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Comparative Legal Approaches to Offensive Names and Images

Alison Dundes Renteln
Professor of Political Science
Anthropology, Law, & Public Policy

Center for Human Rights
Columbia University
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I. Introduction

Offensive names and images generate considerable resentment in society partly because they violate standards of public decency. More than that, of course, is the fact that these provocative symbols often traumatize members of vulnerable communities. In the past few years a social movement has identified a whole host of racist names, images, and monuments to be removed from public spaces and commercial products.[1] In this era when there is a call for a serious reckoning with the past, what role, if any, does and should the law play in discouraging the use of these repugnant symbols?

In this essay I consider a set of debates that show the challenges associated with regulating ethnic slurs and racist images. These illustrations provide a context for the reconsideration of First Amendment jurisprudence concerning freedom of expression. Historically, in the United States, speech has never received protection in all circumstances. Some derogatory racial epithets have been held not to deserve legal protection; this is based in their similarity to or being subsumed in unprotected categories of speech: obscenity, profanity, "fighting words", and incitement to violence. Given the trend toward challenging offensive names and images, it is worth asking whether the U.S. should acknowledge another category of unprotected speech, namely ethnic slurs and racist images, at the very least when the expression may be construed as government speech[2]. Public reactions to some place names with the N-word and S-word and images like Blackface reveal a new willingness to reject symbols that previously seem to have gone unnoticed. It appears to be time for the majority in the U.S. and other legal systems to pay attention to the extraordinary harm caused by particular types of virulent hate speech and specific racist symbols.

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[1] Angela R. Riley and Sonya K. Katyal (2020, June 19). Aunt Jemima is Gone. Can We Finally End All Racist Branding? *New York Times*.

[2] For a seminal work on government speech, see Mark G. Yudof (1983). *When Government Speaks: Politics, Law, and Government Expression in America*. Berkeley: University of California Press.

In a liberal democracy individuals have rights to political freedom, so long as the exercise of these rights does not result in harm to others in the community. This reflects a presumption that regulation is otherwise illegitimate in the absence of serious harm. Historically, in the United States offensive speech has not been subject to regulation largely because of the proverbial wisdom that "sticks and stones can break my bones, but words can never hurt me." Generally, it is considered preferable not to restrict speech; instead of censorship, malicious statements are best dealt with by more speech. This is the famous metaphor of the marketplace of free ideas, which has been the conventional way of defending the American privileging of free speech over equality.

Unfortunately, this presumption does not take into consideration the relative inequality of power between speakers and hearers. Inasmuch as words and images can wound, standard First Amendment jurisprudence fails to take account of the trauma caused by those hurling "racial epithets".[3] The devastating consequences of particular types of hate speech should lead us to reconsider the standard list of categories of unprotected speech. The basic question here is how the law should treat freedom of expression with regard to the utterance of abhorrent racial epithets and the display of repugnant symbols. As with other legal systems that penalize hate speech, it may be that the U.S. should follow suit.[4]

One of the standard premises of constitutional law is that policies should be content neutral and not discriminate on the basis of viewpoint. Much of the debate turns on whether the statutes in question discriminate on the basis of speakers' views. This is presumptively invalid *except* in the case of government speech. The U.S. Supreme Court acknowledged that it is permissible for the government to take positions on policy matters. This will be relevant in some of cases discussed below.

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[3] Critical race theory has contributed a great deal to public recognition of the harms.

[4] See Kent Greenawalt (1995*). Fighting Words: Individuals, Communities, and Liberties of Speech* (Princeton: Princeton University Press), especially Chapter 4 "Insults, Epithets, and Hate Speech, pp. 47-70. Jeremy Waldron (2012). *The Harm in Hate Speech*. Cambridge: Harvard University Press.

Although many other legal systems regulate hate speech[5], resistance to this policy has existed in the United States for a long time. One manifestation of this recalcitrant attitude is the U.S. rejection of international norms. For instance, state parties to the Convention on the Elimination of All Forms of Racial Discrimination, agree to enact domestic policies to forbid the advocacy of race hatred, based on Article 4, unless they opt out through reservations, declarations, and understandings. Article 4 stipulates that states parties make some types of speech punishable by law.[6] The U.S. ratified the treaty with a reservation[7] stipulating that it would not ban this type of expression. In this regard, the United States is unusual as compared with other legal systems.

Public law scholars often note that hate speech has been difficult to address and generally attribute this phenomenon to the American experience with persecution at the hands of the British. The founders wanted to ensure that citizens could criticize the government and effectively seek redress of grievance.

Yet, even though the First Amendment is phrased in absolutist terms, it has, over time, been interpreted in such a way as to allow some limitations. Not only are there categories of unprotected speech such as incitement to violence, obscenity, defamation, but time, place, and manner restrictions are also widely used[8]. Inasmuch as these are deemed compatible with the traditional approach of privileging freedom of expression, it is worth

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[5] See, e.g., Sandra Coliver (Ed.) (1999). *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination*. London: Article 19, International Centre against Censorship.

[6] This provision is more expansive than the narrower provision Article 20 in the International Covenant on Civil and Political Rights. See CERD Committee Recommendation 35 "Combating racist hate speech" adopted in 20013.

[7] The Clinton Administration attached a reservation: "The U.S. Government's ability to restrict or prohibit the expression of certain ideas is limited by the First Amendment, which protects opinions and speech without regard to content. In that Article 4 is inconsistent with the First Amendment and that the Committee on the Elimination of Racial Discrimination has given a broad interpretation to Article 4, the Administration recommends a reservation to make it clear that the United States accepts no obligations under this Convention which have the effect of limiting individual speech, expression and association guaranteed by the Constitution and U.S. law. 10d Congress, 2nd Session, Senate Executive Rept 103-29, June 2, 1994

[8] Profanity is limited sometimes as with George Carlin and 7 Dirty Words. In other contexts, e.g., *Cohen v. California*, it could not be.

asking whether there may be a basis for regulating some offensive names and racist images.[9]

Some contend that it is better to discourage racist behavior through other legal mechanisms, such as with trespass and anti-vandalism in the *RAV* decision, incitement, or other strategies[10]. Even so, there may be a rationale for regulating offensive names and images, at least when it is government speech.

To achieve this, should the U.S. reconsider jurisprudence on hate speech to create a specific category for ethnic slurs, or at the very least restrict government speech that appears to endorse offensive names and images? Insofar as the logic employed is similar to that related to obscenity, profanity --- turning on evolving norms of decency – this may be a viable approach. Furthermore, the old case of *Beauharnais v. Illinois* (1952) involving group libel suggests a way the U.S. Court might be persuaded to treat ethnic slurs of sufficient intensity and racist images as unprotected by the First Amendment.

II. Offensive Names

While many terms are offensive, this paper considers whether the law should treat ethnic slurs as an unprotected category of expression by the First Amendment because they are pernicious hate speech. Other terms for this category of offensive names are *blason populaire* or ethnophaulisms, or racial epithets. It is worth noting that some view these terms as neutral. That is, stereotypical traits can be positive or negative. On this view, while they are often exaggerated in the form of caricatures or even patently false, some may contain "a kernel of truth." Just as stereotypes may be positive or negative, so, too, racial generalizations may be positive or negative.

Other scholars who have considered the function of ethnic slurs contend that all slurs are offensive to some extent. As one analyst put it: "The overt purpose of an ethnic slur is to insult and to injure" (Allen, p. 8). If a slur is by definition pejorative, then it is

[9] Standard texts in the field of constitutional law offer cases showing that offensive speech is largely protected under the First Amendment. This includes *Cohen v. California* ("Fuck the Draft" on the back of a jacket)

[10] *R.A.V. v. City of St. Paul*, 505 U.S. 377.

likely to cause harm if directed at members of the group subject to the characterization. Consequently some of these terms may be construed as hate speech, as is argued in *Words that Wound* (Matsuda et al., 1979), a classic treatment of the subject.[11]

The jurisprudence of ethnic slurs is an important topic for political scientists.[12] Indeed, ethnic slurs operates as a "preeminently a political vocabulary" (Allen, p. 9). This terminology is designed to reinforce ethnic boundaries ("us" versus "them".) The offensive remarks also have powerful consequences when used, whether deliberately or unselfconsciously in the public arena.

American political history is replete with famous examples of leaders referring to ethnic slurs as insults and immediately losing their positions or finding their reputations tarnished. For instance, President Nixon commented on "Jew boys" on the Watergate tapes. Earl Butz, Secretary of Agriculture under Nixon and Ford made racist comments that eventually led to the demise of his political career[13]. As even the possibility that a politician uttered a racial epithet can be damaging, Nixon campaign of "dirty tricks" started a false rumor that Edmund Muskie had said "Canucks" (slang for Canadians) in Maine (Allen, 1979, p. 12).

In the contemporary political scene, ethnic slurs seem not to have the same consequences as in the past. This may be cause for alarm. President Trump repeatedly referred to Senator Elizabeth Warren as "Pocahontas" which he oddly attempted to justify because he denied she had Cherokee heritage. This seems to miss the point that whether her claim was accurate or not, his use of the term was perceived as extraordinarily offensive

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[11] For Matsuda's proposed test, see p. 36: "To distinguish the worst, paradigm example of racist hate messages from other forms of racist and nonracist speech, I offer three identifying characteristics: 1. The message is of racial inferiority; 2. The message is directed against a historically oppressed group. 3. The message is persecutory, hateful, and degrading." See also Mark Tushnet's comment "The 'speech causes harm' paradigm" (2017). *Freedom of Expression* (Elgar), pp. 17-22.

[12] Terms used for members of marginalized groups deserve serious consideration as they result in "othering" them. For a thoughtful essay, see Keith Cunningham-Parmeter (2011). Alien Language: Immigration Metaphors and the Jurisprudence of Otherness. *Fordham Law Review* 79, 791545-1598

[13] As Butz's racist comments were obscene and scatological, leaders in both parties condemned him. This suggests that ethnic slurs are regarded as deserving regulation in some instances because the content falls under an extant unprotected category of speech.

by many Native Americans (Trump also referred to a police van as a Paddy wagon, an anti-Irish slur).[14] Dan Johnson, a candidate for the Kentucky House of Representative used racist imagery in discussing President and Mrs. Obama and posted statements on his Facebook page. Although the Republican Party urged him to drop out of the race, he was elected nevertheless[15].

When examining the role of derogatory terms in contemporary social life, one sees that racial slurs or racial epithets have somewhat different functions for majority and minority groups. For majorities, the use of ethnic slurs serves to promote inequality and discrimination by giving a perverse logic to invidious comparisons of ethnic differences. In short, ethnic slurs are used to maintain social class and privilege. For minorities, name-calling often redresses the injustices of class and the social injustice of privilege. The motivation for hurling the racial epithets is to dignify an imposed minority status. One question is whether ethnic slurs used by minority groups about the majority deserve the same treatment as those expressed by the majority[16].

Another question is whether use of the terms by members of the group itself is permissible. While scholars are intrigued by what they term "inversion", "reclamation", and "appropriation" (Bianchi 2014), it is unclear whether use of ethnic slurs about minority groups by the members of those same groups actually removes the negative connotations of those term. In contemporary jurisprudence the question may be the term is employed by a member of the in-group. If the usage is self-deprecating, does that necessarily deprive the words of negative power?[17]

To a large extent, the determination as to whether a name is truly offensive depends on the particular context. We must always look to the forum in which it is used and identify the hearers, and speaker. Recognition that words "wound" is necessary, and the majority must attempt to understand the trauma caused when individuals have experience of slurs

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[14] For an incisive analysis of the implications of President Trump's repetition of Pocahontas's name as slur in the context of White Supremacist memes, see Ellen W. Gorwevski (2018). For a defense of invoking her name as a symbol, see

[15] http://www.kentucky.com/news/politics-government/article115696453.html

[16] The question might be whether offensive speech, for instance, by the Black Panthers about whites, should be regulated in the same way. Jody Armour's thoughtful work addresses this.

[17] See essay by Gibson, Epstein, and Mag?

hurled at them. Emphasis on anti-racist works will be important to achieve this goal. As with many difficult legal questions, a case-by-case approach to specific names and images will be necessary.

One of the more serious challenges with assessing offensive material is continued adherence to the objective reasonable person standard. As individuals find different names and different images offensive, this complicates efforts to ascertain the magnitude and intensity of the harm. In reality, this is not very different from the challenge associated with identifying what material is legally obscene or what forms of punishment are consistent with evolving norms of decency. This involves the question as to whether a national standard or a "community" standard is to be applied. As the nature of labeling evolves over time, the evaluation of what names and images are unacceptable will have to be a flexible and dynamic process. This means that if we were to regulate offensive names and images in the legal system, we would have to accept the proposition that lists of those items to be proscribed would in constant need of revision in light of changing societal norms.

The conventional wisdom is that the First Amendment affords protection to offensive speech, whether pure utterances or symbolic speech, (as with cross burning), unless it involves a "true threat". Yet, the law in the U.S. is not entirely consistent on this matter. In a relatively recent case *Matal v. Tam (2016)*, the United States Supreme Court considered whether the denial of a trademark to an Asian American band, "The Slants" was unconstitutional. In a somewhat remarkable decision, the Court struck down the "disparagement" clause of the Lanham Act because it violated the First Amendment.[18]

It is conceivable that the Court agreed to hear this case because the identity of the plaintiffs made the challenge more appealing. The particular facts here may have enabled the Court to mollify those who favor regulation of hate speech. First, the term was used

[18] Prior to the *Matal v. Tam* ruling, the disparagement clause empowered the Office to reject derogatory trademarks. Although the Red Skins trademark had been authorized, after years of litigation the office cancelled it. The policy authorized the government not to place on the federal register those names which offended a substantial number of those in the group. The Court struck down the disparagement clause as violating the Free Speech Clause. The analysis depended on whether the clause constituted viewpoint discrimination, and the Court concluded that it did.

by Asian Americans themselves who sought to "reclaim" it in order to rob it of negative meaning.[19] When an ethnic slur is used in a self-deprecating manner, to some it may seem less objectionable. Second, the term "slant" is arguably not the most offensive of all ethnic slurs, if one can possibly judge that. In the scholarship on ethnic slurs, usually the phrase is "slant eye". Furthermore, the fact that some assert one can say it out loud, unlike the N-word suggests that the strength of the negative force conveyed may not be equivalent.

The Court's reasoning was criticized by two commentators on the ground that the effort to reconcile Free Speech law and trademark law produced numerous inconsistences. As one scholar explains: "…trademark law recognizes other content-based criteria for trademark registration and has done so for more than a century" (Snow 2016, pp. 1641). The critique has been partly the contention that the consideration of the one part of the Lanham Act governing trademark law failed to appreciate the field of trademark law as a whole. Another critic maintains that a case-by-case approach based on empirical evidence is warranted (Tushnet 2017, p.941).

From the perspective of constitutional law, it seemed that the analysis turned on the question of whether or not the name is seen as government speech. As the Supreme Court wished to reject this contention, it took pains to distinguish the precedent, *Walker v. Texas Division, Sons of Confederate Veterans*, 576 U.S. ___ (2015). This was a case in which Texas Department of Motor Vehicles rejected a request to issue a license plate with Confederate flag on it. In this case the Court accepted the notion that DMV production of the plate constituted government speech; the license conveys the impression that the state endorses the message.[20] It gives the stamp of approval and in this way reflects on the

[19] For an empirical study testing whether investigates the extent to which reclamation or "reappropriation" influences perceptions, see James Gibson, Lee Epstein, and Gregory Mangarian (2019) Untaming Civil Discourse. *Political Psychology* Vol.?, pp.

[20] For a careful analysis of possible constitutional framings of the case of government speech or an exception to viewpoint discrimination, see Frederic Schauer (2016). Not Just about License Plates: *Walker v. Sons of Confederate Veterans*, Government Speech, and Doctrinal Overlap in the First Amendment. *Supreme Court Review* 2015, 265—299. He concludes that the case presents "a situation in which multiple overlapping but noncongruent doctrinal frames all surpass some threshold of doctrine and theoretical plausibility". (p. 298).

government. When the state is implicated in a decision of a private individual or group, this gives its imprimatur and hence indicates support.

Interestingly, numerous cases show the willingness of state DMV officials and judges to reject offensive license plates. The fact that DMVs have restricted use of offensive names proves that the government does not wish to be associated with particular forms of extremely offensive expression. These terms tend to be obscene, scatological, and racist. Some states compile lists that staff use, sometimes in multiple languages, to vet the names submitted. For decades state agencies have reviewed requests for names on plates to ascertain whether they are consistent with contemporary standards of morality.[21] This is generally regarded as appropriate because the issuance of the license plate is deemed government speech.

Government speech is permitted to have a viewpoint to promote particular policies and programs, which in the case of trademark law would allow decisions distinguishing between trademarks that are not offensive and those that disparage ethnic groups. Even if "the Slants' may not seem disturbing to some, other ethnic names would. For example, the since the ruling in *Matal v. Tam*, the Trademark office has received a number of requests to register names some would find objectionable.[22]

The U.S. Supreme Court also had occasion to review the decision of the Office of Patent and Trademark to cancel the Redskins' trademark. The litigation surrounding that question had lasted over a decade, and the result was finally cancellation of the trademark. This ethnic slur is considered the oldest known slur (Allen, 1979) and comes from the custom of requiring proof of killing an Indian by producing his red skin. This name is considered as offensive as the N- word, and yet, despite this, it for decades it was the name of the professional team in the Capitol of the United States.[23] Fans insist that the name ceased to have negative meaning, just as fans of Indian mascots maintain that the use of

[21] See DMV lists.
[22] According to press coverage, applications for products to have trademarks using the N-word and swastika were among those submitted to the U.S. Patent and Trade Office. Anon. (2017).
[23] C. Richard King (2016). *Redskins: Insult and Brand*. Lincoln: University of Nebraska Press.

Native American names is intended "to honor" indigenous people.[24] In some instances the name, while offensive, is not as disturbing as the caricature or visual representation, though, of course, sometimes both are troubling. In 2020 the football team management, under pressure, decided to change the name.

One of the questions about ethnic names is who should decide whether it is truly offensive or not. Moreover, if it is the group itself which decides, how much consensus must exist within the group in making this judgment?

III. Offensive Place names and Toponymic Resistance

In some contexts the racist name is treated as part of cultural heritage, which has become an accepted part of a landscape. In many instances, individuals challenge these place names in a political movement what some have called "toponymic resistance"[25]. They submit petitions to state and federal geographic boards remove offensive names from maps and replaced with unobjectionable names. The fact that offensive place names receive governmental scrutiny in numerous instances is another indication that regulation of names is, at least to some degree, considered a legitimate political function.[26]

In his definitive study of U.S. government regulation of offensive place names, *From Squaw Tit to Whorehouse Mountain: How Maps Name, Claim, and Inflame (2006)*, cultural geographer Mark Monmonier considers the longstanding practice of revising maps as a political function. His remarkable monograph on the politics of cartography reveals a startling number of quite terrible toponyms, many of which remain on our maps in the United States.

An example that received considerable attention in recent years is the "S" word. Many locations use "squaw" as a place name, as did the California ski resort "Squaw

[24] For a powerful account of the difference in perspectives on Indian mascots, see the documentary "In Whose Honor?" about Chief Illiniwek at the University of Illinois.
[25] Camilla Brattland and Steinar Nilsen (2011). Reclaiming Indigenous seascapes. Sami place names in Norwegian sea charts. *Polar Geography* 34, 275-297.
[26] The work of scholars in the field of onomastics is intriguing. See, e.g., I.M. Nick (2017). Squaw Teats*, Harney Peak, and Negrohead Creek*: A Corpus Linguistic Investigation of Proposals to Change Official US Toponymy to (Dis)honor Indigenous US Americans. *Names* 65, 223-235.

valley" until August 2020[27], even though some Native Americans consider this racist and obscene. They contend that the word refers to the genitals of Indian women in their native languages.[28] Despite this widespread claim of obscene connotations, UCLA linguist William Bright considered the etymology, and ultimately concluded that historical evidence did not show the name has this meaning. Another scholar, Debra Merskin, revisited this question and argued, to the contrary, that the term is considered obscene in at least two Native languages.

How does one determine whether the name is consistent with contemporary community standards? It would seem to hinge on the worldview of the group to which the name applies, irrespective of what the official scholarly record claims. Even if it is unclear by what standard a judgment ought to be made, it seems well established that the U.S. government may legitimately regulate offensive place names and purge the landscape of those deemed to be egregious.

Although the cartographic policy may be permissible as a matter of law, one cannot ignore the reality that enforcement of geographic board decisions will be difficult. Even if the government approves particular changes on new maps to rid them of offensive place names, residents may continue to employ customary place names familiar to them. So while it may be legitimate to regulate toponyms to cleanse maps of hate speech, it is likely to be hard to achieve compliance with this in everyday life. Nevertheless, even if maps cannot change attitudes, this approach may over time contribute to shifts in public perceptions.

Another challenge with regulating names is that meanings vary by context and also change over time. An Australian case about the name on a football stadium demonstrates how communities differ in their response to highly objectionable names. Stephen Hagan filed a lawsuit against the trustees of the Toowoomba Sports Ground in Queensland demanding that the name of the stadium be changed ("The ES 'N--' Brown Stand") because it constituted unlawful racial discrimination. Mr. Hagan was an Australian national who

[27] Des Bieler (2020, August 25). Amid national reckoning on social justice, Squaw Valley ski resort is changing its name. *Washington Post*.
[28] Debra Merskin (2010). The S-Word: Discourse, Stereotypes, and the American Indian Woman. *Howard Journal of Communication* 21, 345-366.

identified with the Kooma and Kullilli Tribes of South Western Australia and who, not surprisingly, found the use of the "N" word objectionable. The sports facility had been named after a popular sports figure who was white with the surname Brown who apparently liked to use "N-- Brown" shoe polish and acquired that nickname. While Mr. Hagan had no objection to honoring the rugby player, Edward Stanley Brown, he argued the ethnic slur should be removed and also requested an apology.

After the trustees declined to make the change and the Australian court ruled against him[29], he filed a communication against Australia with the treaty committee that enforces the Convention on the Elimination of All Forms of Racial Discrimination (CERD). Hagan argued that the N- word is "the most racially offensive, or one of the most racially offensive, words in the English language".[30] He and his family were so offended by the use of this term at the sports ground that they had to avoid attending events there. While he had no objection to honoring E.S. Brown by naming a football stand in his honor, the use of the racist nickname was unnecessary; other athletes had stadia named after them using their ordinary or proper names, rather than nicknames. Moreover, he recognized that "non-Aboriginal Australians "either were not aware of or were insensitive to the hurt and offence that term caused to Aboriginal people". Hagan was not objecting the use of the term "in the distant past but rather its contemporary use and display". Ultimately in *Hagan v. Australia* (2003) the treaty body concluded that the name violated his rights under the Race Convention and recommended that "…the State party take the necessary measures to secure the removal of the offending term from the sign in question, and to inform the Committee of such action it takes in this respect".[31]

Although some argued that the N- word had a different, less obnoxious meaning in Australia, empirical proof of this seems to be entirely lacking. There does, however, appear to be a difference in reaction to the word based on race, which is hardly surprising. This

[29] *Hagan v. Trustees of the Toowoomba Sports Ground Trust*, [2000]FCA 1615, 2000WL 33656721

[30] See Jody D. Armour's book.

[31] *Stephen Hagan v. Australia*, Communication No. 26/2002, U.N. Doc. CERD/C/62D/26/2002 (2003).

means that an assessment by the "objective reasonable person" will be problematic unless it is a reasonable person of the background of the individual who is offended.[32]

The treaty committee had to consider the argument that no one had objected to the use of the term when the sign was originally erected in 1960. Despite the supposed lack of complaint for nearly forty years, the conclusion was that the "…the use of the offending term can at the present time be considered offensive and insulting, even if for an extended period of time, it may not have necessarily been so regarded." Although the Australian government initially refused to respond to the UN request that the sign be removed. Eventually in 2009, after a ten-year battle, the stadium was torn down, and a confidential settlement was reached.

When it comes to judging the magnitude of the insult, it matters who is rendering the decision. This suggests that a more diverse judiciary might help ensure a more nuanced interpretation of offensive names. With respect to names, it seems beneficial to have an open mind when it comes to the possibility that words can wound. Not only are there ethnic slurs in English, but they obviously exist in other languages as well. Although the DMV has dealt with this by hiring staff to evaluate license plates in other languages, the Federal Communications Commission has faced challenges in judging content that should be limited.[33]

For now I have suggested that the pure speech by the government should be subject to possible limitations when it includes racist names. This position is consistent with existing doctrines that exclude certain utterances from constitutional protection. The use of ethnic slurs in other contexts should also be discouraged, although care must taken that these policies not be overbroad. Existing statutes on harassment in the workplace may also serve to ban these types of insults and hate speech. The U.S. can benefit from considering the experience of other countries with regard to hate speech laws to find versions of laws that are narrowly tailored to the most egregious forms.

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[32] This is the same problem encountered in criminal law with the use of the objective version of the reasonable person standard as part of provocation. What is deemed adequate provocation will vary, depending on the identity of the hearer and the context.

[33] Articles on vanity plates. See disputes involving offensive language in Spanish.

IV. Offensive Images

If offensive names may, under some circumstances, be subject to limitations, what are the implications for racist imagery that apparently promotes invidious discrimination? I turn now to the question of whether or not racist images and symbols deserve legal protection. As with the use of the N-- word, whether or not the public appreciated how offensive it was, eventually public awareness of the magnitude of the insult has required reconsidering its usage. Likewise, the presence of symbols, monuments, and caricatures which were ubiquitous for centuries may no longer be explained away by false claims that they are innocuous. Those defending the presence of symbols that terrorize members of marginalized communities often say they are merely "heritage" and not "hate".[34] This is a false dichotomy and fails to undercut the argument that evil or repugnant cultural heritage deserves judicial scrutiny.

If words can wound, then it would also seem reasonable to suggest that pictures and images can be even more devastating. One need only recall the reactions to the publication of cartoons of the Prophet Mohammed in Denmark and in France (Keane 2013). For a religion that prohibits the visual representation of the prophet, a caricature portraying him in unflattering light is bound to have serious consequences. This raises of the question of when images might be considered a form of hate speech,

Although in some European countries, symbols such as the swastika are legally banned, in the United States where free speech has historically been privileged and the Supreme Court disinclined to uphold restrictions, it seems inconceivable that such a ban on offensive images and symbols could occur. However with regard to images that may be construed as conveying government messages, some limits may be permissible. The question is how this applies to offensive figures or characters in public places. Also, it is worth asking if existing time, place, and manner restrictions authorize public officials to refuse to have some types of parades, for instance?

[34] Citation – Southern Poverty Law Center study.

I turn now to the question of racist figures participating in marches and parades. In the United States, Americans usually refer to the Nazis plans to march in Skokie, Illinois in neighborhoods where Holocaust survivors resided. The American Civil Liberties Union defended their right to march to show the importance of the principle of freedom of speech and lost more members over this choice than any other case with might have been dire financial consequences. Samuel Walker explains how courts rejected the notion that the swastika symbol worn by Nazi implying "advocacy of genocide" constituted fighting words under the *Chaplinsky* doctrine. Another way of denying the Nazis a permit might have been based on the *Beauharnais* ruling upholding group libel; however, after the U.S. Supreme Court upheld the Illinois law, the state repealed it in 1961. It may be worth revisiting Skokie to consider whether there might have been a way to avoid the trauma that the prospect of a march caused community members.[35] As public events are generally subject to time, place, and manner restrictions, the city might have authorized the march in a different neighborhood. Does a constitutional right implicated necessarily entail to right to choose the particular avenue where one's group marches?

If we shift our attention to consider the debate in Northern Europe about Zwarte Piet or Black Pete, we can assess this issue in a comparative perspective. In Belgium and the Netherlands, instead of Santa Claus, Saint Nicholas (Sinterklaas) delivers present with the help of Black Peter who is basically a slave. The character appears in Black face similar to what was seen widely in the U.S. during the last century. As discussed earlier with the non-native responses of Americans and Australians to the name of the football team and stadium, the majority of Dutch people flatly reject the proposition that Black Pete is racist icon. Commentary and videos about the holiday festivities underscore the point that Black Pete is simply a Dutch cultural tradition. Some go so far to deny any racial aspect as to claim Pete is Black because of soot he gets from coming down the chimney. Zwarte Piet has a Moorish background, he frightens children to ensure that they behave properly during the year, and is simply part of the Dutch heritage. Perhaps most startling is that, according

[35] Samuel Walker concludes that the way the Skokie controversy was handled because it provided enormous free publicity for the Nazis. He concludes the regulating hate speech was not an approach favored by civil rights groups because they fear restrictions on public events will be used against them.

to one article, only 27% of Dutch people of color regard Zwarte Piet as racist. Social science research on this underscores the point that the Dutch fail to see the character as a racist trope.[36]

When one individual publicly objected to Black Peter, this struck a nerve. Quinsy Gario, a Curacao-born Dutch artist, wore a T-shirt "Black Pete is racist" to the St. Nicholas parade, he was physically removed. Many Dutch citizens reacted angrily and voiced their support for the figure. A Facebook page showed Black Pete had two million endorsements in a country of 17 million (Tagliabue 2013).

When protest began to emerge, one part of the social movement was to challenge his presence in public parades. This led to a public debate over whether to cancel the St. Nicholas arrival parade because Black Pete was part of it. The mayor advised the city council to reject the petition. The legal question that arose was precisely whether the city should decline to issue a permit for a parade including Black Pete.

The controversy resulted in United Nations condemnation by the ICERD Committee which regarded Zwarte Piet as a racist symbol.[37] In addition, the United Nation High Commissioner for Human Rights sent a letter to the Dutch government. It sided with the critics of Black Pete saying it reinforced negative racist images of those of African descent and was "a living trace of past slavery" (Grunberg 2013).

The Dutch persist in claiming that those who make these arguments are racists themselves and are simply projecting their ideas on the character. Mr. Wilder's party views this as part of the challenge to Dutch traditions from multiculturalism. One Dutch commentator wrote:

> Yet the general tenor among the Dutch public was that 'they' should keep their mitts off 'our tradition,' an opinion you can hear in any number of variations on any street corner. By 'them' people mean the United Nations and 'unnatural' Dutch citizens, by both birth and naturalization, who want to put an end to this admittedly dubious tradition"(Grunberg 2013).

[36] Judi Mesman, Sofie Janssen, and Lenny van Rosmalen (2016). Black Pete through the Eyes of Dutch children. *PLoS On 11 (6)*, pp. 1-14.
[37] Somini Sengupta (2015, August 28). U.N. Urges the Netherlands to Stop Portrayals of 'Black Pete' Character. *New York Times*.

A compromise was proposed to make Black Pete, less Black; make him Blue or Green, but even that was unacceptable.[38] Increased pressure has been exerted on cities not to continue allowing Black Pete to participate in Christmas festivities.[39]

In light of this controversy, it is worth asking when, if ever, parades should be disallowed, redirected, or modified? If the government issuance of a permit is a form of government speech, that might allow for more control over parades.[40] This is inconsistent, however, with the usual view that more protection of speech is necessary in a public form or limited public form.

If the decision about whether a trademark on the federal register implicates the government, then it would appear that issuance of parade permits also does. If the DMV can reject ethnic slurs on the highway, then it would appear that local officials might be authorized to refuse permits for parades that may also offend[41]. Even if one is not persuaded by this analogy, time, place, and manner restrictions would at least enable the government to direct the parade to less traveled thoroughfares.

V. Customary Norm Prohibiting Some Ethnic Slurs and Racist Images

Some public reactions to racist speech and images have led individuals associated with these to lose their positions. If "cancel culture" is sanctioning the removal of individuals, this might imply that there is an emerging norm of customary law that supports another category of unprotected speech, one for ethnic slurs and racist images. Is there sufficient evidence of this public view of offensive names and images?

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[38] This is similar to the attempt in Hollywood to render the Oompa Loompas orange.

[39] Anon. (2015). NPR, So Long, Black Pete June 24, 2020. https://www.npr.org/2020/06/24/882816031/so-long-black-pete https://www.cnn.com/2019/11/30/europe/belgium-blackface-colonial-history-intl/index.html

[40] Michael L. Landsman (1999). The Politics of Permits: The Unconstitutionality of the Giuliani Administration Parade and Rally Permit Application Procedures. *Fordham Urban Law Journal* 27, 237- . Add other parade references.

[41] Is it possible that Skokie officials were correct in their initial assessment that Nazis should not march in that particular neighborhood?

In the twenty-first century public reactions to offensive costumes and Blackface[42] have been stunning. When photographs of leaders in yearbooks are disseminated showing them dressed in Blackface, some have lost their positions and if not, they find themselves in a precarious position and have apologized profusely.[43] For instance, after a picture appeared of Prime Minister Justin Trudeau in Blackface, ostensibly dressed as a character from "Aladdin", his political career was in jeopardy; the press reported that he rejected calls for his resignation.[44]

Not only has Blackface had consequences in politics, but also in the arts. A scandal about dancers in Blackface has also attracted public attention.[45]

Holidays sometimes center on the tension between cultural sensitivity and free speech. This conflict frequently occurs on college campuses. When it comes to university policies regarding Halloween costumes, the debate about appropriate dress may involve Blackface. For instance, the Yale Intercultural Affairs Committee emailed students advising them to avoid "culturally unaware and insensitive costumes" that "might offend minority students". It specifically advised them to steer clear of outfits that included elements like feathered headdresses, turbans, or blackface".[46] Similarly, students have been suspended from universities for dressing up as persons with disabilities for other festivities.[47]

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[42] For an important study, see Michael Rogin (1996). *Blackface, White Noise*. Berkeley: University of California Press.

[43] Consider Governor Ralph Northam of Virginia. Alan Blinder (2019m May 23). Investigation of Blackface Photo Ends Without Answer. New York Times, p. A23.

[44] Ian Austen and Dan Bilefsky (2019, September 19). Photo of Trudeau in Brown face Disrupts the Canadian Election. New York Times, p. A7. Ian Austen (2019, September 19). Trudeau Struggles to Pivot from Blackface Scandal. *New York Times,* p. A7.

[45] This was the 19th century ballet "La Bayadere set in India. Alex Marshall (2019, September 24). Blackface at the Ballet, and a Global Divide on Race. *New York Times*, p. C3.

[46] Liam Stack (2015, November 8). Yale's Halloween Advice Stokes a Racially Charged Debate". *New York Times*. See also Kirk Johnson (2015, October 15). Costume Correctness on Campus: Feel Free to Be You, but Not Me. *New York Times*, pp. A1,A15.

[47] Mark Duell (2018 January 22) Disability is not a punchline: Oxford University student disciplined as he dresses as Stephen Hawking for college fancy dress bash. The *Daily Mail.* Its president Miranda Reilly and college disability representative officer Josie Paton, an LMH undergraduate said in a joint statement: 'While it is not impossible to dress

A particularly disturbing incident involved a law professor at the University of Oregon who wore Blackface at a Halloween party which her students were expected to attend. She apologized, explaining she had dressed up as Dr. Damon Tweedy, a black psychiatrist who wrote a best-selling memoir called "Black man in a White Coat". Her costume, she said, "…was intended to provoke discussion about racism and societal injustices".[48]

One objection is that those who do not belong to the cultural community should not appropriate the dress or symbols. Another is that regardless of whether someone is ingroup or outgroup, the costume itself is an unacceptable because it reinforces negative stereotypes. The fact that so many instances occur suggests that members have society have lost a common sense of decency.

In many of these controversies those accused of insensitivity and racism argue that their conduct is merely "cultural". They are simply following traditions associated with Christmas as with Zwarte Piet and with Halloween in the university conflicts over costumes. While it is true that laws afford protection to cultural heritage, some traditions cause irreparable harm. Consequently, these forms of repugnant heritage ought not to receive legal support under either domestic or international law. Indeed, although the right to culture, formally recognized in international human rights law, it must be balanced against other important human rights. In these cases we see the need to protect the rights to equality and non-discrimination and conclude that they trump cultural rights. Furthermore, children deserve protection from racist propaganda. In the Convention on the Rights of the Child, children have a right to their culture in Article 30; however, they also have a right against traditions that are 'prejudicial to their health". The psychic harm from racism as well as the history of violence against minorities can be understand as creating an exception from the human right to culture.

I would be remiss if I did not acknowledge that the Internet has obviously exacerbated the harms associated with racist names and images. That insults circulate in

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respectfully as Stephen Hawking, as a world-renowned physicist, this seems to have not been the case or intention.

[48] Anon. (2016, December 24). University of Oregon professor who wore blackface blasts school report. Associated Press. See also, University of Oregon Investigative Report of Nancy Schultz, November 30, 2016.

"viral" form intensifies the danger these pose to the health and well being of communities. In addition, the existence of memes that appropriate harmless images and gestures indicate the subtle ways that hate speech is disseminated. Here I have in mind the Pepe the Frog meme[49]. Recognition of this phenomenon has led to a debate in the U.S., Australia, and elsewhere about whether the service providers should be held responsible for their complicity in the sharing of hate speech. It centers on Section 230 of the Communications Decency Act, which shields internet companies and other service providers from liability. In the twenty-first century the question of the potential impact of hate speech online merits further consideration in light of the Internet and other forms of technological innovation.

VI. Reflections

It does seem unwise to recommend further limitations on free speech because of the great risk that governments will use a new category of unprotected speech to oppress minorities and attempt to undermine their political movements. For this reason members of minority groups and social justice advocates may not necessarily favor restrictions of the sort discussed above. With regard to activities such as parades and marches, advocates will most likely reject the proposal for regulating racist tropes through the denial of permits, hard enough to come by as it is. It is simply too dangerous to empower governments with yet another weapon.

Some may also take the view that existing doctrines are adequate to the task of regulating pernicious hate speech. Use of ethnic slurs could be treated as "fighting words" or limited by means of the "clear and present danger" doctrine. Inasmuch as time, place, manner restrictions remain justifiable, this would appear to offer another strategy for minimizing the potential harm of racist images and names.

Another reason to question the validity of this proposal is that society has already reached a stage of rejecting some of the most virulent racist material. The rise of what some have termed "cancel culture" reflects anger about the continuation of repugnant symbols that should have been removed from public spaces long ago. If these names and

[49] Add references on Pepe the Frog meme. Documentary Feel Good Man.

symbols can be put aside through informal channels, it might be preferable to avoid handling these matters through the law. On this view, there is a lack of a need for any modification in public policy.

While the counterarguments to the proposal for regulating ethnic slurs and racist images have merit, it seems that society has already demonstrated support for another category of unprotected speech. In the social movement underway for the removal of racist tropes, there is an implicit customary right against repugnant symbols. If this attitude change supports this notion, then the U.S. would join other countries around the world that regulate hate speech. I think it is time to reconsider how to treat hate speech in American law to help build a more just society.

VII. Conclusion

Although it is dangerous to suggest limiting free speech, existing doctrines such as incitement, obscenity, defamation, group libel already allow some restrictions. The question is whether it is defensible to regulate offensive names and images, when it is government speech and possibly in other contexts.

I have suggested that the Court's reasoning in *Matal v. Tam* should be questioned. The Court did not satisfactorily distinguish the *Walker* case with regard to government speech. If it was inadvisable to strike down the "disparagement" clause as violating Free Speech, Congress may want to revise the formulation and provide a more carefully worded description of the most egregious ethnic slurs and other offensive terms. It might even provide a list similar to those used by the DMV which could be revised every few years to meet evolving community standards.

The difficulty that members of the majority have in appreciating the magnitude of insults also necessitates a reshaping of the standard for assessment them. No longer can jurists rely on the fiction of an "objective reasonable person" who is in reality is the White masquerading as a person without any ethnic identity. Furthermore, The polarized political climate in the United States and the rise of the alt right should compel us to revisit the question of regulating offensive names and images.

Although there is a tendency to dismiss words and other symbols as less important than actions, it is clear that they evoke strong emotions. In a democracy it is shameful to ignore the plight of those who cannot challenge oppression because of widespread cultural myopia[50].

[50] One scholar uses the term "cultural aphasia" to characterize the inability of one group to appreciate the meaning of traditions. See John Helsloot (2012). Zwart Piet and Cultural Aphasia in the Netherlands. *Quotidien* 30 (1), 1-20.

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