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Danielle Dick McGeough
Louisiana State University, kalscopejrnl@gmail.com

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Selling the "Marketplace of Ideas" and Buying Fish, Bollinger, and Baker

Danielle Dick McGeough
Louisiana State University
dmcgeo1@tigers.lsu.edu

The "marketplace of ideas" theory has been described as one of the most powerful metaphors in the free speech tradition and has played a central role in how the Supreme Court has ruled on free speech cases. Yet, this metaphor has been heavily criticized for influence on hate speech and pornography legislation. The purpose of this essay is to introduce three free speech theories that challenge the marketplace theory and discuss how, if adopted, these theories would or would not legally accommodate the positions of Critical Race Theorists and anti-pornography feminists. To do so, I explain the marketplace of ideas theory and its critiques. Next, I give a brief explanation of Critical Race Theorists' and anti-pornography activists' perspectives on freedom of speech. I then present theories from Stanley Fish, Lee Bollinger, and Edwin Baker, applying each theory to racist speech and pornography. I conclude with a discussion on whether adopting new theories solves the confusion that exists under the marketplace of ideas paradigm. Do Fish, Bollinger, or Barker's theories provide insight into how law ought to be applied to difficult cases, such as those pertaining to racist speech and pornography?

In 1919, Justice Oliver Wendell Holmes, Jr. reinforced a foundational concept that had and would continue to permeate free speech dialogue for years to come: the "marketplace of ideas."[1] In his dissent in *Abrams v. United States* Justice Oliver Wendell Holmes, Jr. reasoned, "The best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out." The rationale that the search for truth is best advanced by the free trade of ideas "is perhaps the most powerful metaphor in free speech tradition" (Smolla 6).

1 Holmes' conceptualization of the marketplace metaphor has had a significant influence on contemporary notions of freedom of speech. However, the marketplace metaphor can be traced to ancient origins, namely the Socratic Method. In *Areopagitica*, John Milton explicates the importance of an open exchange of ideas. Adam Smith introduces the invisible hand metaphor in *The Wealth of Nations* to explain the self-regulating nature of the marketplace. Others such as John Stuart Mill and Thomas Jefferson are linked to the metaphor as well.

Danielle Dick McGeough is a Doctoral Candidate at Louisiana State University. She sincerely thanks Catherine H. Palczewski for her astute critiques and support in developing this essay.

Although the marketplace theory is widely accepted and habitually used, it has also been robustly debated. Critical Race Theorists and anti-pornography activists have been particularly critical of the marketplace of idea's influence on law. In regard to racist speech, Charles Lawrence III argues, "The American marketplace of ideas was founded with the idea of the racial inferiority of non-whites as one of its chief commodities, and ever since the market opened, racism has remained its most active in trade" (468). Catharine A. MacKinnon, an anti-pornography feminist and legal scholar, insists, "The marketplace rewards the powerful, whose views then become established as truth" (*Only Words* 102). MacKinnon alleges that the powerful use pornography, and as a legal category of "speech," it pronounces and produces the subordination of women (*Only Words* 88).

The purpose of this essay is to introduce three free speech theories that challenge the marketplace theory and discuss how, if adopted, these theories would or would not legally accommodate the positions of Critical Race Theorists and anti-pornography feminists. To do so, I explain the marketplace of ideas theory and its critiques. Next, I give a brief explanation of Critical Race Theorists' and anti-pornography activists' perspectives on freedom of speech. I then present theories from Stanley Fish, Lee Bollinger, and Edwin Baker, applying each theory to racist speech and pornography. I chose to focus on theories from Fish, Bollinger, and Baker, despite being somewhat dated, due to their continuing importance and influence in legal theory. I conclude with a discussion on whether adopting new theories solves the confusion that exists under the marketplace of ideas paradigm. Do Fish, Bollinger, or Baker's theories provide insight into how law ought to be applied to difficult cases, such as those pertaining to racist speech and pornography?

The Marketplace

How the Marketplace has been Bought

The marketplace theory is based on the belief that, in a democracy, free speech is necessary for an informed citizenry. The theory proposes that ideas compete with one another, people evaluate and analyze these ideas, and that over time arrive at truth. The theory assumes: 1) truth is objective, 2) we are rational people who examine information, and 3) over time, ideas are winnowed down. Weak, false, or bad ideas do not survive and truth is revealed. According to this theory, if the best ideas or solutions are to be discovered, government interference must be discouraged. The objectives of the marketplace of ideas are to achieve truth, improve decision-making, create an informed electorate, and enhance debate in a democracy.

Although the marketplace of ideas theory is not the sole justification for free speech, the marketplace of ideas theory proliferates in judicial opinions and courts' justifications for First Amendment tests (Baker 7).

The marketplace metaphor arises in cases as justices struggle to determine whether obscene, offensive, inaccurate, and/or dangerous speech is essential to the marketplace of ideas. *Roth v. United States* argues that obscene materials do not deserve protection from the First Amendment because obscenity is "utterly without redeeming social importance." Other cases rely on the marketplace metaphor to determine if false or offensive speech ought to be protected by the First Amendment. *New York Times v. Sullivan* makes clear that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they need in the marketplace of ideas." Furthering this notion, the "clear and present danger" test articulated in *Shneck v. United States* declares that if danger is not present, then there is time for the marketplace of ideas to reveal fallacies. In regards to pernicious speech, the case *National Socialist Party of America v. Village of Skokie* determined that the Nazi Party should be allowed to march through a Jewish community "precisely because officials anticipate that the marketplace will reject it" (Ingber 22-23). Finally, some judicial decisions have been rendered to make sure individuals have equal access to information in the marketplace. The "fairness doctrine" was created to "preserve an uninhibited marketplace of ideas" (*Red Lion Broadcasting Co. v. FCC*). When applied to law, the marketplace of ideas theory makes clear the solution to bad speech is to let the marketplace of ideas, not the government, sort it out.

Marketplace of Ideas for Sale

Despite the marketplace theory's frequent usage, it has been vigorously criticized. Skeptics of the marketplace of ideas have leveled six main critiques, claiming the marketplace of ideas: 1) is a flawed metaphor, 2) falsely assumes people have equal access to the marketplace, 3) reinforces the status quo, 4) misunderstands how humans interact with information, 5) falsely assumes truth exists, and 6) overlooks the length of time it takes to arrive at the truth.

First, the marketplace metaphor itself has received various critiques. Many challenges of the marketplace theory have focused on the analogy between it and laissez-faire economics. Nearly all economies need government regulation of markets. In fact, "today's economists widely admit that government regulation is needed to correct failures in the economic market caused by real world conditions" (Ingber 5). Still, the marketplace theory is used to argue that ideas must be exchanged in a competitive free market with few, if any, regulations.

One reason critics urge regulation of the marketplace is to achieve the desired distribution of ideas. Paul H. Brietzke explains that an economic approach to the marketplace of ideas places a price on speech. People that are unable to pay (in money, time, education, or other scarce recourses) have less power to speak and this, in turn, makes the poor poorer. Brietzke uses the

example of the New York Stock Exchange. The poor do not get to participate in the New York Stock Exchange, and, therefore, have less influence on political and economic policies that are typically debated in that arena.

Critics maintain that regulations in the market are needed to decrease monopolization and promote equal access to the marketplace of ideas. Today, access to the media is essential to anyone wishing to disseminate his or her views widely. Edwin Baker explains:

> The extreme concentration of ownership of major mass media in the United States, as well as the large corporate advertisers' power implicitly to set norms for acceptability of form and content and sometimes to control specific publication or broadcast decisions, and the typically less organized status of those outside the existing power structure are among the factors that predictably cause these market failures to reinforce corporate power and the status quo. (38)

Even if an individual or group gains access to the media, owners and managers still control what information reaches the public. Thus, controversial ideas are less likely to be disseminated.

Not only do certain groups have greater access to the marketplace, it seems that most people favor the presently dominant groups (Baker 15). People tend to prefer the status quo to change. Derek E. Bambauer explains that people are "reluctant to give up what they have even when presented with attractive alternatives" (695). This is because people prefer to reduce uncertainty and stick with the status quo even if the alternative may be the wiser decision. Furthermore, humans "often become locked into their initial mental framework, and tend to adopt simple beliefs such as stereotypes rather than using more accurate information" (Bambauer 708). Consequently, the marketplace may serve to reinforce individual egos, uphold existing views, and do little to challenge existing ideas.

The marketplace of ideas theory makes several other inaccurate assumptions about how humans interact with information. Bambauer uses research in cognitive psychology and behavioral economics to prove that the way in which humans process information is contrary to the marketplace assumptions. The marketplace of ideas, for example, suggests that it is necessary for unrestrained speech to enter the market in order to promote wise decision-making. However, because humans must select and process information, too much information may make separating truth from falsehood more difficult. "Simply adding information to the environment—without regard to its relevance, quality, or presentation—increases demands on consumers' scarce attention and may lead them to shift their analysis and decisions in ways inconsistent with prior expressed preferences." Additionally, how information is heuristically framed influences what we choose to select. Bambauer explains, "The weakness of the marketplace of

ideas is the consumers who shop within it. Our perceptual filters, cognitive biases, and heuristics mean that we do not consistently discover truth and discard false information" (698, 709).

The fact that cognitive biases influence people's reaction to information calls the marketplace's emphasis on objective truth into question. If truth is objective, then "socioeconomic status, experience, psychological propensities, and societal roles should not influence an individual's concept of truth" (Ingber 15). Stanley Ingber explains that most people today do not believe in an objective truth, and "as long as people have differing experiences, there is little guarantee that any society can agree on what is 'true'" (26). Therefore, the marketplace of ideas is less likely to reveal the truth and more likely to reveal what is a culture's sense of what is "true" or what is "best."

Finally, the marketplace theory overlooks the length of time it takes to arrive at the truth. For example, it may take years for an accepted idea to be analyzed by the marketplace, only to discover that it is false. Frederick Schauer insists, "even if a populace is not likely to accept some false idea, great harm can nevertheless be produced by the false idea's side effects (28). Therefore, even if an objective truth were to exist, a lot of damage may be done before that truth is discovered.

Hate Speech and Pornography

Hate Speech

Audrey P. Olmsted defines Critical Race Theory (CRT) as "an attempt made by minority group law professors to improve the position of nonwhites with respect to law and society" (323). CRT insists speech acts cause racism and "solutions to problems resulting from racism require the use of language to reshape reality" (Olmsted 324). Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado, and Kimberlè Williams Crenshaw, the authors of the 1993 book *Words that Wound*, became the leaders of the CRT movement after Harvard University denied students' requests to hire a nonwhite person to teach a course on racism (Matsuda et. al.). These four lawyers developed a theory that recognizes how the legal system enforces racism.

One legal perspective CRT challenges is the marketplace of ideas. CRT points out that racism is not rational or objective, creates an unequal marketplace, and is a form of worthless speech that fails to contribute to the marketplace of ideas. CRT maintains that racist speech is not rational and does not promote the unbiased process of evaluating information that the marketplace requires. Instead, racism is embedded into our thought processes, "At some level, no matter how much both victims and well-meaning dominant-group members resist it, racial inferiority is planted in our minds as an idea that may hold some truth" (Matsuda et. al. 25). Charles R. Lawrence III critiques the marketplace of ideas in detail:

> But it is not just the prevalence and strength of the idea of racism that make the unregulated marketplace of ideas an untenable paradigm for those individuals who seek full and equal personhood for all. The real problem is that the idea of the racial inferiority of nonwhites infects, skews, and disables the operation of a market (like a computer virus, sick cattle, or diseased wheat). It trumps good ideas that contend with it in the market. It is an epidemic that distorts the marketplace of ideas and renders it dysfunctional.
> Racism is irrational. Individuals do not embrace or reject racist beliefs as the result of reasoned deliberation. For the most part, we do not even recognize the myriad ways in which the racism that pervades our history and culture influences our beliefs. But racism is ubiquitous. We are all racists. Often we fail to see it because racism is so woven into our culture that it seems normal. In other words, most of our racism is unconscious. (77)

Lawrence III goes on to argue that as long as racism pervades society there are some people who will be considered "less deserving" because they are considered "racially inferior" (78). This corrupts the effectiveness of the marketplace of ideas theory.

According to CRT as articulated by Matsuda et. al., the marketplace of ideas is also rendered useless due to the silencing power of racism: "When the Klan burns a cross of a Black person who joined NAACP or exercised the right to move to a formerly all-white neighborhood, the effect of this speech does not result from the persuasive power of an idea operating freely in the market." Racism prohibits equal participation in the marketplace, and society has nothing to gain by allowing certain members of society to be excluded from the marketplace. They argue, "When individuals cannot or choose not to contribute their talents to a social system because they are demoralized or angry, or when they are actively prevented by racist institutions from fully contributing their talents, society as a whole loses" (79, 93). Richard Delgado argues that the First Amendment functions to provide individual self-fulfillment, obtain truth, increase participation in decision-making, and balance between stability and change. Racism stifles individual self-fulfillment, prohibits certain members of society to voice their opinions, and "dulls the moral and social senses of its perpetrators even as it disables its victims from fully participating in society" (Matsuda et. al. 108, 109). Delgado compares racist speech to obscenity, arguing that racist speech is worthless and, therefore, unnecessary to protect.

Pornography

Similar to these Critical Race Theorists, legal scholar Catherine A. MacKinnon argues that there is a battle between freedom of speech and

freedom of equality, and currently the free market subdues freedom of equality. MacKinnon asserts “the First Amendment has grown as if a commitment to speech were no part of a commitment to equality and as if a commitment to equality had no implications for the law of speech.” MacKinnon’s main critique of First Amendment speech theory is that it ignores the role of power in the marketplace of ideas. “Speech theory does not disclose or even consider how to deal with power vanquishing powerlessness,” MacKinnon states; rather, “it tends to transmute this into truth vanquishing falsehood, meaning what power wins becomes considered true” (*Only Words* 71, 78).

Sex and sex equality are areas where power becomes a primary concern. Troubled with how pornography is legally defined as a category of speech, MacKinnon describes pornography as “a means through which sexuality is socially constructed, a site of construction, a domain of exercise. It constructs women as things for sexual use and constructs its consumers to desperately want women to desperately want possession and cruelty and dehumanization” (“Sexuality” 327). Pornography quells women’s participation in the marketplace, which reinforces the status quo and keeps those in power powerful. MacKinnon defines pornography as:

> The graphic sexually explicit subordination of women through pictures and/or words that also includes one or more of the following: (a) women are presented dehumanized as sexual objects, things, or commodities; or (b) women are presented as sexual objects who enjoy humiliation or pain; or (c) women are presented as sexual objects experiencing sexual pleasure in rape, incest, or other sexual assault; or (d) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (e) women are presented in postures or positions of sexual submission, servility, or display; or (f) women’s body parts—including but not limited to vaginas, breasts, or buttocks—are exhibited such that women are reduced to those parts; or (g) women are presented being penetrated by objects or animals; or (h) women are presented in scenarios of degradation, humiliation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in context that makes these conditions sexual. (*Only Words* 121-22)

MacKinnon recommends that this definition of pornography be adopted so that people who are harmed by pornography can sue for group defamation, which would be a criminal charge. Taking this approach to pornography allows people to “talk to each other, rather than buy and sell each other as ideas.” Under MacKinnon’s model of expression, the law will “have as great a role in providing relief from injury to equality through speech and in giving

equal access to speech as it now has in disciplining its power to intervene in that speech that manages to get expressed" (*Only Words* 102, 109).

Stanley Fish and Literary Theory

Stanley Fish, a Professor of Humanities and Law, applied literary theory to law. In *There's No Such Thing as Free Speech and It's a Good Thing Too,* Fish maintains that legal documents such as judicial opinions are texts, just as a poem, novel, or play is a text, and should be interpreted as such. Contrary to the marketplace assumption of an objective truth, Fish claims an objective text does not exist. Rather than argue that texts are inherently indeterminate or subjective, Fish claims the meaning of a text is found within "interpretive communities," where the reader is a member. Fish defines an interpretive community as:

> Not so much a group of individuals who shared a point of view, but a point of view or way of organizing experience that shared individuals in the sense that its assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance were the content of the consciousness of community members who were therefore no longer individuals, but insofar as they were embedded in the community's enterprise, community property. (*Doing* 141)

Fish's definition of interpretive community implies that individuals are not autonomous beings capable of choosing among competing ideas. Instead, people are "inescapably bound by the modes of thought made available by the interpretive communities to which they belong" (Bunker 70). Just as in any given community rules regulate speech, in the legal setting judges interpret laws, not objectively, but according to the meaning derived from interpretive communities.

For Fish, absolute free speech cannot exist, because, in every given community, certain speech is not allowed. According to Fish, it is commonly assumed that all speech is free, and then which speech should not be allowed is determined. However, Fish suggests we first determine which form of speech should not be permitted, and then free speech is what is left over. In other words, we literally "carve out the space in which expression can then emerge." To support this argument, Fish cites *Aeopagitaica* where Milton blatantly excludes Catholics from the right to toleration and free expression. He purports that Milton's description is not an anomaly. Although today people may not extirpate Catholics from First Amendment protection, some may argue that Nazis, child molesters, or enemy combatants should not be protected by the First Amendment. Fish states, "Speech, in short, is never a value in and of itself but is always produced within the precincts of some assumed conception of the good" (*There's No Such Thing* 103, 104). In other words, in any given community, rules regulate speech.

Because existing guidelines influence how speech is regulated, Fish contends that theory in practice is useless. In Fish's opinion, judges do not need theories to guide their decisions on a case, because "an agent so embedded would not need anything external to what he [sic] already carried within him [sic] as a stimulus or guide to right—that is, responsible—action; in short, he [sic] would not need a theory" (Fish, *Doing* 386). Interpretive communities have rules that guide their decisions regarding First Amendment legislation, rendering external theories useless.

Literary Theory and Hate Speech

Three aspects of Fish's literary theory are relevant when debating hate speech legislation. First, Fish's claim that interpretive communities determine meaning allows little room for personal agency. He maintains that pure expression rarely exists because it is "always in danger of being compromised by the urgings of special interest communities," and "the very act of thinking of something to say… is already constrained… by the background context within which the thought takes place" (Fish, *There's No Such Thing* 108). A special interest community may be an academic community, a shopping mall community, or an office community (for example). If, in any of these communities, people do not have agency because they are bound by the modes of thought made available by the interpretive communities, can an individual be held responsible for a racist comment? If an individual cannot act independently and instead is an extension of the community, is the interpretive community responsible for making space for racist expression?[2]

Second, Fish's concept of interpretive communities complicates individual's ability to make unbiased judgments. He views individuals, including judges, as an extension of the interpretive community. He writes:

> People cling to First Amendment pieties because they do not wish to face what they correctly take to be the alternative. That alternative is *politics*, the realization that decisions about what is and is not protected in the realm of expression will rest not on principle or firm doctrine but on the ability of some persons to interpret—recharacterize or rewrite—principle and doctrine in ways that lead to the protection of speech they want heard and the regulation of speech they want heard and the regulation of speech they want silenced. (*There's No Such Thing* 110)

2 Fish's position is not unlike the position Judith Butler lays out in *Excitable Speech*. She argues, "One speaks a language that is never fully one's own, but that language only persists through repeated occasions of that invocation" (140). Butler supports Fish's claim that interpretive communities make it difficult for an individual to solely be held responsible for racist speech. In fact, this is in part why Butler discourages judicial remedies for harmful speech.

Fish narrows the possibility for individual autonomy and leaves little room for individual reflection and creativity. Because people are incapable of thought detached from the values held by their interpretive community, Fish argues community's ideals, not theoretical principles, govern decisions on First Amendment legislation.

Fish believes that many legal distinctions, such as the speech/action division, are inconsistent because judges make decisions based on the interpretive community values to which they cling.[3] "Despite what they say," Fish contends, "courts are never in the business of protecting speech… they are in the business of classifying speech" (*There's No Such Thing* 106). Critical Race Theorists argue the courts have classified speech in a way that perpetuates racism.

It is likely Fish would agree with CRT's argument that the value of freedom of expression threatens the value of equality. If a specific interpretive community agrees that racist speech threatens that community's purpose, regulation of speech may be necessary. Fish is open to the possibility of campus speech codes, but is reluctant to apply restrictions on hate speech in all situations (*There's No Such Thing* 107). In place of constitutional hate speech regulation, Fish suggests we "consider in every case what is at stake and what are the risks and gains of alternative courses of action" (*There's No Such Thing* 111). Does this mean that each community would have different laws regarding hate speech? What happens if a visitor breaks the community's regulations? How is an interpretive community determined? Or is the concept of interpretive communities not that far from considering time, place, and manner restraints on speech?

Literary Theory and Pornography

If literary theory is difficult to apply to hate speech, then its application to pornography laws is even more complicated. Fish concedes that words can be injurious and that pornography can have harmful effects. Although he is critical of how our legal system currently justifies its responses to pornography, he does not offer suggestions on how to respond to this type of speech. The situation becomes even more dismal when one accepts that judges will always have biases when making decisions on anti-pornography cases. According to Fish, we must abandon the neutral principals that guide law because they make it difficult for people to see differences that matter, such as those between pornography and the statue of David. Fish recognizes an individual's ability to interpret a text is constrained by the interpretive communities they belong to; however, he does not explain what happens

3 Legally, it is difficult to distinguish between speech and action. For example, Critical Race Theorists argue racist speech is an act and therefore is punishable by law as violent action. Symbolic actions, such as burning the flag, are also protected as freedom of speech. Thus legally, speech may be considered action and action considered speech.

when one interpretive community places power over another. According to MacKinnon, pornography is in part successful because those in power use pornography in a way that sustains inequality between the sexes. If a powerful interpretive community endorses pornography, is it necessary to protect powerless members within that community? How are powerless members of a community protected from internalizing messages of inferiority and inequality? If a community's purpose is to subordinate particular members of the community, whose responsibility is it to protect those members?

Ultimately, Fish's only suggestion is much like that of qualitative researchers: admit your biases and establish your positionality. Just as qualitative researchers disclose how their personal perspectives influence the way they interpret research, people who interpret law ought to reveal their subjective positions. Unfortunately, even though Fish provides interesting insights into our flawed assumptions regarding how law functions, he offers few concrete suggestions on how to apply his theory to law.

Bollinger's Tolerance Theory

Lee Bollinger developed tolerance theory in his 1986 book, *The Tolerant Society: Freedom of Speech and Extremist Speech in America*. Bollinger's purpose was not to replace but to expand upon standard First Amendment theories. The theory rose out of concerns regarding classic free speech theories, such as the "marketplace of ideas," that grounded their defense in the needs of democracy. He argues that extremist speech, like the Nazis', cannot be justified with truth or knowledge-seeking as the value to be protected. Bollinger recommends we consider how legal restraints affect the broader social culture, rather than setting the boundary of legal restraints on speech. He believes that free speech serves to foster tolerance and provides an opportunity for citizens to exercise self-restraint (*The Tolerant Society* 10). This shifts focus from the speaker to the *listeners' reactions* towards the speech act. Bollinger defines tolerance as, "showing understanding or leniency for *conduct* or ideas…conflicting with one's own" (*The Tolerant Society* 10). Bollinger's emphasis on conduct is not accidental; he suggests that by "looking at what we count as harm in nonspeech" we can better "evaluate whether our thinking is askew in the speech area." This supports Bollinger's view that "the social value we can derive from free speech need not depend upon speech being unique or significantly different from other areas of interaction." Speech is valuable because it creates a "capacity for tolerance" that helps us coexist in a heterogeneous society, not because speech creates truth ("The Tolerant Society" 981, 983).

Tolerating Hate Speech

Walter Chaplinsky, a Jehovah's Witness, was distributing materials in Rochester, New Hampshire and preaching when a disturbance broke out. Upon arrest for violating the public laws of New Hampshire, Chaplinsky

cursed, "You are a damned racketeer" and "a damned Fascist" to the city marshal (*Chaplisky v. New Hampshire*). When the landmark case *Chaplisky v. New Hampshire* reached the Supreme Court, Chaplinsky claimed that he was preaching "the true facts of the Bible," and his treatment was "at the hands of the crowd." By doing so, he attempted to remove himself from blame and shift responsibility for the disturbance to the crowd. The Supreme Court rejected Chaplinsky's argument and convicted him. Had the Court used Bollinger's tolerance theory to guide their decision, this landmark case may have had quite a different outcome.

In the aforementioned case, the concept of "fighting words" was conceived. Although aspects of the "fighting words" doctrine have not survived, words that "inflict injury upon the listener" or tend to "incite an immediate breach of the peace" are still upheld (*Chaplisky v. New Hampshire*). Contrary to many of Bollinger's arguments, "fighting words," are beyond the scope of protection. Bollinger believes that extreme hate speech must be protected to support the larger moral lesson of tolerance. For example, Bollinger would agree with the decision made in *National Socialist Party of America v. Village of Skokie* to allow the Nazi Party to march through the Jewish community. However, Bollinger maintains that "fighting words," libel, and obscenity are types of speech that when tolerated can bring injury to a community. It is not clear if Bollinger would agree that "fighting words" were used *in Chaplisky v. New Hampshire*. He is somewhat vague in his justifications for allowing the regulation of "fighting words" and does little to explain what should be done legally when "fighting words" and racist speech overlap.

Interestingly, Bollinger admits that hate speech sends a message of inferiority, hatred, and contempt. He even argues that racist speech is not much different than other racist acts that we prohibit ("The Tolerant Society" 980). However, he believes that by restricting hate speech we forgo the valuable lesson of toleration. He explains:

> Once we realize that speech can not only constitute bad behavior but can also cause palpable injury, we understand that speech can provide the context for exercising self-restraint toward bad behavior as a means of demonstrating and developing a capacity to exercise appropriate self-control when punishment is inflicted elsewhere. ("The Tolerant Society" 984)

On the surface, Bollinger appears to take an absolutist approach to hate speech, but he also makes several unpredictable exceptions. For example, while he disapproves of campus hate codes and finds tort actions for racist speech unnecessary, Bollinger does make space for regulations on libelous speech. In most situations, tolerance theory places an emphasis on tolerance that outweighs other values. The crucial question is whether tolerance theory could survive condemnation from Critical Race Theorists.

First, Critical Race Theorists argue that racist speech goes beyond inciting violence; it *is* violence. Charles R. Lawrence III proclaims that the racial epithet “is invoked as an assault” (75). Therefore, is allowing racist speech creating “a capacity for tolerance” or creating a space for intolerance? If Bollinger advocates regulating “fighting words” because they can bring injury to a community, one must challenge that racist speech has the same effect. Mari J. Matsuda insists that “an absolutist First Amendment response to hate speech has the effect of perpetuating racism: Tolerance of hate speech is not tolerance borne by the community at large. Rather, it is a psychic tax imposed on those least able to pay” (18). Still, one might claim that placing restrictions on racist speech or allowing tort actions for racial speech promotes toleration for people of all races and affirms “the right of all citizens to lead their lives free from attacks on their dignity and psychological integrity” (Delgado 110). A final concern with Bollinger’s approach to hate speech is the potential it creates for victim blaming to occur as responsibility is placed on the target of hate speech. If tolerance promotes victim blaming, it is doubtful that it would withstand legal muster.

Tolerating Pornography?

As previously mentioned, Bollinger feels that obscenity exceeds the scope of First Amendment protection. Bollinger does not give a definition of obscenity but is clear that pornography is obscene material that needs to be regulated. In *Morality of Consent*, Alexander M. Bickel explains that pornography may be private but it still affects the community. He states, “Still what is commonly read and seen and heard and done intrudes upon us all, wanted or not, for it constitutes our environment” (Bickel 74). Bollinger uses arguments such as Bickel’s to urge regulation of obscene materials. Bollinger also believes, “toleration of obscenity is unacceptable because it is too complicated psychologically to separate our attraction from rejection in any act of toleration.” He writes, “I see obscenity, in other words, as akin to fighting words, in the sense that the reason both are treated as exceptions to the first amendment is the sense that toleration is too freighted with messages of weakness and condonation” (Bollinger, “The Tolerant Society” 990). In general, Bollinger agrees with current laws regarding pornography regulation and obscenity.

Bollinger’s desire to regulate pornography is not because pornography “causes” undesirable attitudes, but because the values pornography manifests are “an appropriate area for society to symbolically reject, through legal prohibition” (*The Tolerant Society* 184). That being said, Bollinger would likely embrace MacKinnon’s definition of pornography, because she makes clear the effects pornography has on the community at large. It is also likely that Bollinger would prohibit sexually explicit materials because of the psychological attraction people have to them.

The application of tolerance theory is complicated due to inconsistencies between the need for tolerance and the need for regulations on materials that “may create confusion for what toleration would mean” (*The Tolerant Society* 185). How does one distinguish between the danger obscenity imposes on a community and the damages imposed by racist speech? Do the arguments used to regulate pornography not also justify regulating the Nazis’ march through a Jewish community or a burning cross in an African American family’s yard?

Edwin Baker’s Liberty Theory

The development of “liberty theory” began with Edwin Baker’s publication of *Human Liberty and Freedom of Speech.* The theory “holds that the free speech clause protects not a marketplace, but rather an arena of individual liberty from certain types of governmental restrictions. Speech or other self-expressive conduct is protected not as a means to achieve a collective good but because of its value to the individual” (Baker 5). Baker vehemently argues that the classic marketplace of ideas theory is based on the flawed assumptions of objective truth and human rationality. He contends that “society should deny no one the right to speak” even if the speech does not contribute to the pursuit of truth (Baker 24). The two key values of the First Amendment, according to Baker, are “self-realization” and “participation in change” (48). Baker believes these values deserve constitutional protection because historically we commit to such values.

Freedom of speech is essential to individuals’ self-fulfillment and participation in change, and, therefore, speech need not be limited to words or phrases. Instead, free speech expands to include acts intended to communicate ideas (Baker 51–52). Baker explains that protesting war should be protected, because it “expresses and further defines the actor’s identity and contributes to his or her self-realization” (53). He also argues that speech needs to expand beyond words because some words are creative. For Baker, creative words are utterances that do what they claim to do; in other words, they are illocutionary in nature.

Baker acknowledges that “All sorts of speech can harm others” but provides two reasons certain types of harm-causing speech ought to remain protected. First, as long as the harm-causing speech “does not itself interfere with another person’s legitimate decision-making authority” then the speech should be protected. He goes on to explain that “Outlawing acts of the speaker in order to protect people from harms” is to disrespect “the responsibility and the freedom of the listener” (Baker 55, 56). In other words, listeners have the ability to accept or reject what a speaker says; the restriction of speech disregards both the speaker and the listener’s autonomy.

Liberty Theory and Hate Speech

Baker resists placing restrictions on individuals’ right to free speech. He does not make any explicit decisions on hate speech regulation, and his

theory argues both sides of the debate. For example, it is possible Baker carves out a small space for hate speech restrictions. He explains: "If the speaker manifestly disrespects and attempts to undermine the other person's will and the integrity of the other person's mental processes," that speech is subject to prohibition (Baker 59). The authors of *Words that Wound* depict in great detail the effect hate speech has on a person's mental processes. Delgado says, "The psychological effects of racism may also result in mental illness and psychosomatic disease" (91). CRT argues that racist speech greatly restricts self-realization. Baker's theory justifies hate speech regulations by claiming the side effects of racist speech impede on individual liberties to self-realize and participate in change.

However, Baker warns any prohibitions on such speech must be "narrow, precise, and defensible." He claims, "people constantly invoke loosely formulated or inappropriately broad notions of coercion to justify regulation of various behavior, including speech, of which they disapprove" (Baker 56). One could use liberty theory to argue hate speech restrictions impair the speaker's right to communicate personal values. Alternatively, one could also use liberty theory to argue that allowing hate speech inhibits the listener's will and integrity. Although seemingly contradictory, both arguments are possible using liberty theory because Baker grants the speaker and the listener separate constitutional claims. However, Baker is absolute in his claim that speech does not wound. He explains, "Speech, unlike other behavior, is seldom thought of as physically violent or destructive." In fact, he declares that harmful speech is "fraud, perjury, blackmail, espionage, and treason" (55, 60). Therefore, Baker is more likely to restrict racist speech that is simultaneously blackmail than, for example, a racial epithet.

Liberty Theory and Pornography

Edwin Baker believes that pornography should be protected by the First Amendment. He firmly states that "laws should not be aimed at supplanting individual choice or commitment," and "the first amendment should protect the listener's or reader's interest in obscenity" (Baker 77, 69). Baker explains his position:

> Pornography may have more to do with ribald entertainment than with robust debate. If pornography degrades sexual intimacy or contributes to the subordination of women it does so more by being an undesirable activity and a corrupting experience, not by being an argument. From the perspective of liberty theory, however, pornographic communications, or even pornographic materials produced and pursued by a solitary individual contribute—whether in a good or bad fashion—to building the culture. (68)

According to Baker, restriction on pornography impedes individuals' decision-making capabilities and constricts their ability to create the

world in a particular way. He uses a pollution analogy to explain his position. If a person reads pornography, he or she "presumably values this 'polluting' activity." However, people do not buy cars because cars pollute the air; instead, this is "an undesired consequence" of the purchase. Baker argues that if a person does something for the sake of doing, such as viewing pornography, then that right should be protected because it contributes to self-realization. However, if there are side effects, as with buying a car, then this right can be restricted. Baker reasons, "Even with polluting behavior prohibited, the person (if she has sufficient recourses) typically can still engage in the aspect of the activity that she substantively values—only the cost or difficulty of the valued activity may have increased" (77, 78).

MacKinnon would agree with Baker's assumption that women are a resource that pornography must use. She states, "Pornography has to be done to women to be made." However, for Baker the social cost of pornography is not as great as the cost of legal restrictions that allow the majority to suppress an individual's values. Anti-pornography activists, however, would argue that Baker greatly underestimates the cost pornography places on society, especially women. One cost of pornography is that it limits women's decision-making capabilities. According to anti-pornography feminists, women do not get to choose whether to participate in the making of pornography, and they do not get to choose the message pornography communicates about women. MacKinnon explains, "Both bodies of law [the First and Fourteenth Amendment] accordingly show virtually total insensitivity to the damage done to social equality by expressive means and a substantial lack of recognition that some people get a lot more speech than others" (*Only Words* 39, 72). Baker might answer these arguments by claiming that anti-pornography activists have equally underestimated women's individual autonomy. For Baker, it is more important to respect women's responsibility and freedom to reject pornography.

Conclusion

There are clearly flaws with the marketplace of ideas theory, but have Fish, Bollinger, or Baker offered more attractive alternatives? After exploring literary, tolerance, and liberty theory and applying all three theories to hate speech and pornography, it is apparent these theories struggle to provide clarity on how law ought to deal with difficult cases. This is not to suggest that we should revert to the marketplace of ideas theory. Instead, we must consider whether the search should continue for a more compatible metaphor and/or theory. It might be necessary for us to contemplate forgoing the quest for an alternative metaphor altogether. The advantage to metaphor is that it allows us to understand one experience in terms of another, but the precision with which law must be applied requires concrete, meticulous explanations. Metaphors are useful for clarifying and

organizing concepts, but, as shown through this analysis, they may also highlight and hide aspects of the concept, which is disadvantageous to understanding and applying law.

Rather than attempting to pinpoint the perfect metaphor, we might consider how free speech theory functions based on counterfactual ideals for U.S. democracy. The marketplace metaphor, for example, envisions an informed citizenry capable of rational thought. As an ideal to strive toward, the marketplace of ideas imagines equal citizens with equal access to information as well as the ability to sift through information and ultimately discover truth. Treated as a possibility or an approach toward the goal of equality and justice, the marketplace metaphor ought to function to move us closer to the ideal. Past applications of the marketplace metaphor, however, assume the ideal already exists. Critical Race Theorists and anti-pornography feminists critique the marketplace because it reinforces racist and sexist power structures. If the marketplace of ideas is treated as an ideal to strive toward, court decisions should be made in an effort to transform the ideal into a reality.

Fish, Bollinger, and Baker attempt to construct free speech theories around what they perceive as society's ideals. With Fish's literary theory, for example, interpretive communities establish goals and then determine which speech is allowed. Bollinger creates tolerance as an ideal characteristic that is generated through difficult speech interactions. Finally, Baker crafts a theory around the goal of self-actualization, permitting speech that promotes self-understanding and awareness. Despite the shortcomings of literary, tolerance, and liberty theory, they provide examples of how to create free speech theory based on ideals for U.S. citizenry. Future research should consider how law would be applied to difficult cases if the marketplace of ideas theory were regarded as an ideal rather than actuality.

It is also important to consider what analyses of Fish, Bollinger, and Baker's theories indicate about social attitudes regarding racist and sexist speech. The application of these theories suggests that people are more prepared to accept hate speech regulations than restrictions on pornography. Furthermore, the theories are more adequately equipped, and therefore easier to apply to, the issue of racist speech than pornography. It is imperative that we question why legal theory is more apt to recognize and deal with the harms of racist speech than sexist speech. Historically, obscenity was defined as a religio-moral offense just as blasphemy and teaching false doctrine. Of the original six religio-moral offenses, obscenity is the only remaining offense that the government regulates.[4] Thomas L. Tedford and Dale A. Herbeck

4 The six religio-moral heresies, as outlined by Tedford and Herbeck, are: 1) false doctrine; 2) irreverent expression; 3) profane and disgusting speech; 4) sexual communications of a sensual and erotic nature; 5) scientific opinion and fact, including sex education materials and challenges to church dogma concerning earth and life sciences; and 6) nonconforming views on private morality.

explain, “In the United States, obscenity is the last religio-moral heresy to be suppressed by government authority on behalf of the nation’s majority religion” (163). As Tedford and Herbeck allude to, obscenity is not excluded from protection because of the harms it does to women but because it is considered a moral issue. Could it be that our society accepts racism as a political problem but still views sexism as a cultural and/or personal issue? If we accept that law aids in the construction of social norms, we must consider the way we discuss the possibility of law. The way we imagine law reflects our imagined possibilities for social change.

Challenging existing norms is a vital part of perpetuating change and a primary justification for First Amendment protection of freedom of speech. However, it is possible that the speech/action discussion is a distraction that hinders the effectiveness of the racist speech and pornography debate. All three theories argue that speech and action are conflated. Each theorist grants that certain acts speak. However, in order to fully address racist speech and anti-pornography arguments, it is necessary to consider how closely speech/action is tied to the effect. Lawrence III provides an example of a gay man being called a “faggot” on a San Francisco subway. He explains that counterspeech is useless due to its instant and irrevocable effect:

> Like the word “nigger” and unlike the word, “liar,” it is not sufficient to deny the truth of the word’s application, to say, “I am a faggot.” One must deny the truth of the word’s meaning, a meaning shouted from the rooftops by the rest of the world a million times a day. The complex response “Yes, I am a member of the group you despise and the degraded meaning of the word you use is one that I reject” is not effective in a subway encounter. (Lawrence III 70)

Critical Race Theory makes clear that racist speech obstructs the possibility for counterspeech. In other words, the effect of racist speech is immediate, and, therefore, leaves little room for response. However, those who argue against regulations on speech claim the possibility for rebuttal is always present and even necessary. Basically, the absolutist argument detaches the speech from the effect in a way that creates space for response. For example, Bollinger’s tolerance theory proposes that racist speech is necessary to promote tolerant reactions. This implies that victims of racist speech have the ability and the opportunity to react in a tolerant manner. The issue of pornography is further complicated because the message is visual. Those who insist counterspeech is always possible have the difficult task of figuring out how one resignifies and counters images. Baker’s liberty theory not only assumes that women have the ability to respond to pornography; according to this theory restricting pornography actually limits women’s individual autonomy.

It is clear that legal theory must move beyond the speech/action debate in order to explore whether the effects of racist and sexist speech are

immediate. Such distinctions are necessary for making important decisions regarding whether space should be carved out for hate speech or pornography regulations. As legal theorists discuss the possibilities of law, it is essential that they look reflexively at how changes reflect and influence social attitudes regarding racist and sexist speech. The marketplace of ideas theory must be sold. It is time to imagine a new paradigm for freedom of speech that more fully addresses how law ought to deal with difficult cases such as pornography and racist speech.

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