*, 82 CAL. L. REV. 871 (1994).

64. *Id.* at 878-80.

65. On this "confrontation theory" of regulating racism, see, for example, Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1385-90.

66. *Id.* at 1386-87.

67. See *supra* notes 19-20, 25-30 and accompanying text.

under the First Amendment.<sup>68</sup> Unless hate speech rises to the level of a crime, the best approach to hate speech is more speech. For these theorists, usually liberals, free speech is the price we pay for living in a free society.

A second camp, composed for the most part of conservatives and libertarians, finds hate speech repugnant but also would not forbid it.<sup>69</sup> The best approach to hate speech, for this group, is for minorities to toughen up and refuse to allow themselves to fall into the role of victim. In his approach to hate-speech regulation, Kennedy falls closer to this second group than to the first.

For example, Kennedy dismisses the need for hate-speech reform, arguing that its proponents have not proven that it is a major problem.<sup>70</sup> How do we know that a tide of hate speech is sweeping over the nation's campuses, as critical race theorists and others assert? Might it not instead be the product of increased sensitivity or better reporting by the news media?<sup>71</sup> This is, of course, possible; hard and fast statistics are hard to come by. But what Kennedy neglects is the widely held socioeconomic competition theory, which holds that racism tends to increase during times (such as now) of increased competition, for example, over jobs.<sup>72</sup> An increase in ethnic slurs and name-calling is just what that theory would predict. Without citing evidence to the contrary, Kennedy doubts that hate speech is increasing, as though this were a reason for relaxing our vigilance over it when it does happen.

He also puts forward a second article of the tough-love faith: that hate-speech codes deepen victimization.<sup>73</sup> By encouraging minorities to see themselves as victims, codes distract them from taking advantage of the opportunities that are available to them. Instead of running to the authorities every time they hear an offensive word, minorities ought to get over it and move on.<sup>74</sup>

Kennedy also considers hate-speech codes classist, because they punish the crude epithets of the blue-collar white while leaving untouched the more genteel racism of the educated bigot who preaches about the evils of affirmative action or an African-American culture of poverty.<sup>75</sup> But, the

68. See UNDERSTANDING, *supra* note 26, at 34-36.

69. *Id.* at 36-37.

70. See NIGGER, *supra* note 15, at 119-21.

71. See *id.* at 120-21.

72. See, e.g., GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1954) (putting forward classic view of this position); BELL, *supra* note 50, at 25-27, 67, 77-80 (articulating interest-convergence theory that whites endorse advancement for blacks only when it also advances—or does not frustrate—their own well-being).

73. See, e.g., NIGGER, *supra* note 15, at 92-96 (deploring over-eagerness to find insult); *id.* at 132-33 (reporting that a prominent civil rights leader dismissed critiques of a racist show as whining); see also *id.* at 67 (noting that some judges deny relief for just this reason).

74. E.g., *id.* at 90-91, 92-96 (citing complaints over classic books like *Gone with the Wind* or *Huckleberry Finn* that include the term).

75. See *id.* at 123-24.

elaborate argument of a book like *The Bell Curve* or a campus address by a right-wing ideologue, while deplorable, is less shocking than an anonymous leaflet shoved under the dormitory door of an eighteen-year-old Latino undergraduate telling him that he has no legitimate place at the university, or anti-Semitic graffiti scrawled on a campus meeting house for Jewish students, or epithets hurled at a lone black undergraduate walking home from the library late at night. It also lends itself to a more-speech response, such as a reply speech or letter to a campus newspaper rebutting the speaker's arguments.<sup>76</sup>

Like many opponents of hate-speech regulation, Kennedy takes comfort in formalistic legal doctrines such as overbreadth, vagueness, the rule against content regulation, and the fear of official censorship that once weighed heavily against hate-speech rules.<sup>77</sup> With the advent of First Amendment legal realism, however, these doctrines and mind-numbing clichés exert less power than they once did.<sup>78</sup> Modern courts have begun applying the insights of legal realism to this area of law and considering social science, communication theory, history, and power in deciding First Amendment controversies.<sup>79</sup> The greater flexibility courts have exhibited in this area suggests that the comfort Kennedy takes in these doctrines may be misplaced.

Still, Kennedy's approach to hate speech offers insights into his somewhat puzzling treatment of the word *nigger*. It explains how he can canvass the history of the word in literature, song, popular culture, and even court proceedings, and still urge that we not pay it much heed.<sup>80</sup> It explains how he can urge that when a bigot upbraids a black, perhaps a child, her solution is to adopt the bigot's language in her everyday use.<sup>81</sup> It explains how he can see racial remedies, designed to right power balances and avoid oppression of one group by another, as wallowing in victimization.<sup>82</sup>

### B. A Different View of the Word Nigger

Kennedy and I see much the same history and read the same cases. But I put things in a slightly different perspective from his. We both agree that the term *nigger* originated, as did the terms *spick*, *kike*, *wop*, and *chink*, in a period of extreme white domination over blacks and other people of color. With African Americans, that period took place during the middle years of the slave

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76. See UNDERSTANDING, *supra* note 26, at 111-14 (recounting many similar events).

77. E.g., NIGGER, *supra* note 15, at 122-25.

78. See J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 379-94; Richard Delgado, *Toward a Legal Realist View of the First Amendment*, 113 HARV. L. REV. 778 (2000) (book review) [hereinafter *Toward a Legal Realist View*].

79. *Toward a Legal Realist View*, *supra* note 78, at 779-801.

80. See *supra* notes 27-31 and accompanying text.

81. See *supra* notes 36-38 and accompanying text.

82. See *supra* notes 70-71 and accompanying text.

trade.<sup>83</sup>

But like all stereotypes and other forms of racial depiction, *nigger* emerged and changed to suit the needs of the dominant society.<sup>84</sup> Kennedy's and my differences over the word *nigger* may, then, come down to different views of the history of white-minority relations and the part racial imagery and language play in that history. For Kennedy, *nigger* is simply a curious word that emerged around 1820 when society began calling African slaves, and a few free blacks, by that term.<sup>85</sup> Blacks found it offensive, especially when it began taking on a highly negative connotation, but many white people used it anyway, and with increasing civil rights consciousness it found its way into a number of court opinions.<sup>86</sup> Today, many ("eradicationists") would like to abolish the word,<sup>87</sup> but, according to Kennedy, this is a mistake. The word has many uses, some of them innocent. The best approach is for blacks to take control of the word and use it on stage, over the air, and in daily conversations. This will defang the term and deprive it of its ability to harm.

My own view is different from Kennedy's. For me, history teaches a more complex lesson: that words and stereotypes emerge and change to suit the needs of dominant society.<sup>88</sup> At certain points in history, American society needs to oppress a group, say Latinos or Asians or blacks. It coins terms aimed at persuading everyone that the group deserves its fate. Images circulate reinforcing the notion that the group is stupid, lacking in ambition, or eager to displace hard-working whites, and covetous of white women. During these periods, images of the bestial, rapacious black or devious, shoot-you-in-the-back Mexican proliferate. These images justify repression.<sup>89</sup> *Nigger*, with its connotations of bestiality and wanton behavior, evokes these types of images.

At other times, however, when society has things relatively well in hand, a different vocabulary emerges. Then, society's greatest need is for guilt-assuagement. The minority group, now reduced to servant roles, must appear to enjoy or be peculiarly suited to those roles. During these periods, a different set of imagery—the happy Sambo, the carefree, music-loving Mexican—emerges, reassuring consumers that the group is happy with its lot and wants nothing

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83. NIGGER, *supra* note 15, at 4 (stating that the first use of the term as a racial insult had occurred by the first third of the nineteenth century).

84. *Id.* (noting that as late as the 1700s, the term was used mainly in a descriptive sense).

85. *Id.*

86. *See id.* at 45-88 (Chapter 2, "Nigger in Court").

87. *Id.* at 126-27 (defining "eradicationists" as those who would like to abolish the term completely).

88. On this "functional" view of racial stereotypes, see Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992).

89. *Id.* at 1263-65.



better.<sup>90</sup> *Nigger* has overtones of this symbolism, as well. What about the changes Kennedy advocates? Can they be seen as parts of an evolving system of social control through words and symbols? That requires a look at the setting in which Kennedy's book was written.

### C. *What Society Today Needs: Kennedy's Book and the Functional Approach*

If this functional view helps explain the trajectory of most racial narratives, images, and terms, what does it say about those in use today? Today, the dominant society is most interested in diminishing race consciousness and establishing colorblindness, a system of law and discourse that minimizes the role of race and pretends that all playing fields, discursive and material, are now level.<sup>91</sup> Blacks have achieved equality with whites; protected by a host of civil rights statutes, they may accomplish anything they set their minds to. The few acts of out-and-out racism that occur can be punished and condemned. Neutral meritocratic criteria, evenhandedly applied, will assure that every person, white or nonwhite, will earn what he or she deserves. Neatly concealing a host of social arrangements surviving from the past, colorblindness assures that those arrangements continue to favor those whose ancestors enjoyed social power long ago.<sup>92</sup>

Kennedy's approach to hate speech, and to the word *nigger* in particular, can be seen as an aspect of this emerging colorblind approach to race. Like many neoconservatives, Kennedy seeks to end discussion of hate speech, and minimize the harm of *nigger*, because hate speech constitutes a constant reminder that social arrangements are not neutral. And the reason is simple—the English language contains no correlate for *nigger* in the lexicon of terms for whites. *Honky* may be demeaning, but it nevertheless carries overtones of grudging respect.<sup>93</sup> *Cracker* may be disrespectful, but it too concedes that the other possesses power, if only the power to wound.<sup>94</sup>

Kennedy's approach, then, emerges from and reinforces the current emphasis on colorblindness. It gives whites permission to use the term, too.

90. *Id.* at 1266-67, 1274. Examples of eras when whites had things well in hand are the period of black slavery and the time following Conquest and, later, the period of the Bracero (guest worker) program for Latinos. Of course, white control was never absolute. Conquered people everywhere resisted the terms of their oppression. Uneasy rested the head that wore the crown. See PEREA ET AL., *supra* note 40, at 118-23.

91. See, e.g., BELL, *supra* note 50, at 131-54.

92. *Id.*

93. *Toward a Legal Realist View*, *supra* note 78, at 797; UNDERSTANDING, *supra* note 26, at 176, 179.

94. See UNDERSTANDING, *supra* note 26, at 176-79. The term *white trash* also conveys scorn, but is reserved for just the small subset of whites who do not take advantage of their opportunities and wallow in poverty. See *supra* note 89. These terms do communicate that the black dislikes the white. But, by themselves they do not carry an implied threat nor call up and evoke long histories of oppression.

Unconsciously echoing the language of Justice Brown in *Plessy v. Ferguson*,<sup>95</sup> Kennedy urges that *nigger* means nothing special—only the construction we choose to place upon it. But he neglects to take account of the social psychology of race, the power system in which racial insults like *nigger* are embedded, and the likely impact on civil rights litigation if the use of those terms becomes normalized. He ignores the possibility that his proposed solution will produce a paradoxical effect, or pose unacceptable risks for children. Simply asserting that a group should take charge of its destiny does not mean that it can do so merely by agreeing to speak differently. As admirable as Kennedy's etymological studies and Lexis searching are, he needs to have gone further in the search for a remedy.

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95. 163 U.S. 537, 551 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

