VOLUME XVIII, NUMBER 1, WINTER 2018

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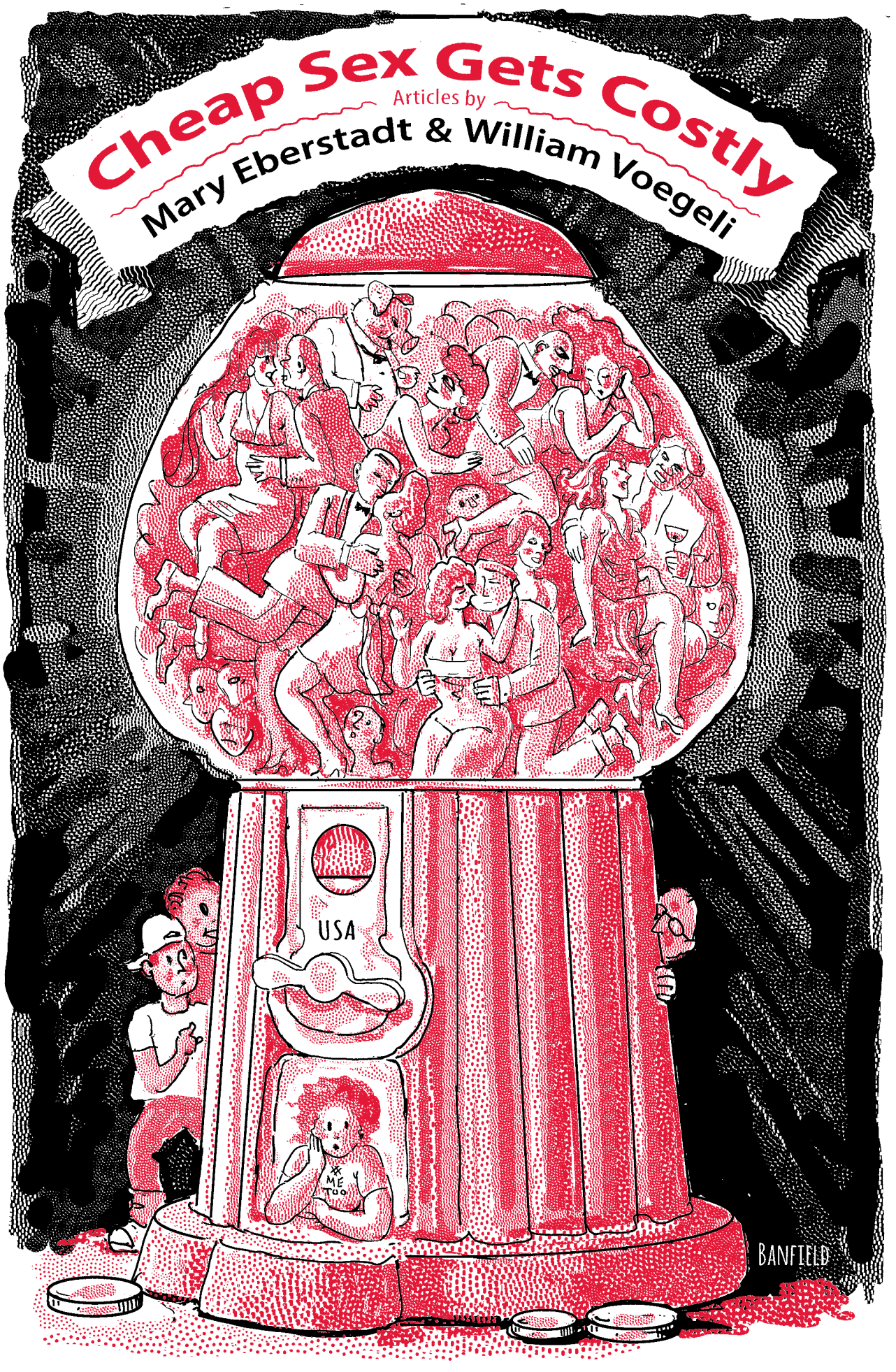

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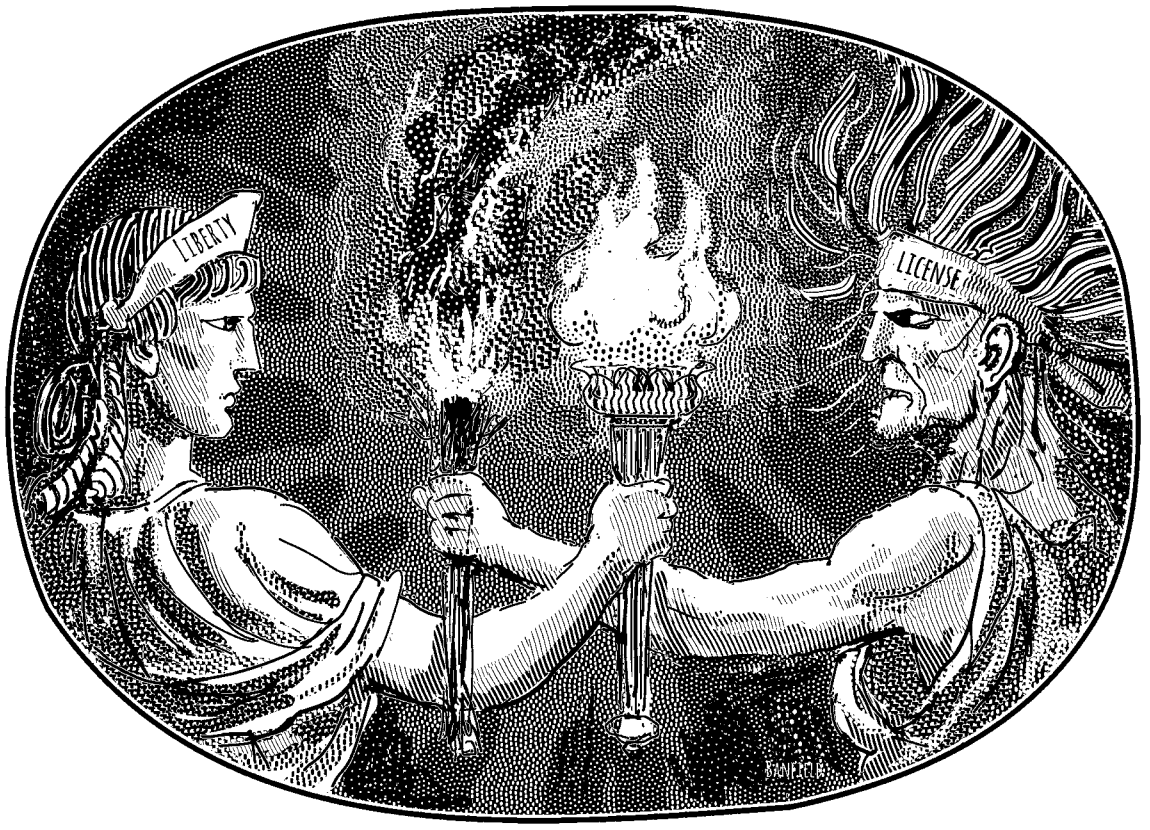
A Publication of the Claremont Institute
PRICE: $6.95
IN CANADA: $8.95

Essay by Hadley Arkes

Conservatives and Freedom of Speech



Conservatives seemed to come a bit unmeasured in their praise last spring as they celebrated a decision of the Supreme Court that they took to offer a full-bodied reading of the First Amendment. The case of *Matal v. Tam* (2017) involved the prosaic matter of "disparaging names" for trademarks: the Court struck down a decision of the federal Patent and Trademark Office, denying a trademark to a rock band composed of Asians. The decision was treated by conservatives as part of a design to shape a robust freedom of speech. But the grounds of judgment offered by the Court should have caused conservatives to wince.

To take an old line about Machiavelli, it might be said that this decision of the Court offers a façade of moderation for a radical interior. For the case found the conservative judges backing themselves into a doctrine that settles on moral relativism as the anchoring premise and the new default position in judging matters of speech. That conservatives should celebrate that kind of decision seems to fit in now with a building sentiment on the right to resist the repression of speech on college campuses by flying to a doctrine of free speech that denies any grounds of limitation. It soars to a grand moral defense of speech by detaching speech from any standards of moral judgment or discrimination. But soaring, too, is the illusion that conservatives are willing to spin for themselves if they think that such a scheme could possibly bring safety and freedom on the campuses—or anywhere else.

Fighting Words

Simon tam and his rock band styled themselves The Slants. The name was meant to make light—and dissolve in mockery—a term often used apparently as an epithet to disparage. The U.S. Patent and Trademark Office invoked a provision in federal law that barred the registration of trademarks that may "disparage…or bring…into contemp[t] or disrepute," any "persons, living or dead."

The law had long recognized that there are certain terms or expressions, settled at any moment in the language, as terms that have the distinct function of deriding and insulting. One need only think of what we now call the "N-word," a word no longer thought fit to print or say, at least in most circles. The argument was that the term "slants" was simply part of that same family of expressions and could be barred in the same way from respectable discourse. Whether the Trademark Office got that call right or wrong is a question readily answered under the formula of the classic case of *Chaplinsky v. New Hampshire* (1942). Justice Frank Murphy observed in that case that certain well-defined and narrowly focused classes of speech have never been given protection under the Constitution:

> These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which *by their very utterance inflict injury* or tend to incite an immediate breach of the peace. [Italics added.]

That case had guided judges and police quite sensibly for many years, for it was built upon the common sense of ordinary people and the clearest lessons taught in linguistics: It is the most distinctive mark of human

nature that humans alone, among animals, have the gift of language. They can do more than make sounds to indicate pleasure or pain; they can give reasons over the things that are right or wrong, just or unjust. And it seems to be part of that same nature that these same creatures have an irrepressible tendency to keep offering those moral judgments. It stands to reason, then, that any language will bring forth the words that bear the moral function of *commending* and *condemning*, approving and disapproving. But within that class there is a cluster of words with a sharper edge, words that deride, insult, assault.

The test in the old *Chaplinsky* case was clear enough to the man on the street, unburdened by a legal education: whether he was a construction worker or a lawyer, would he recognize, when he heard them, words or gestures that demeaned and insulted? The soundness of the test can be confirmed again instantly whenever we give a panel of people this set of words and ask if they can identify the terms clearly established as terms of insult, as opposed to words that may be on the borderline of insult, or perhaps even terms of *approval* and *commendation*: 1) kike, 2) wop, 3) nigger, 4) urologist, 5) meter maid, 6) saint. People will not show the slightest puzzlement here in fixing on the words used as insulting or "fighting words."

At the same time, the guidelines in the *Chaplinsky* case offered the advantage of averting the fears brought forth in all quarters over the restriction of speech: that it would work to bar "ideas" that are unpopular or uncongenial. The *Chaplinsky* case more readily averted that danger because it offered the simple—and enduringly workable—distinction between epithets and *arguments*. As Justice Murphy had rightly said, these "utterances are no essential part of any exposition of ideas." And so, 30 years later, in the case of *Rosenfeld v. New Jersey* (1972), Mr. Rosenfeld, speaking at a school board meeting, had only one word as he unrolled his complaints: mother-f---ing. Rosenfeld was simply asked to refrain from using that word in order to avoid wrecking the climate of discourse and civility in the room. And yet, the barring of that word would not diminish in any way his freedom to offer the most scathing critique of the policies followed by the school and its board. Chief Justice Warren Burger once offered the example of a couple "locked in sexual embrace at high noon in Times Square." Shifted to City Hall, the couple could be seen acting out a metaphor describing what the mayor was doing to the city. But they could be barred from putting on this display, designed to shock ordinary folks, without being barred from offering the strongest, substantive critique of the mayor and his policies.

As it happens, a criminal case with a jury still offers the best test for that common-sense understanding contained in the *Chaplinsky* case, for a trial simply taps the understanding of 12 ordinary people chosen at random. But when the office of trademarks had to make a decision on its own, it would have to conduct a survey or simply use the judgment of the staff in its own office, pressed by letters of complaint. I must admit myself that I'd never heard or seen the expression "slants" until I encountered it in this case. And that may be a telling sign that the term might not have been recognized widely in the public, even if people had any awareness that it was referring to Asians.

Expressing Ideas

Among the current members of the Court, the one who has come the closest to understanding anew the teaching in the *Chaplinsky* case has been Justice Samuel Alito. And over the past 40 years he may be the only one who has cited seriously that key passage in Justice Murphy's opinion: that those gross words of assault "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Alito cited that passage several years ago, as it bore on the case of *Snyder v. Phelps* (2011). Fred Phelps and his Westboro Baptist Church had harassed the funeral of a young man who had died in Iraq, waving signs saying "Semper fi fags" and "Thank God for dead soldiers." They would also decry the "pedophile machine" of the "Roman Catholic Monstrosity." It was clear to Justice Alito that what had occurred in this case was a "vicious verbal assault." And the fact that it was verbal did not make it any less of an assault. But as Alito also understood, there was not the slightest interference with the religious or civic freedom of the Reverend Phelps and his group, as they were barred from harassing the family of the dead soldier. As the Justice noted, Phelps and his band

> have almost limitless opportunities to express their views. They may write and distribute books, articles, and other texts; they may create and disseminate video and audio recordings; they may circulate petitions; they may speak to individuals and groups in public forums and in any private venue that wishes to accommodate them; they may picket peacefully in countless locations; they may appear on television and speak on the radio; they may post messages on the Internet and send out e-mails. And they may express their views in terms that are "uninhibited," "vehement," and "caustic."

By this common-sense test, following the common sense of the *Chaplinsky* case, the Nazis who marched in Skokie, Illinois, in 1977, and the white supremacists who marched in Charlottesville last August, may be restrained from provocative rallies designed to stir violence, while at the same time a Hitler would still be free to publish *Mein Kampf*. Writing may indeed be inflammatory, but when set in books and journals it reaches people through the calmer medium of reading, and lends itself to critique and counter-arguments. In contrast, as anyone knows, the encounter on the streets between neo-Nazis and Antifa is not the coming together for an argument in the Oxford Union. In any event, it was the common sense of the *Chaplinsky* case that had to remain the key even now, as the Patent and Trademark Office had to consider whether the term "slants" would be recognized instantly by most people today as a term of insult or belittling. But the decision handed down by the Supreme Court in *Matal v. Tam* moved the matter onto another plane entirely. For the decisive sentences, cited widely now in media, were these:

> We now hold that this provision [on derogatory names of companies] violates the Free Speech Clause of the First Amendment. It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.

The shift was simple, but unsettling. For the implication here was that "offense" is entirely subjective—that there is nothing in fact, in principle, offensive and wrong. From these premises, any hurt or damage depends entirely on the feelings of the people who hear the words. The argument, then, is that people could take offense over all manner of things, and that is no basis for barring speech to those who are not offended by it. And yet what is ruled out here, quite decisively, is that there is indeed a class of acts and expressions, as Justice Murphy knew, that "by their very utterance inflict injury." They may be harassing, threatening phone calls; letters of extortion; the burning of crosses; and yes, the calling of names, with

the precise intention of assaulting and intimidating. And what makes the injuries in these cases is not merely that people *feel* hurt, but that there could be no moral justification, say, for staging attacks on people solely because they are African-American or Asian. In one instance, 30 years ago, crosses were burned outside the home of a black family in Maryland. As it happened, the family wasn't home at the time, and the debris had been cleared away by the time they had returned. Nevertheless there was a sense running through the community that something wrong had been done even though the targets of the assault had never felt even a tremor of anxiety.

Likes and Dislikes

When the band of self-styled American Nazis sought to parade through a Jewish community in Skokie waving banners with swastikas, the late Philip Kurland of the law school at the University of Chicago raised the questions: How many times need we wait to see whether the idea of genocide should have a chance to prevail in the marketplace of ideas? Is there not some ground on which the law in a free society may recognize that the mass killing of the innocent is one of those things that happens to be inescapably wrong? Most people will not have at hand the terms used by philosophers in distinguishing between wrongs that may be "categorical," wrong under any circumstances and conditions, as opposed to things that may be only "contingently" wrong, wrong under certain circumstances. But most people readily grasp that it is not always harmful and wrong to take an alcoholic drink—that any harms would depend on matters of degree and moderation. And yet the same people will not say that genocide, if taken in moderation, may be harmless or inoffensive. They may not have the technical vocabulary, but in their own way they recognize wrongs that will not be effaced by matters of degree and circumstance. The proverbial "man on the street" is likely to see at once what is morally bizarre about visiting death upon people who would seem to be innocent of any wrongdoing. The "idea" of genocide could not claim, then, the standing of a legitimate idea. And the outrage stirred by the appearance of Nazis marching in a Jewish neighborhood cannot be anything other than a justified anger. The law that would restrain that act of provocation could not itself then be unjustified.

As it happened, the passages that were key, or decisive, in the opinion in *Matal v. Tam* were set down by the Justice who had been the lone voice in holding to the teaching in the *Chaplinsky* case—namely, that the meaning of words was not merely subjective, that the law could justly restrain and punish "speech acts" that functioned as acts of insult or denigration. But Justice Alito was no longer holding out against the current here. In delivering the opinion of the Court, he was now respecting the lines of argument that had been handed down and confirmed over many cases by his colleagues, conservative as well as liberal. Indeed, the line he was proclaiming now was an echo of the line sounded by Chief Justice John Roberts in *Snyder v. Phelps*, the case in which Justice Alito had offered that strong and lonely dissent. And Roberts in turn had found himself channeling, in that case, the liberal Justice William Brennan striking down laws to protect the American flag in *Texas v. Johnson* (1989): "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

> Conservative judges are serenely putting in place premises that deny the moral ground of their own authority.

We may ask, of course, how that proposition became a "bedrock" of the First Amendment. It has never been part of the text, and it suffers the embarrassment of falling into self-contradiction as a moral principle. After all, if there is no objective truth that measures what "offends"; if "offense" simply depends on the subjective feelings of the people who hear the words; what could it mean to say then, as the Court did here, that the law that bars disparaging names "*offends* a bedrock principle of the First Amendment"? If "offense" is merely subjective—if some may be offended and others not—why should the law be struck down when many people are *not* offended by it? Or has the Court now discovered that the "idea" behind *this* law, the law that allows names to be judged for their propriety, is in fact at odds with the logic of the Constitution? Has the Court now come to the judgment that the only idea that can be offensive in point of principle is that… there are ideas that are indeed wrong and offensive in point of principle?

Are the judges then channeling Justice Robert Jackson in the classic case on the saluting of the American flag, *West Virginia State Board of Education v. Barnette* (1943)? Jackson famously remarked there that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." Could it really have escaped Jackson, this most urbane of judges, that he was acting here in high official authority and proclaiming nothing less than a new "orthodoxy" on the rightful and wrongful restriction of speech?

Jackson had been part of the crew of New Deal judges, headed by Hugo Black, who made it part of their own teaching to reject the tradition of natural law, with its claim to know moral truths. And so Black would insist that when conservative judges struck down "social legislation" or virtually any other kind of legislation, it could only be because they did not "like" the legislation before them. The conservative judges offered serious arguments, woven, they thought, in the logic of the Constitution; but those claims were reduced by Black to mere feelings, to mere "likes" and "dislikes." This was all part of the "positivist" attack on natural law and on the conservative jurists who earnestly invoked what they took to be truths and principles that were bound up with the rule of law.

Reclaiming Slurs

The irony in our own day is that the rhetorical baton here was taken up by conservative jurists, such as William Rehnquist, Robert Bork, and Antonin Scalia. They made it clear that they did not take natural law seriously. And they rejected any appeal to those deep principles of law that were not all set down in the text of the Constitution. For they saw that willingness to move "beyond the Constitution" as the driving force in "judicial activism." The cruel irony is that, in taking up that mission, they found themselves absorbing deeply the positivism of Justice Black.

In the case of The Slants, it was obvious that the members of the band did not choose that name with any purpose of disparaging other Asian Americans. Justice Alito caught the sense of the matter when he remarked on the belief held by members of the band, "that by taking that slur as the name of their group, they will help to 'reclaim' the term and drain its denigrating force." And indeed we have seen that same style at work dramatically among teams or bands with African Americans. Since the day that the decision in *Matal*

was handed down, the Patent and Trademark Office has listed applications for trademarks using the word "Nigga" for everything from tablecloths and headgear (hair bands, hair holders) to athletic apparel (shirts, pants, jackets). As we have seen now quite often, this is a license that young black people may claim for themselves—to use the N-word in a jaunty way, even as they treat it as a major offense when someone like comedian Bill Maher innocently picks up the banter and falls into the use of that word even in a self-mocking way. In the meantime, in the state of things that the Court has now shaped for us, we may have the "bizarre scenario," noted by attorney Gunnar Gundersen, that "a restaurant could not have on its door a sign warning 'whites only,' but it could name its restaurant Whites Only®." In that case why not some other old favorites, such as "No Irish Need Apply," or "Gentiles Only—No Jews"?

In the aftermath of the decision in *Matal v. Tam* it is hard to see that there could be any principled ground now for denying these applications. In that event, the Court would find itself undercutting the laws on civil rights that barred the advertising of racial discrimination. And yet, that may merely be another sign that, with this decision, the Court could generate a virtual spiral of incoherence.

Might the Court try to finesse the problem by trying to install as a principle the rule arising from the reaction to Bill Maher: terms that excite high outrage when used by whites suddenly become quite acceptable in the law when used only by the people whom the terms are meant to disparage?

But it would be hard to find five Justices likely to embrace an opinion of that kind should a case come before the Court. The judges, in their inventiveness, would surely find some way to narrow or "distinguish" the holding in *Matal*. Which is to say, they would find some way of working their way back to the logic in *Chaplinsky*.

Some observers of the Court suggest that what the Justices were trying to do was simply stay the hand of legal authority and leave that matter to be settled in the private sphere: people with more refined sensibilities can press their concerns, say, with the owners of the Washington Redskins, with Bill Maher, or with conservatives speaking on the campuses in America. It could be that the Justices simply wished to draw a bright line to discourage all such challenges taking place in the halls of official authority. But that account simply begets another question, even more embarrassing: If the Justices earnestly wished to draw a bright line, why did they offer such a spurious and untenable line? More than that, *why did they use the authority of our highest Court to make moral relativism the default position?*

After all, the judges could have avoided that simple but momentous shift merely by relying again on the guidelines of the *Chaplinsky* case, which contained not the slightest hints of relativism. If the judges had fallen back on *Chaplinsky*, there would have been no need even to take up *Matal* for argument. The Justices could have reminded themselves that the standards used in *Chaplinsky* were by and large the right ones, but that the Trademark Office had simply made a factual mistake in assuming that most people in the country would understand "slants" as a term of insult and ridicule. The matter could have been left, then, to be challenged in protests to the agency, in editorials, or even in legislation to change the law on trademarks. And all of this could have been done without the intervention of the judges. The only rationale for taking up this case in the Supreme Court was to move the issue to another plane and articulate a new principle. But that principle happens also to be the principle that the American Civil Liberties Union was floating, and ever floats, in a slogan nearly put to song: that freedom of speech is "even for the speech we hate" and for the people who may truly be hateful.

Or to put it another way, there is no idea in politics that is so wrong or despicable that it can *never* be regarded as legitimate.

Freedom to Choose?

What we may be seeing here is the same grievous mistake that conservatives have made in their response to the wave of repression on the campuses. Faced with the mindless passion to stamp all conservative thought as racist, bigoted, homophobic, the conservative response has been to declare for a regime of "free speech" in which no idea may be stamped as illegitimate. In the name of prudence and cleverness, the conservatives now seek their refuge by affirming the principles of relativism. What they will discover yet again is that there is no refuge here. The move to relativism as the new orthodoxy will bring them no safety or freedom, no civility or tolerance. Even as the faculties at the University of Chicago and Princeton offer high-minded declarations on freedom of speech, people with reservations about the homosexual life will still be branded as "homophobes," as though they were carriers of disease rather than bearers of arguments that deserve to be respected and addressed *as arguments*. Conservative professors will still be branded as objects of contempt and obloquy. Conservative speakers will still be unwelcome. But if there is a bright line to be drawn by the judges, would it not make more sense for the conservatives to form a clearer line of defense by holding to that simpler line in the *Chaplinsky* case: the line that separates the calling of names from the giving of arguments?

And is this not, after all, the very core of the crisis that has been upon us? It is the willingness even to *make an argument* over same-sex marriage or transgenderism, that is treated now as a telling sign of bigotry. Even to entertain an argument here is to entertain the possibility that thoughtful people may indeed challenge the true rightness of these things. The campuses still churn over Black Lives Matter, and yet it is not legitimate on those same campuses to speak of the black lives lost in the thousands every year in the major cities, either in crimes of violence within black communities or in the number of abortions exceeding the number of live births. We have a spiraling tragedy of a people ordering up the deaths of their own offspring, and none of that can be mentioned at the best schools. But as the conservatives feign their acceptance of a world in which there are no ideas that are seriously right or wrong, true or false, they give up at the same time any claim to the moral defense of their own position.

I was a participant at the time in that debate on the Nazis in Skokie, and on the other side of the debate of course, seeking to defend the Nazis, was the ACLU. In making the case for the Nazis, the ACLU's David Hamlin put it this way: "the First Amendment," he said, "protects all ideas—popular or despised, good or bad…so that each of us can make a free and intelligent choice." In Hamlin's translation, it was a matter of being "popular" or "despised"—to be despised was merely to be "unpopular." It was no part of his understanding that certain things may in themselves be, in principle, despicable. And now, it may be the height—or the depth—of irony, that this position of the ACLU now seems to be settling as the position even of conservatives on the Court.

That "freedom to choose" the Nazis in a free election sprang, of course, from that "proposition," as Abraham Lincoln called it, that "all men are created equal" and that the only rightful government over human beings depended on "the consent of the governed." But the Nazis, with their racial principle, rejected at the root that founding premise, and with it, the regime of free elections. To say that it was legitimate "to choose" the Nazis in an election was to say that it was legitimate to choose the party that would not only end free elections; it would sweep away also that regime of absolute freedom of speech that the ACLU affects to treasure. But if there was something good in principle about that regime of freedom, we could not be warranted in choosing to sweep it away. And if that regime is not rightful in point of principle, then the underlying principle of "all men are created equal" could not itself be true. It could not be, as Lincoln thought, a "self-evident" or necessary "truth, applicable to all men and all times." It could be, at best, only something true now and then. And if it is not an enduring truth, it must only be an opinion, no more nor less true than any other set of opinions on offer in the political landscape. The real danger posed then by that case in Skokie was not the danger posed by this ragtag bunch calling themselves American Nazis. The deeper danger was that lawyers from the best schools, heading the ACLU, would talk themselves out of the very principles that marked this regime and the ground of their own freedom. And the danger even deeper now is that a corps of gifted conservative judges, backing into a stylish relativism, show little awareness that they are serenely putting in place now the premises that deny the moral ground of this regime and their own authority. What may be said then of the current state of conservative jurisprudence is this: that some of our best minds have talked themselves into moral relativism as a key component of their jurisprudence, and the conservative lawyers who have been tutored over the years by our best judges have been tutored now, in turn, not to notice.

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