Taking Expression Seriously: Equal Citizenship, Expressive Harm and Confederate Iconography[1]

Introduction

It is often assumed that taking expression seriously means simply acknowledging the value of *freedom* of expression, or at least granting the importance of values promoted when we protect that freedom. To be sure, institutions and practices which secure freedom of expression often support valuable ends such as individual autonomy, progress in the possession of truth, and space for political expression and dissent. Yet we do not take expression seriously unless we also acknowledge another important fact: some expression has the power to do harm, including harm that violates the principle of equal citizenship. This should concern us because the political morality of a just democracy demands earnest commitment to the principle of equal citizenship, and any harm that violates that principle will constitute an injustice that we have a duty to try to redress or prevent. My central aim in this paper is to show that expression sometimes violates the principle of equal citizenship and that when we have convincing evidence that this has happened, or reasons to believe it is substantially likely to happen, the principle of equal citizenship justifies 'all things considered' restrictions—including content-based restriction—on the relevant expression.

This paper focuses on a set of phenomena that, I will show, provide especially convincing evidence of expressive harm that rises to the level of citizenship harm: Confederate monuments and symbols (on one hand) and the symbolic content of the historically related practice of cross-burning (on the other). This linking of the expressive harm of Confederate monuments with the expressive harm of cross-burning may seem unusual, but it is carefully considered and entirely consistent with historical fact. First, Confederate monuments are inescapably entangled in the mythologizing narrative of the "cult of the Lost Cause" that, from 1866 to 1915, unfolded to

falsify Civil War history, deny the evils of slavery, and defend the oppressive and violent excesses of attempts to assert white supremacy as critical to post-civil war national "reconciliation."[2] Second, the way in which that narrative unfolded has served to link the symbolic content of Confederate monuments and symbols with social institutions and practices, as well as individual actions, meant not only to stigmatize and demean African Americans, but also to intimidate anyone attempting to challenge the social, political and economic implications of the ideology of white supremacy. This claim is supported by extensive research conducted by the Southern Poverty Law Center in an effort to understand the origins of more than 1500 public symbols of the Confederacy in thirty-one states and the District of Columbia. [3] That research has shown that two distinct historical periods produced a significant increase in the dedication of Confederate monuments and symbols. The first period began around 1900, as an accompaniment to Jim Crow segregation and disenfranchisement of African Americans, but the second period "began in the early 1950s and lasted through the 1960s, as the civil rights movement led to a backlash among segregationists."[4]

As a consequence of these historical developments, the expressive content of Confederate monuments and symbols cannot now be understood apart from the expressive content of institutional policies and practices, social norms, and individual actions meant to discriminate against African Americans by stigmatizing them as undeserving of full citizenship (like the policies associated with Jim Crow segregation) and by intimidating anyone who might challenge the ideology of white supremacy. I will examine the means by which Confederate monuments and symbols work to stigmatize African Americans. But a central commitment of this paper is that the threat of white supremacist intimidation is now critical element of the expressive meaning of Confederate monuments, and I will explore the concept of symbolic intimidation

through the phenomenon of cross burning and its relationship to debate about the constitutional doctrine of "true threats."

My discussion of symbolic expression builds upon two commitments embraced by J.L. Austin in *How to Do Things with Words:* first, the idea that linguistic utterances can have the power to *do* things, and second, the notion that the concept of 'speech act' succinctly expresses the connection between that 'power' and the permeable boundary between speech and action.[5] Yet my argument extends the scope of Austin's insights in order to understand the power of expression in a broad sense. Expression, on my account, includes not only linguistic utterances, but symbolic expression (such as messages conveyed by official flags, and civic art and architecture), as well as institutional expression (in messages conveyed by attitudes, ideas and judgments embodied in institutional actions, policies and practices) and the expressive content of certain actions and practices performed by individuals who are somehow authorized to convey institutional messages.[6]

My account of the illocutionary force of artifacts, acts, institutions and practices draws upon Austin's claims that *non-verbal gestures* can have illocutionary force.[7] Thus, unlike the argument concerning the illocutionary force of pornography developed by Rae Langton, in particular, I am not treating the non-verbal expression bound up with our Confederate monuments and symbols (and our practices of displaying them), or by the symbolic intimidation carried out by cross-burning, as 'standard' speech acts.[8] I am claiming that we can identify *illocutionary expressive artifacts, acts, institutions and practices* that have the power to do things in a manner analogous to illocutionary utterances; that some of these "doings" constitute (and do not simply cause) expressive harm; and that this expressive harm sometimes violates the principle of equal citizenship. The distinction between constituting and causing expressive harm

relies on Austin's distinction between illocutionary and perlocutionary speech acts—the distinction, roughly, between what a speaker does *in* saying something and what she does *by* saying it.[9] In what I take to be the spirit of Austin's view, I argue that we can identify cases in which some expressive artifact, act, institution or practice constitutes a violation of the principle of equal citizenship simply in virtue of its illocutionary force.

To understand the principle of equal citizenship, I draw on the work of constitutional scholar Kenneth Karst. For Karst, the principle of equal citizenship requires that each person is viewed as "presumptively entitled" to be treated by her society "as a respected, responsible and participating member," and never as "a member of an inferior or dependent caste, or as a non-participant."[10] This account directs our attention to those dimensions of equal citizenship "that are most closely bound to the sense of self and the sense of inclusion in a community"—that is, to those aspects of equality most closely linked with a sense of fully "belonging."[11] On Karst's view, a society fulfills its commitment to equal citizenship only when the *central* message expressed by its basic institutions and practices, and embodied in its symbolic cultural processes, is that every member of society is presumptively entitled to be treated as a respected and responsible participant. Of course, in order to articulate the concrete requirements of equal citizenship we must specify what kinds of institutions, practices, and even what norms for the behavior of individuals send the right message about equality. For instance, a society that allows legally mandated segregation fails to meet the principle's demands because institutions and practices which sustain the structures of discrimination send its targets a message they don't belong. Moreover, a society that routinely accords places of honor to monuments celebrating those who fought to preserve structures of unjust discrimination fails to meet the principle's demands, if the monuments are meant to honor those figures *for that effort.*

This way of thinking helps explain why many legal scholars and philosophers, as well as many 'ordinary' citizens, contend that the conditions which protect equal citizenship have an unavoidably expressive dimension. I will use the label *"citizenship harm"* to describe any harm—including any expressive harm—in which the state treats any individual members or significant social groups as inferior, or as though they were non-participants. Citizenship harm is any injury through which the state violates the principle of equal citizenship by conveying the message that some persons or groups do not really 'belong.' In developing the notion of citizenship harm, I adapt and extend an idea formulated by legal scholars Robin Lenhardt and Bennett Capers, as part of their efforts to deepen understanding of equal citizenship in the context of American constitutional law.[12]

My account also builds on three assumptions underwriting Rae Langton's analysis of the claim that pornography constitutes the subordination of women. First, Langton plausibly assumes that some of the most serious harms associated with systematic subordination and discrimination are constituted by the intertwining of messages conveyed by institutions and practices with messages expressed in symbolic displays and processes. Second, Langton rightly presumes that valuable lessons about the connection between expressive harm and (what I call) citizenship harm will emerge from the analysis of symbolic expression, alone. In keeping with this assumption, I show (in the next section) that debates about the meaning of confederate monuments can be a source of critical insight into the expressive content of systematic discrimination. But, third, Langton correctly supposes that attention to the "pragmatics" of expression provides a reliable means of understanding how some expressive artifacts, acts, institutions or practices might endanger equal citizenship.

My argument begins, in Section I, with some preliminary observations about the links between the power of expression, the idea of equal citizenship and the phenomenon of citizenship harm. In Section II, I defend the claim that expressive harm occurs and that it can violate the principle of equal citizenship. Sections III and IV show how the expressive content of systematic discrimination that determines the expressive content of Confederate monuments and symbols can constitute citizenship harm, primarily through its capacity to stigmatize (Section III) and intimidate (Section IV) the targets of discrimination. In Section V, I argue that long after laws explicitly licensing discrimination are struck down, the expressive content of systematic discrimination can continue to do expressive harm—including serious citizenship harm—unless we acknowledge and seek to eliminate lingering, destructive messages that distort our social identities, damage our institutions, and limit our capacity to collectively realize the goods of a genuinely democratic way of life. These goods are not limited to the removal and repositioning of Confederate monuments and symbols, but must also include finding ways to uproot the destructive attitudes and beliefs that shaped their destructive messages.

Section I: Preliminary Observations on Expression, Citizenship and Harm

The idea that equal citizenship has an expressive dimension informs many recent political protests and social movements. It is at the core of many college student protests regarding the names of buildings and schools, as well as many of their challenges to hate-filled public lectures on campuses claiming to celebrate 'diversity.' [13] It also shapes debates about public displays of certain monuments and symbols, and it underwrites demands across the globe to legislate against expressions of hate. Unsympathetic critics complain that such efforts reflect the preoccupations of an overly sensitive contemporary culture that encourages people to react to expression that *offends* them with all the resilience of "snowflakes." But such criticisms rest on a fundamental

misunderstanding of the protests to which I refer. In fact, these protests begin from a commitment to the principle of equal citizenship and challenge us to consider whether some kinds of expression violate that principle. The protesters assert that certain kinds of expression involve harms that constitute political injustice, and not 'simple' offense.[14] To be sure, these challenges involve presuppositions that merit scrutiny: in particular, the claim that feeling offended is fundamentally *different* from being unjustly subject to expression that stigmatizes and intimidates, and the idea that expression that stigmatizes and intimidates constitutes expressive harm and sometimes citizenship harm. But if we purport to take expression seriously, we must address these presuppositions with care.

Recent responses to controversies concerning the public display of Confederate monuments and flags help to provide some clarity about where to begin. Consider the argument made by New Orleans Mayor Mitch Landrieu, in May 2017, to defend the New Orleans City Council's decision to take down the last of the city's Confederate monuments.[15] Landrieu observed that the statues in question—of Robert E. Lee, Jefferson Davis, and P.G.T. Beauregard—had been erected to honor the mythologizing "Cult of the Lost Cause" and he argued that, as a result, the statutes could not plausibly be understood as "innocent remembrances of a benign history." Rather, they were symbols of the Confederacy's efforts to "deny the humanity" of African Americans and of the "death, enslavement and terror" that the Confederacy sought to preserve. Landrieu even urged that because the statues were "erected purposefully" to "send a strong message… about who was still in charge" in the post-Civil War south, they were as much "a part of the terrorism" for which the confederacy stood "as burning a cross on someone's lawn." [16]

Given the similar origins of confederate monuments in general, Landrieu's analysis offers a powerful indictment of those monuments as a class. [17] If Landrieu is right—as extensive research done by Southern Poverty Law Center seems to confirm—those monuments are symbolic expressions of the ideology of white supremacy, placed in central positions of public honor to *stigmatize* African Americans as less than fully human and to *intimidate* anyone who might have thought that the demise of the Confederacy would lead to the dismantling of American racial apartheid. It is tempting to suggest that the monuments and symbols are simple attempts to remember "southern history"—but as instruments of a troubling effort to falsify that history, and to turn that falsehood in service of white supremacy, there is nothing "simple" about them. Moreover, like Mayor Landrieu, I contend that any community that continues to display these monuments in places of public honor must be taken to affirm the stigmatizing and intimidating messages they send.

Those hoping to reject such indictments sometimes claim grounds for "plausible deniability" of any connection between displaying confederate monuments in spaces of public honor and affirming the ideology of white supremacy. But it should be noted that in the period leading up to the eventual removal of New Orleans' last Confederate Monuments, contractors who had bid for the job of removing the monuments were threatened with violence and the car of at least one potential contractor was firebombed. [18] Moreover, just three months after Landrieu's speech, those grounds for plausible deniability concerning the link between confederate monuments and violent white supremacy were severely undermined by a violent display of hatred and intimidation that erupted in response to a decision by the City Council of Charlottesville, Virginia to take down their city's statue of Robert E. Lee. That episode in Charlottesville was a terrifying echo of the 2015 murder of nine black churchgoers in Charleston,

South Carolina that, according to then Governor of South Carolina Nikki Haley, helped confirm the racist symbolism of the Confederate flag.[19]

Three important lessons can be gleaned from these terrifying events. The first lesson is that if we hope to understand the expressive content of some symbol, social institution or practice, we must begin by placing the symbol, institution or practice in the context of what I call the "total expressive situation." This claim adapts an idea from Austin, who insisted that we can fully understand what a linguistic utterance might "do" only when we consider the "the total speech act"—by which he meant "the total situation in which the utterance is issued."[20] My concept of the "total expressive situation" involves an analogous point about various symbolic and cultural phenomena and processes. It might be thought that the total expressive situation of Confederate Monuments and symbols is mainly (or even entirely) a function of their origin in the cult of the Lost Cause and in the mythologizing narrative associated with that cult. From 1866 to 1915, that narrative unfolded to falsify Civil War history, deny the evils of slavery, and defend the oppressive and violent excesses of white supremacy as critical to post-war national "reconciliation." Moreover, as historians like David Blight have argued, Confederate monuments and symbols remain entangled in that narrative even in contemporary contexts.[21] But we cannot understand the "total expressive situation" of these monuments and symbols unless we acknowledge that the *way* in which they remain entangled in the Lost Cause narrative is largely function of the beliefs, intentions, and actions of contemporary agents who continue to treat them as symbolic expressions of white supremacy.

Those who purport to have grounds for "plausible deniability" of this entanglement often argue that the monuments are "in themselves" benign. They will contend that any harms that their critics associate with the monuments and symbols are a function of the manner in which

those critics interpret them. Yet if confederate monuments and symbols are really benign, why have they so predictably served as focal points for the violent expression of racial hatred? Not long after the first successes of the American Civil Rights Movement in challenging legally sanctioned segregation, Confederate iconography quickly came to symbolize active resistance to racial equality. Recent events in Charlottesville and Charleston (described above) are firmly rooted in this resistance, and shaped by patterns of beliefs, intentions and actions that inextricably link Confederate monuments and symbols with white supremacist ideology.

Of course, interpretations matter when we seek to determine the significance of the art and artifacts of public commemoration. As Marcel Duchamp once claimed, "the creative act is not performed by the artist alone," since in the process of interpretation, the spectator "adds his contribution to the creative act."[22] This observation has special relevance to projects of remembrance in democracies, where commemorative projects are usually commissioned by committees whose members disagree about the projects' goals, and created for communities of spectators who may disagree about whether the finished product meets those goals. The democratic art of remembrance is always entangled in the political controversies that proceed it, and in the interpretive controversies to which it gives rise. But in the case of Confederate monuments and symbols, the overwhelming "weight" of interpretations clearly and forcefully reiterates the legacy of post-civil war Black Codes, Jim Crow segregation and white supremacist violence. This legacy, and the intentions and actions which rely upon it, render Confederate monuments and symbols "conventional expressions" of white supremacist ideology in Austin's sense of "conventional."

The second lesson to emerge from reflecting on events in Charlottesville and Charleston is that the expressive harm constituted by the legacy of the Confederacy is a function of that

legacy's connections to the expressive content of systematic discrimination and exclusion. Drawing on Landrieu's analysis, I urge that this expressive content is best understood as a matter of stigmatizing and intimidating the targets of discrimination. It is certainly true that physical violence (in a variety of forms) is often a critical element of the material reality of systems of discrimination. But the focus, in this paper, is on the *expressive* harm that can be constituted by the social meanings associated with systematic practices of discrimination and exclusion. I will show that these social meanings can be a source of especially serious expressive harms—in particular, the kinds of expressive harms that are likely to constitute citizenship harms.

Finally, the third critical insight that emerges from contemplating the events at Charlottesville and Charleston is that the harmful expressive content of systematic discrimination can have a 'life' that extends well beyond the demise of any formal legal structures that may have actively licensed discrimination. In this way, it can continue to constitute citizenship harm of the sort that can license restrictions on expression that might otherwise be difficult to defend, including the removal of monuments and symbols from public display.

Section II: Defending the Concept of Expressive Harm

But, first, I want to more fully develop and defend the concept of expressive harm. I begin by noting that the distinction between feeling offended by some expression and experiencing expressive harm in virtue of it, is hardly new. The distinction played a critical role in the late 19th century emergence of organized challenges to Jim Crow segregation.[23] Moreover, the distinction remained critical to every succeeding stage of the African American struggle for equal citizenship: including the 1905 Niagara Movement, the NAACP's challenges to Jim Crow that began in the 1930's and culminated in *Brown v Board of Education* (1954), and the Non-Violent Direct Action that helped to produce the Civil Rights Act of 1964 and the Voting Rights

Act of 1965. The legal theorist Charles Lawrence has argued that the mid-twentieth century response of the American legal system to core arguments of the anti-discrimination project was an acknowledgment that expressive harm is real, that it has the power to constitute serious citizenship harm, and that sometimes the only way to address the injustice in that harm is to impose restrictions on racist expression. [24] I will show why we ought to agree with Lawrence's provocative claim.

But what do I really mean by "expressive harm?" Richard Pildes and Richard Niemi have been credited with coining the phrase to characterize the kind of harm that

> "results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about. … Public policies can violate the Constitution not only because they bring about concrete costs, but because the very meaning they convey demonstrates inappropriate respect for relevant public values."[25]

The authors of an anonymous law review "note" eventually clarified the central idea, explaining that expressive harm is *"non-material" harm* of the sort comprised, for example, by being the subject of attitudes and judgments that "send a message of racial, gender or religious inferiority."[26] The note's authors also observed that "expressive injuries" may have "concrete negative consequences" that lead to "other injuries," and that being able to establish a clear connection between expressive and non-expressive injuries often helps to make a stronger case for taking the expressive injuries seriously.[27] But they continued to hold that, in some circumstances, simply conveying a message of racial, gender or religious inferiority *is in itself* a harm that a society should not merely condemn, but seek to prevent.

The paper in which Pildes and Niemi first discuss "expressive harm" focuses on harm done by governmental institutions and practices. A later paper, jointly authored by Pildes and Elizabeth Anderson, proposes a broader view on which non-governmental institutions, and even individual agents, may have duties not to do expressive harm.[28] I adopt this broader view. I claim, for example, that expressive harm can be constituted by messages conveyed by the actions, practices and policies of non-governmental institutions such as private universities and colleges. I also maintain that individual agents can produce expressive harms that count as citizenship harm, especially when those agents are *authorized* to apply or implement a state's policies, practices or norms, or when they are in a position to express messages constituting citizenship harm because they are engaged in endeavors that have a public, or quasi-public, dimension.

The notion of "authorization" at work here is complex.[29] Elected officials, high placed civil servants and political appointees are clearly authorized in ways that often make it reasonable to assume that their actions have expressive authority. But, as Michael Lipsky has argued, many of the regular interactions that ordinary citizens have with "the state"—and with the expressive content of its institutions—involves interactions with "street-level bureaucrats" such as teachers, school administrators, government social workers, county clerks, lower court judges and police officers.[30] Moreover, given the sometimes life- altering nature of the services that street-level bureaucrats provide, as well as the degree of autonomy and discretion they may have when they provide them, these agents can be the source of citizenship harms that have a direct and forceful impact on the sense of belonging. Teachers and school administrators help determine who has access to opportunities for education and employment. County clerks control citizen access to institutions such as marriage. Police determine the quality of our interactions

with the legal system and they have extraordinary power to secure—and sometimes to deny—equality before, and equal protection of, the law. In all of these contexts, street-level bureaucrats play a critical role in expressing—and sometimes failing to express—society's commitment to the principle of equal citizenship.

Less obviously, but no less seriously, the 'routine' work of many citizens who are not *officially* designated as providers of public services—citizens who wok as pharmacists, doctors, bakers, florists or even college professors—must often be understood as "quasi-public" activities. In some cases, this is because they must obtain a state license or certification to perform their characteristic activities. But often their routine work is "quasi-public" because they provide a service that is central to their society's capacity to confirm its commitment to equal citizenship.[31] This means that even in their routine work, many 'ordinary' people who are not street-level bureaucrats can be the source of expressive harms that count as citizenship harms. This is why Title II of the *Civil Rights Act of 1964,* and Title III of the *Americans With Disabilities Act,* define most "private businesses" as public accommodations that must be open to the public regardless of race, gender, religion and disability. This is also why philosophers such as Ishani Maitra and Kate McGowan, in their work on how the racist expression of 'ordinary' people can subordinate, are correct to insist that the kind of authority that can generate (what I call citizenship harm) need not, and should not, be tied to one's position in a social or political hierarchy. [32] Indeed, as Maitra suggests, there is often a sense in which by virtue of uttering certain kinds of expression in contexts in which the expression denies someone access to a basic citizenship right, ordinary people may effectively 'elevate' themselves into authoritative spokesman for an entire society.

It may be asked how expressive content can be embodied in, and conveyed by, institutions-- and sometimes by the agents who carry out their missions. In my view, the best explanation of this phenomenon will appeal to the idea of socially constructed meaning.[33] Lawrence Lessig, for instance, contends that institutional policies, practices and norms help to construct "social meanings" by producing "the semiotic content" that members of a society attach "to various actions or inactions, or statuses within a particular [social] context."[34] Anderson and Pildes defend a similar view, asserting that "expressive meanings are socially constructed." They go on to claim that socially constructed meanings are the "result of the ways in which actions fit with (or fail to fit with) the meaningful norms and practices in the community," and that in order "to grasp the expressive meaning of an act, we try to make sense of it by fitting it into an interpretive context."[35] Drawing on these views, I hold that utterances, actions, institutions, and symbolic cultural displays and processes do expressive harm when they reiterate damaging, degrading or dehumanizing *social meanings*, especially those social meanings that help shape our self-conceptions, our conception of others, and our understanding of the purposes that guide our practices and structure our institutions. Damaging, degrading and dehumanizing meanings often function to rationalize the social "scripts" through which a society purports to deny individuals or groups the status of full participants. When they do, they cause the kind of expressive harm that also constitutes citizenship harm.[36]

Section III: Understanding Stigmatizing Expression

Many people would assume that a system of legally enforced racial segregation provides a clear example of what this process looks like. They might also assume that such a system not only does expressive harm, but offers 'clear and convincing evidence' of citizenship harm. In the

early 1890's, a group of African American citizens in New Orleans thought so too, and on that basis, they formed a committee to challenge the constitutionality of an 1890 Louisiana statute requiring "equal but separate accommodations for the white and colored races" on all passenger railways within Louisiana. Their challenge involved the hoped-for arrest and conviction of one Homer Plessy, who ultimately appealed his (actual) conviction all the way to the United States Supreme Court.[37] The Court issued its opinion in *Plessy v. Ferguson (1896)*, with the now infamous denial that legally enforced racial segregation could plausibly be thought to stigmatize African Americans. Justice Henry Billings Brown delivered the majority opinion:

> "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[38]

The Supreme Court eventually rejected this claim, recognizing in *Brown v. Board of Education (1954)*, that systematic racial segregation in public accommodations constitutes the expressive harm of racial stigmatization. Over the next decade, anti-discrimination law involved a strengthening commitment to that idea.[39] In this section, I show that the "badge of inferiority" claim was wrongly rejected in *Plessy*, and that being stamped with such a badge is intrinsically injurious, even independent of its tendency to cause further unjust injuries that also constitute citizenship harm.

Contemporary discussions of the "badge of inferiority" notion are typically framed in terms of the idea of stigma, and for many, Erving Goffman's *Stigma: Notes on the Management of Spoiled Identity* (1963) offers a good starting point for reflection on this concept. Goffman initially suggested that stigma is essentially a "deeply discrediting" attribute, as though it were

fundamentally something "in" the individual stigmatized person.[40] But, ultimately, he was really interested in the way stigma might help define a social identity, rather than an "essential" attribute of individuals. He thus claimed that understanding stigma requires "a language of relationships, not attributes" and that the relationship most in need of analysis is that between "an attribute" and "a stereotype." [41] Contemporary researchers now assume that, for Goffman, stigma cannot be understood apart from social and historical processes that somehow link stereotypes with socially discrediting attributes.

Sociologists Bruce Link and Jo Phelan have offered an insightful account of these processes in their article "Conceptualizing Stigma" (2001).[42] They maintain that stigma exists when the following five "interrelated components converge":

(1) A dominant social group engages in distinguishing and labeling human differences;

(2) Dominant cultural beliefs link labelled persons to negative stereotypes;

(3) The linking process serves to mark a fundamental separation—of "us" and "them"—between negatively stereotyped members of society and the dominant group;

(4) Negatively stereotyped members of society experience "status loss and discrimination" that may lead to unequal social, political and economic outcomes.

(5) The mechanisms of labelling, negatively stereotyping and separating are accessible only to a social group with social, political and economic power.

Two features of this account deserve special notice. First, Link and Phelan clearly reject the notion that social stigma is something really "in the person." On their analysis, the attribute or mark that comes to be deemed as stigma is to be understood as a 'proxy' for a complex, socially constructed identity that is the outcome of several multi-layered social and historical processes. But, second, Link and Phelan presume that stigmatizing processes cannot be fully understood by

reference to individual, intentional acts of discrimination. They do not deny that such acts can have deleterious effects on the lives of those targeted by them, or that any acceptable political morality should condemn them. But, on their view, the processes that are fundamental to the kind of stigma that matters most always involve institutional and practice-based processes that, over time, help to create the social contexts in which individual, intentional acts of discrimination can exist and constitute expressive harm.[43] Link and Phelan thus contend—reasonably, in my view—that in order to understand stigma we need to understand the institutions and practices that construct certain kinds of social meanings.

Now if we were considering ordinary linguistic utterances, the speech acts that Link and Phelan might describe as labelling of difference and negative stereotyping would fit quite neatly into two categories of illocutionary speech acts that Austin called *"verdictives"* (including grading, ranking, assessing and valuing) and *"exercitives"* (including dismissing, degrading, demoting, and excommunicating).[44] Austin claims that arbitrators and judges, for instance, make use of both verdictives—typified "by the giving of a verdict"—and exercitives, which are "the exercising of powers, rights and influence."[45] But building on Austin's claim, I propose that the expressive practices and institutions of Jim Crow segregation similarly combined verdictives and exercitives in a process that created and cemented the link between the labelled attribute (in this case a racial classification) and a complex combination of degrading, sometimes dehumanizing negative stereotypes. On my account, then, the practices and institutions of racial segregation came to constitute unjust expressive harm, and indeed citizenship harm, simply by virtue of the illocutionary force of the expressive content that they embodied and conveyed. The residual (perlocutionary) effects of this expressive content, along with the illocutionary force of cultural art and artifacts which reproduce can produce additional instances of citizenship harm.

Theorists of expressive harm are right to insist that some kinds of expressive injury are both intrinsically unjust *and* also unjust in virtue of the additional harms they cause. Moreover, the case presented by the plaintiffs in *Brown v Board of Education* is justly famous for its meticulous account of the "additional harms" that accrued as direct consequences of Jim Crow's stigmatizing practices. Link and Phelan treat "status loss" and discrimination as the *initial* consequences, while unequal social, political and unequal outcomes are the *extended* consequences. Their distinction allows us to understand Kenneth Clark's famous "doll study" of racial preferences in children as a way to help the plaintiffs in *Brown* introduce facts about *the* non-material harms done by segregation. [46]

But suppose that the "verdictive" and "exercitive" components of legally mandated segregation did not damage the self-conception *of every* young black child who experienced it (as it almost certainly did not). Social psychologists have described psychological "buffering" mechanisms that can sometimes prevent the internalization of stigma, and strengthen resistance to such things as "stereotype threat" and anxiety.[47] There is evidence (even if mostly anecdotal) that, for some groups of African Americans, buffering mechanisms were surprisingly effective, even with regard to the worst excesses of Jim Crow segregation. But suppose, further, that some for whom the buffering mechanisms proved effective went on to lead relatively satisfying and successful adult lives, despite segregation. Would we then be required to say that those whose self-conceptions did not appear to be damaged, and who in some sense 'triumphed' over the consequences of status loss and discrimination, were therefore not subjected to expressive harm? I believe that the only plausible answer to this question is "no," and that the concept of citizenship harm helps to show why.

I note, first, that we can deepen our understanding of citizenship harm by reflecting on how it is connected to the basic *components* of equal citizenship. On my account those components fall into two broad categories: a) equal protection of, and equality before, the law; and b) equal access to basic rights, opportunities and privileges. The second component includes such things as rights regarding conscience, expression, assembly and participation; opportunities for education and employment; and privileges to create new structures of rights and duties through such instruments as contracts and wills. But citizenship harm undermines one's sense of fully belonging to, and having equal access to basic rights, opportunities and privileges of citizenship

But the sense of "belonging" at stake in this context is not a matter of having a feeling of solidarity with fellow citizens (though such a feeling can sometimes be a good thing). Indeed, it is not really a matter of feelings at all, but of being able to trust that one will be respected as an equal, participating member of one's society. As Jeremy Waldron argues in *The Harm in Hate Speech, in* "a well-ordered society" there will be "a general and diffuse assurance" that all members can expect to treated with appropriate respect, and a sense that such assurance is a fundamental social good. Yet as Waldron also insists, a critical measure of whether a society is adequately providing such assurance is its "political aesthetics," by which he means what a society "looks like" and "feels like" to persons considered both as individuals, and as members of various socially defined groups. For Waldron, a society's political aesthetics are shaped primarily by officially 'sponsored' expression: for instance, by messages conveyed through civic art and public architecture; in official ceremonies, displays and events; and even in "visible displays of power in such things as uniforms and public symbols." [48] I presume that Waldron could accept, as a friendly amendment, my emphasis on the importance of messages embodied in

and conveyed by various legal institutions and practices, as well as by the choices and actions which they authorize.

Yet Waldron also contends that a society's political aesthetics can sometimes be affected by imagery displayed, and messages conveyed, by "ordinary" individuals. I second this claim, and note that it helps to strengthen the claim that no anti-discrimination project—whether it concerns race, gender, religion, or sexual orientation, or ability—can consistently assume a strict boundary between what is 'public' and what is 'private'." The failure to recognize the permeability of the boundary between public and private in projects seeking social equality constituted a regrettable weakness in Hannah Arendt's infamous criticisms, in an essay written in 1957 but published more than a year later, of the effort to desegregate schools in Little Rock Arkansas. [49] Acknowledging the permeable boundary between public and private also weakens the claim that religious beliefs merit exemptions from the requirement to respect equal citizenship in the matter of same sex marriage. A baker who refuses to sell a wedding cake to a same sex couple—even on grounds of religious conscience –may seriously endanger a society's efforts to provide adequate assurances of equal respect. [50] I contend that refusing to serve certain customers on the basis of a (still) socially stigmatized status cannot be a purely private act, because that refusal involves denying access to a basic component of equal citizenship—in this case, equality in public accommodations. The message conveyed by the denial reasserts socially stigmatizing attitudes and beliefs in a way that constitutes expressive harm and citizenship harm. Everyday discriminatory acts performed by individuals sometimes draw on the illocutionary force of discriminatory social practices in ways that unacceptably violate the principle of equal citizenship.

In this section, I have argued that—contrary to the claims of the majority opinion in *Plessy v. Ferguson*, the institutions and practices of Jim Crow segregation were, at least in part, an effort to "stamp" African Americans with a "badge of inferiority" and that that effort produced expressive harm that also constituted citizenship harm. I close this section by clearly reasserting the reasons for which this phenomenon matters to any reasonable assessment of Confederate monuments and symbols. The main issue is simply that those monuments and symbols are inextricably bound up with the stigmatizing messages of Jim Crow segregation, and that in so far as those messages constitute harm by virtue of their "verdictive" and "exercitive" components, so, too, do the monuments and symbols dedicated to the preservation of segregation. I stress, further, that demands to preserve these monuments and symbols in places of public honor—despite powerful evidence of the link between them and the ideology of violent white supremacy—involve what we might call a second "layer" of expressive harm that helps to constitute ongoing citizenship harm in the contemporary moment. The verdictive and exercitive elements of the messages expressed by official displays of Confederate monuments and symbols, and contemporary efforts to defend them, continue to dampen reasonable hopes for morally responsible and epistemically defensible debate about racial reconciliation.

Section IV: Understanding Intimidating Expression and its role in Confederate Iconography

But as I have argued from the outset, the expressive content of the system of discrimination and white supremacy of which Confederate monuments and symbols are a part has never been confined to racially stigmatizing attitudes, beliefs, practices and institutions. As New Orleans mayor Mitch Landrieu compellingly asserts, intimidation has always been a second critical element of any such system, and we cannot fully understand the harm constituted by

Confederate monuments and symbols unless we acknowledge this. So, I turn, first, to an analysis of the concept of intimidating expression.

In the most general sense of the word, intimidation is an effort to make another feel "timid or fearful," sometimes by seeking to "compel or deter" with threats of harm.[51] Indeed, in the context of systematic discrimination, intimidation serves to monitor boundaries that separate social groups into 'us' and 'them,' to maintain barriers meant to sustain status loss (and its consequences) for the stigmatized group, and often to keep the targets of intimidation from protesting the fact that they have been so targeted. Regrettably, the concept of intimidation is not (yet) as well theorized as the concept of stigma. But reflections on attempts to legislate against cross-burning (in the U.S.)—as (possibly intrinsically) an effort at symbolic intimidation can help illuminate critical elements of the problem. It is especially important to develop these reflections in this context since the rise (and re-emergence) of hate-groups who have frequently used cross-burning as symbolic expression of their hatred coincides with those periods which saw a marked increase in the dedication and celebration of Confederate monuments and symbols. My inquiry will be guided by two questions. First, is cross-burning 'symbolic intimidation' and thus an expressive act that by its very nature constitutes citizenship harm? Second, if only *some* instances of cross-burning constitute intimidation, is this merely in virtue of the way in which they are experienced or interpreted? Those who reject the "always symbolic intimidation" view contend that when cross-burning is used to express an ideology of racial supremacy, or to express solidarity with others who adopt that ideology, it cannot be held to constitute unlawful intimidation or constitute a citizenship harm.

Two U.S. Supreme Court decisions explicitly reject the view that cross-burning is intrinsically symbolic intimidation view of cross-burning. In the first, *R.A.V. v City of St. Paul*

*(*1992), the Court unanimously struck down a St. Paul, Minnesota bias crime ordinance because, in Justice Scalia's words, it was wrongly "silencing speech on the basis of its content." That decision also reversed the conviction of a (then) 17-year old skinhead who had openly bragged about burning a cross on the lawn of a black family to drive them out of a formerly all-white working-class neighborhood in St. Paul. [52] Eleven years later, in a second case, a Supreme Court majority held in *Virginia v. Black* (2003) that part of a Virginia statute treating cross-burning as "*prima facie* evidence of an intent to intimidate a person or group of persons" was unconstitutional. Yet they deemed constitutional an aspect of the Virginia statute under which cross-burning would be treated as a criminal offense only when the *intent to intimidate* could be proven independently of the cross-burning itself. Importantly, they added that when intent to intimidate can be independently established in a particular instance, that instance can be understood as a "true threat" and the First Amendment "permits a state to ban" true threats:

> "True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat…. Rather, a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.' Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. … some cross burnings fit within this meaning of intimidating speech… .[53]

The only way to rebut the Court's stance, and make a convincing case that cross-burning is intrinsic intimidation, requires somehow showing that cross-burning is essentially an illocutionary act of threatening. But speech act theorists disagree about whether threats, in the most general sense, can be understood as illocutionary acts.[54] Those who reject the idea insist that threatening would count as an illocutionary act only if there were some "conventional expression" that consistently corresponds to, or counts as, the performance of a threat, and they point out that threats can be expressed by an indefinitely wide range of expressive acts—a claim confirmed by street gangs and crime syndicates whose members are frighteningly creative in devising ways to threaten people.

Those who are critical of the Court's stance in *Virginia v. Black* must thus try to show that cross-burning is, in some sense, *sui generis,* so that unlike any other expressive acts or linguistic utterances, cross-burning must be understood as always intended to threaten—whatever else it may be intended to do. This is the view that Justice Clarence Thomas seems to take in dissenting from the majority in *Virginia v. Black,* and in my view, Justice Thomas is rights. Moreover, a careful analysis of the "pragmatics" of cross-burning shows why. Cross-burning could not serve the perlocutionary ends it is meant to promote amongst racists and white supremacists, themselves, *but for* the illocutionary force of the act as an intrinsic expression of intimidation. That is, when a cross-burning is performed at a political rally as a way of asserting solidarity among white supremacists, it could not successfully achieve that goal unless those in attendance understood its expressive *social meaning* in terms of a historically generated capacity to intimidate, by its very nature—and in particular to intimidate those racial and ethnic groups they want to dominate and destroy. They must understand it, that is, as a conventional symbol of intimidation. Of course, a book, movie or a play might depict a cross-burning in a way that need

not count as symbolic intimidation. But any uses of the phenomenon to solidify bonds between white supremacists are entirely dependent upon the *conventional* status of cross-burning as symbolic intimidation. This means that when the Supreme Court exempts such uses from the "true threats" doctrine, they are defending a stance that excuses and encourages serious violations of the principle of equal citizenship.

To fully understand what it is in virtue of which cross-burning has this conventional status as symbolic intimidation, we can appeal once again to Austin's claim that we fully understand what speech acts actually do only when we consider "the total speech act"—that is, "the total situation in which the utterance is issued."[55] For any particular utterance, Austin would have us consider its grammar, syntax and vocabulary; as well as the speaker's tone of voice and accompanying gestures; and even the speaker's personal characteristics and social status--as one might plausibly say, for instance, "coming from him, I took it as an order."[56] In this spirit, I urge that the "total situation" in which *any* expressive act occurs, or in which any expressive artifact, practice or institution exists, is always the product of exceedingly complex social and historical processes, and that if we hope to understand how any act or institution might constitute expressive harm we must attending to the "total expressive act." In the case at hand, acts of cross-burning cannot be separated from the history of violence and intimidation directed by the Ku Klux Klan primarily at black people, but sometimes also at Catholics, Jews, and any white person who dared to cross racial, ethnic and religious divides.

But just as acts of cross-burning cannot be separated from the history of violence and intimidation that surrounded the rise of racial segregation, successful challenges to segregation, and violent backlash to those challenges, neither can the display of Confederate monuments and symbols in places of public honor be separated from that history of violence, intimidation and

backlash. Equally important, there is reliable evidence –documented by the Federal Bureau of Investigation, the Southern Poverty Law Center and confirmed by the experience of many municipalities across the American south—that some social groups stand prepared (as of this writing, in 2018) to mount violent and organized resistance to any efforts to remove these monuments and symbols from various public displays in places of honor. [57] This is because Confederate iconography—along with public displays of honor that celebrate it—has, for some, come to symbolize active resistance to *de facto* as well as *de jure* racial equality. And in my view this phenomenon has now become an essential (and inescapable) element of the context we need to attend to if we want to claim genuine understanding of the "pragmatics" of Confederate iconography. Confederate monuments and symbols function to promote group identity and solidarity among white supremacists because—and only because—of their illocutionary force as symbols of racial stigma, intimidation and terror.

This critical connection between expressive artifacts, acts, institutions and practices (on one hand) and their socio-historical contexts (on the other) has broader implications. In particular, it shows that making a convincing case for a claim that some particular symbol or expressive act constitutes symbolic intimidation demands a deep and nuanced understanding of the social and historical contexts of its use. Of course, sometimes a symbol can have one expressive meaning in one place and another expressive meaning in a different cultural or historical context. For centuries, the swastika was mainly a sacred symbol in South Asian and East Asian religious traditions, but when it was adopted by the Nazi party, and later the Nazi regime, it took on a new expressive meaning (especially—though perhaps not only-in "Western" cultural and political contexts). Yet decisions in countries such as Germany, Austria and France to ban public display of the Nazi flag (except for certain artistic purposes) seems entirely

appropriate—given the fact that their national frameworks for interpreting the expressive content of that flag inevitably make genocide and other massive crimes a central part of that content.

Of course, I have adopted Landrieu's position that Confederate monuments and symbols (and not just acts of cross-burning) are conventional expressions of racial intimidation as much as they are of racial stigmatization. It is not unimportant, in this context, to note that in the early phases of the decades-long process of "denazification" in post-WW II Germany, physical symbols of the most intimidating elements of the Nazi regime were often destroyed or entirely banned from public display.[58] Yet I suggest that in the context of contemporary American political culture, destroying confederate monuments and banning *all* displays of confederate symbols might incite more racist violence than removing them from places of public honor ever could. Equally important, I do not want to revive familiar, and profoundly unconstructive, debates about whether it is appropriate to ponder substantive comparisons between American chattel slavery and the Holocaust. Fortunately, there is an option that is, in any case, more appropriate to the American context: removing and relocating Confederate monuments can be an effective way of diminishing their power to rally the forces of racism and white supremacy, provided that Americans can eventually develop a coherent vision what to do with the monuments once they are resituated.

I concede that is sometimes possible to transform the expressive meaning of some expressive artifact, symbol, act, institution or practice. Indeed, over time, what spectators "add" to a particular artifact by virtue of their reinterpretations may prove quite different from, or even entirely antithetical to, the values and social meanings intended by its initial creators. This is how Nelson Mandela's election to the South African presidency allowed for the transformation of Robben Island prison into part of a national museum (and a 'world heritage site') that many

South Africans view as a symbol of "the triumph of the human spirit over adversity."[59] But there are good reasons to doubt that Confederate monuments can be transformed in this way, because they have so clearly and forcefully come to symbolize the commitments and aims of the ideology of white supremacy. It would require a massive denial of historical fact, or a highly improbable evolution in the social meaning of Confederate monuments and symbols, to recast those monuments and symbols as something other than expressions of white supremacy.

Some critics may object that removing and relocating even morally irredeemable monuments might encourage us to forget—or sometimes, to deny—parts of our history that we have epistemic and moral obligations to remember. But there is an important distinction between remembering something and commemorating it. To commemorate is to remember either as a way of paying respect and according honor to some person or some achievement, or as a means of giving appropriately solemn attention to great suffering and loss. Simple remembrance, in contrast, can be achieved by documentation alone. For instance, the Nazi Documentation Center in Munich (dedicated in 2015) preserves the memory of Munich's role in the rise of Nazism without celebrating it, and without honoring those who designed and participated in it. In a different kind of project, Budapest's "Memento Park" (created in 1992) is an effort to preserve several monuments and statues from the Communist era in Hungary without celebrating that era's totalitarian, anti-democratic values. Regrettably, the American approach to Confederate monuments and symbols has unfolded in a haphazard fashion that has discouraged analogous efforts at systematic management. Because of continual intimidation and threats of violence, removals sometimes occur in the dark of night, often with little advance reflection about where to house the displaced monuments and how to display them. America is in need of

a calm, national conversation about how to remember the Confederacy without celebrating its anti-democratic values and practices, or honoring efforts to defend them.

This conversation must include broader reflection on how the civic art of remembrance might help renew our democratic institutions, and there are valuable examples to consider within, as well as outside, of the United States. Among the most powerful such examples are the St. Gaudens *Memorial to Robert Shaw and the Massachusetts 54th Regiment* (1897), Maya Lin's *Vietnam Veterans Memorial*, in Washington D.C (1982) and Peter Eisenmann's *Berlin Memorial to the Murdered Jews of Europe (2005).* [60] It is time for Americans to explore the aesthetic values, political principles and moral ideals that produced these projects and to reject nostalgia for a "*lost* cause" that promotes racial division and hatred in favor of modes of civic remembrance that encourage unifying around the *just* cause of robust equality.

V. Democratic Conversation and the Transformation of Social Meanings

One larger goal of this project to encourage national unity around the cause of robust equality in America ought to be constructively transforming the content of social meanings surrounding race to bring them in line with the expressive requirements of equal citizenship. Of course, equal citizenship is not *just* a matter of not being subject to expressive harm. The conditions of material life are obviously just as important—and sometimes more important—than the content of symbolic cultural processes. Moreover, transforming social meanings cannot automatically transform the material conditions of a society's inhabitants. Yet there are nonetheless circumstances in which we can transform the material conditions only if we can transform certain persistent social meanings.

At any point in time, the shared life of a society is like a *palimpsest* which continues to bear traces of the past. When a society has a history of systematic discrimination, its social life

will often continue to bear traces of harmful expressive meanings—and sometimes long after any laws that explicitly licensed discrimination have been struck down. In such contexts, expressive traces of systematic discrimination will function as dangerous background social scripts. In one such example contemporary American society is shaped by powerful expressive traces of the southern backlash against Reconstruction, especially in the tendency to interpret the concept "black American" as a proxy for "irredeemable criminal" and "permanent possibility of danger." Powerful expressive traces of that script in practices of racial profiling and mass incarceration continue to diminish American society: endangering lives, damaging neighborhoods, engendering disrespect for the law, and distorting the principles that ought to govern America's criminal justice system. We cannot take expression seriously unless we acknowledge that such discriminatory social scripts can preserve social injustice, distort social interactions, and damage self-understandings long after legally sanctioned discrimination has formally ended.

Moreover, the kind of background 'scripts' that I have in mind do not merely continue to stigmatize disfavored groups. They also exert a dangerous influence on the self-understandings those who are beneficiaries—though admittedly to varying degrees—of those stigmatizing practices. That is, many of those who have been on the socially dominant end of the processes that create and preserve damaging stigma will often, themselves, be damaged by residual effects of the problematic social scripts. As Martin Luther King urged, in a famous passage in *Letter from a Birmingham Jail*, when socially dominant groups define their identity by reference to their (alleged) fundamental difference from socially stigmatized others, this typically leaves them with a false sense of superiority. I urge, still further, that when such socially dominant groups must at some contemplate no longer having a socially dominant status, and must ponder the consequences of the transformation of social meanings around socially charged concepts such as

'race', something that we can call *"identity-panic"* may set in. Demographic changes that are likely to transform white Americans into a minority at some point in the 21st century, are a critical driver of this identity panic for many of those who see themselves as part of the white "resistance" to racial equality in America. The identity panic to which they are not subject may be a psychologically predictable consequence of how difficult it can be to refashion one's identity in response to social and political changes that mean one's "affinity group" is no longer dominant.[61] But the psychological predictability of identity panic does not diminish the social dangers it may pose.

Yet, perhaps unsurprisingly, expression may turn out to be an important part of the solution to the problem of the destructive social palimpsest. But it will be a constructive solution only if it occurs as part of newly respectful forms of *democratic conversation*. Constructive and potentially transformative democratic conversations will sound nothing like the unproductive exchanges that happen on sensationalistic cable news programs, for instance, in which representatives of opposing political factions seek to score points against their opponents. The transformative conversations I envision will also sound quite different from the exchanges made possible in forums defended by theorists of deliberative democracy to encourage better political participation. In my view, deliberative democrats like Jane Mansbridge and James Parkinson are certainly arguing for the creation of complex deliberative forums—they call them "deliberative systems—that will be be critical to the reinvigoration of democracy, but deliberative forums about policy cannot provide a framework for the transformation of destructive social scripts.[62] Constructively transformative democratic conversations must create new modes of social interaction, and encourage creative social transformations, more consistent with the ideal of equal citizenship envisioned by the discussion that Kenneth Karst, and others,

have sought to start. Such creative transformations will not result from transformations in political deliberation, but from a new kind of readiness to recognize all participants in the deliberations as genuine sources of claims to the status of equal citizen.

One of the most instructive examples of the democratic conversation I have in mind was an extended, five and a half- year conversation that began in the Boston area, in 1994, in response to the killings of two receptionists at Boston area abortion clinics. Participants were drawn from opposing sides on the abortion question, but they were not there to settle the question of appropriate legal policy. Their task was to help quiet divisive political rhetoric, to lessen the possibility of violence around abortion clinics, and to consider how people who disagreed on abortion might nonetheless reaffirm a sense of community. *The Boston Globe* eventually published an account of that conversation under the provocative title "Talking with the Enemy." For all of its imperfections, the conversation actually helped to de-escalate conflict in public debate about abortion, and to discourage the violence that sometimes followed from that conflict. It worked, for as long as it did, because the conversations managed to encourage its participant to see themselves as fellow citizens and not just as combatants in a morally charged debate about abortion. [63]

In my view, the arena in which the de-escalation of contemporary social conflict is most urgent is in interactions between the police — as street-level bureaucrats who help to convey the expressive content of society's stance on equal citizenship—and the varied communities they are meant to serve. Lipsky notes that "street-level bureaucrats must manage their difficult jobs by developing "*routines of practice"* and by "psychologically simplifying their clientele and environment."[64] But too often, the "routines of practice" and psychological simplifications informing the work of police unreflectively reiterate a social script that stigmatizes, intimidates

and denies equal citizenship to members of socially disfavored groups (especially African Americans). This process compounds those members' suspicion and mistrust of a system that constructs them as permanent possibilities of danger, rather than as presumptively entitled to participate fully in social life. We are clearly in urgent need of transformative, socially widespread, democratic conversations about these matters.

To be sure, even the most creative conversations cannot, alone, eliminate bias in critical bureaucracies, or reduce the socio-economic inequalities that often intensify the effects of persistent inequality and bias. But if we take expression seriously, we must take seriously the human capacity for transformative democratic conversations. We must also hope that such conversations can be part of a comprehensive and constructive strategy for creating new possibilities for democratic cooperation and renewed commitment to the ideal of equal citizenship. These conversations will be unlikely to happen as long as there is a general unwillingness to confront the many ways in which the expressive content of Confederate monuments and symbols (and their display in places of honor) is a standing rejection of that ideal. It is time to reject nostalgia for "lost cause" that promotes racial division and hatred in favor of modes of remembrance, as well as forms of contemporary conversation, that encourage us to unite around the *just* cause of robust equality.

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1 Audiences at MIT, Brown University, and Felician University—among others—have provided helpful commentary that have (I hope) improved this draft of the paper.

2 See David Blight, *Race and Reunion: The Civil War in National Memory* (2001) (Cambridge: Harvard University Press), esp. chapter eight "The Lost Cause and Causes not lost."

3 Southern Poverty Law Center, "Whose Heritage? Public Symbols of the Confederacy" (2016) https://www.splcenter.org/20180604/whose-heritage-public-symbols-confederacy.

4 Southern Poverty Law Center, "Whose Heritage?"

5 J.L. Austin, J.L. , *How to Do Things With Words* (Cambridge: Harvard University Press, [1962] 1975).

[6] My account of the illocutionary force of artifacts, acts, institutions and practices draws upon Austin's claims that *non-verbal gestures* can have illocutionary force. See, for instance, p. 119 where Austin writes that we can "warn or order or appoint or give or apologize by non-verbal means and these are illocutionary acts." Unlike Rae Langton, for instance, I do not want to argue that non-verbal expression should be understood as 'standard' speech-acts. .

[7] See, for instance, Austin p. 119 where Austin writes that we can "warn or order or appoint or give or apologize by non-verbal means and these are illocutionary acts."

[8] See See Rae Langton, "Speech Acts and Unspeakable Acts," *Philosophy and Public Affairs*, 22 (4):293-330 (1993).

[9] Austin, p. 99-100.

[10] Kenneth L. Karst, Kenneth L. *Belonging to America: Equal Citizenship and the Constitution.* (New Haven: Yale University Press, 1989), p. 3.

[11] Ibid..p.3.

[12]Robin A. Lenhardt "Understanding the Mark: Race, Stigma, and Equality in Context" *New York University Law Review* 79. See also, Bennett Capers "Rethinking the Fourth Amendment: Race, Citizenship and the Equality Principle," *Harvard Civil Rights-Civil Liberties Law Review* Vol 46 (1) (2011) 1-50. See, Lenhardt p. 845: Citizenship harms "refer to stigma-related injuries that … have a negative impact on a racially stigmatized individual's ability to … be a full participant in the relationships, conversations, and processes that are … important to community life."

[13] Students at Yale, for instance, successfully challenged the University's plan to retain the name of a former slaveholder for one of its residential colleges. As of October, 2018, students at Princeton have (without success) challenged their institution's decision to retain the name "Woodrow Wilson" for the school of Public and International Affairs.

[14] I discuss this distinction at greater length in "Is there a Safe Place for Academic Freedom?" forthcoming I Jenifer Lackey, editor, Academic Freedom (Oxford Univ. Press).

[15] Landrieu's speech is reproduced at https://www.nytimes.com/2017/05/23/opinion/mitch-landrieus-speech-transcript.html.

[16]

[17] In 2016, the Southern Poverty Law Center found more than 1500 public symbols of the Confederacy (including 718 monuments) in 31 states and the District of Columbia. Southern Poverty Law Center, "Whose Heritage? Public Symbols of the Confederacy" (2016) https://www.splcenter.org/20160421/whose-heritage-public-symbols-confederacy. Even after some well-publicized removals, the class of publicly displayed Confederate monuments and symbols remains large.

[18] The city eventually removed the list of possible contractors from public view because of the threats https://www.nola.com/politics/index.ssf/2016/02/confederate_monuments_threats.html. In addition, one contractor pulled out of effort after his car was firebombed: https://www.nola.com/politics/index.ssf/2016/01/former_confederate_monument_co.html. See also Landrieu, *In the Shadow of Statues*, pp. 1-6.

[19] For a transcript of Halley's speech, see https://www.nytimes.com/interactive/2015/06/22/us/Transcript-Gov-Nikki-R-Haley-of-South-Carolina-Addresses-Removing-the-Confederate-Battle-Flag.html.

[20] Austin, p. 52.

[21] David Blight, *Race and Reunion: The Civil War in American Memory.* (Cambridge: Belknap Press of Harvard University, 2001). See, especially Ch. Eight,"The Lost Cause and Causes Not Lost."

[22] Marcel Duchamp, "The Creative Act," in *The Writings of Marcel Duchamp,* edited by Michel Sanouillet and Elmer Peterson (Cambridge, MA: DaCapo Press, 1989), pp. 138-140., See p. 138.

[23] **Self-identifying reference.**

[24] Charles Lawrence," The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism *Stanford Law Review* Vol. 39, No. 2 (Jan., 1987), pp. 317-388 ; and "Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection" *40 Connecticut Law Review Vol 40, (2008)* 931-978.

[25] Richard Pildes and Richard Niemi, "Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno," *Michigan Law Review* Vol. 92, No. 3 (1993), pp. 483-587; see p. 507.

[26] *Harvard Law Review,* Note "Expressive Harms and Standing," *Harvard Law Revie*w, Vol. 112 , No. 6 (1999) pp. 1313-1330; see p. 1314

[27] *Harvard Law Review* Note, Pp. 1314-1315.

[28] Elizabeth S. Anderson and Richard Pildes, "Expressive Theories of Law: A General Restatement," *University of Pennsylvania Law Review,* Vol 148, No. 5 (2000) 1503-1575.r

[29] For fuller discussion of this notion of authorization see **Moody-Adams, "Democratic Morality and the Political Morality of Compromise," in NOMOS Compromise, ed. Jack Knight.** See also, Ishani Maitra, "Subordinating Speech," pp. 94-120 in Maitra and McGowan, eds., *Speech and Harm :Controversies Over Free Speech.*

[30] Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Service* (New York: Russell Sage Foundation Press; exp. Ed. 2010).

[31] See Moody-Adams, "Democratic Conflict and the Political Morality of Compromise," Compromise NOMOS LIX, Jack Knight editor (NYU Press 2018)

[32] Ishani Maitra , "Subordinating Speech" p. 96.

[33] Contrary to objections raised by Simon Blackburn, this view does not need to posit "group minds." For Blackburn's argument that it might see, Simon Blackburn, "Group Minds and Expressive Harm," *Maryland Law Review,* Vol 60, No. 3 pp. 467-492.

[34] Lessig "The Regulation of Social Meanings" pp. 951-952.

[35] Anderson and Pildes, p. 1525.

[36] Expressive harm does not always constitute citizenship harm. A school-yard bully's taunts and slurs can cause extensive expressive harm to a classmate, but such harm would not in itself constitute citizenship harm.

[37] See Moody-Adams, The Legacy of *Plessy v. Ferguson*," *Blackwell's Companion to African American Philosophy*, eds. T. Lott and J. Pittman, (Oxford: Blackwell 2003).

[38] *Plessy v. Ferguson* 163 U.S. 537 (1896).

[39] See Lawrence's argument in "Unconscious Racism Revisited."

[40] Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (p. 2). (New York: Touchstone Press, 1963), p.2

[41] Bruce Link and Jo C. Phelan make this point in "Conceptualizing Stigma," *Annual Review of Sociology* Vol 27, (2001)363-385; esp. pp. 365-366.

[42] Link and Phelan, p. 367-376.

[43] Link and Phelan, pp. 381-382.

[44] Austin, pp. 151, 153, 155-156; and 163.

[45] Austin, p.151; see also p. 163.

[46] For a succinct discussion of the study see Kenneth Clark, *Prejudice and Your Child* (Boston: Beacon Press 1963); See also, Moody-Adams "Race, Class and the Social Construction of Self-Respect," *Philosophical Forum*, vol. XXIV, nos. 1-3. (Fall-Spring 1992-93), 251-266.

[47] For instance, see Kristof Dhont and Alain Van Hiel , "Intergroup contact buffers against the intergenerational transmission of authoritarianism and racial prejudice," *in Journal of Research in Personality* 46:231-234 · April 2012.

[48] Jeremy Waldron, *The Harm in Hate Speech* (Cambridge: Harvard University Press, 2012) pp. 84-89.

[49] Hannah Arendt, "Reflections on Little Rock," *Dissent* Vol. 006, No. 001 (1959), pp. 45-56.

[50] The Supreme Court's 2018 (7 to 2) finding in *Masterpiece Cakeshop v. Colorado Civil Rights Commissio*n has , left unaddressed the central question surrounding the role of private citizens in providing equ al access to public accommodations.

[51] I draw on the *Oxford English Dictionary* definition of "intimidate."

[52] Jeanine Bell , "O Say, Can You See: Free Expression by the Light of Fiery Crosses," *Harvard Civil Rights-Civil Liberties Law Review*, Vol 39 (2004), 335-389; see esp .p 336-337.

[53] *Virginia v. Black* 538 U.S. 343 (2003).

[54] Douglas Walton, *Scare Tactics: Arguments that Appeal to Fear and Threats* (Dordrecht, the Netherlands: Kluwer 2000). See, esp. Ch. 4 "The Speech Act of Making a threat."

[55] Austin p. 52.

[56] Austin, p. 76.

[57] Landrieu discusses some of the activities of these groups in chapter six of In the Shadow of Statues.

[58] Frederick Taylor, *Exorcising Hitler: The Occupation and DeNazification of Germany* (Bloomsbury Press, 2013). See also Joshua Zeitz, "Why There are No Nazi Statues in Germany," *Politico* (August 20, 2017).'t

[59] Robben Island is described as "the triumph of the human spirit over adversity and injustice" at http://www.robben-island.org.za/.

[60] I develop this argument more fully in"Civic Art of Remembrance and the Democratic Imagination" ch. Two of Renewing Democracy, unpublished book MS in progress.

[61] I develop this argument more fully in Moody-Adams "Democracy, Identity and Politics", *Res Philosophica* Vol 95, No. 2 (April 2018) pp. 199-218.

[62] Jane Mansbridge and John Parkinson, editor*, Deliberative Systems* (Cambridge: Cambridge University Press 2010).

[63] "Anne Fowler, Nikki Nichols Gamble, Frances X. Hogan, Melissa Kogut, Madeline McComish and Barbara Thorp, "Talking with the Enemy," *Boston Sunday Globe* Jan. 28, 2001 pp. F1-F3.

[64] Lipsky, *Street-Level Bureaucracy*, *p. xii*