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Sticks and Stones

John Arthur

A recent *New York Times* article described the intense controversy surrounding a German court's decision that a bumper-sticker proclaiming "soldiers are murderers" is constitutionally protected, just as it would be under the First Amendment to the United States Constitution. Chancellor Helmut Kohl characterized himself as "outraged" at the court's decision, saying that "We cannot and must not stand by while our soldiers are placed on the same level with criminals." A leading German newspaper editorialized that "In a democracy, criticism of war and the military is naturally not forbidden. But among reasonable people, it must be done in a civilized way and not with brutal insults like "murderers." And the judge in the case, who said he regretted having to decide as he did, complained that earlier decisions of the Constitutional Court "are steadily placing freedom of speech ahead of the protection of people's honor" (*New York Times*, January 15, 1996, p. A-5). As this event shows, hate speech occurs in a wide array of contexts; it can also be directed at many different targets, not just racial groups. It is also unclear, of course, whether and in what form hate speech should be censored.

Proponents of limiting hate speech on college campuses and elsewhere have generally taken one of two approaches. One is to pass a "speech code" that identifies which words or ideas are banned, the punishment that may be imposed, and (as at the University of Michigan) an interpretive "Guide" meant to explain how the rules will be applied. The other approach has been to treat hate speech as a form of harassment. Here the censorship is justified on anti-discrimination grounds: hate speech, it is argued, subjects its victims to a "hostile" work environment, which courts have held constitutes job discrimination (*Meritor Savings Bank* v. *Vinson*, 1986).

Advocates of banning hate speech do not usually include all expressions of hatred, however devastating and humiliating they may be. Few would ban such criticism of the military, for example. And words directed at another person because of what he has done are also not normally included: "You bastard, you murdered my father!" is not thought of as "hate speech," nor is an attack on a person simply for being stupid or incompetent. Rather than censoring all expressions of hatred, advocates of banning hate speech use the term narrowly, to refer to speech directed at people *in virtue of their membership in a (usually historically disadvantaged) racial, religious, ethnic, sexual or other group*.

Such a conception can be criticized, of course, on the ground that it arbitrarily narrows the field to one form of hate speech. Perhaps, however, there is reason to focus on a limited problem: if it turns out, for example, that hate speech directed against such groups is especially harmful, then it may seem reasonable to have created this special usage of the term. In this essay I consider some of the important issues surrounding hate speech and its regulation: the political and legal importance of free speech; the types of harm that might be attributed to it; and whether, even if no harm results, causing emotional distress and offense is by itself sufficient to warrant censorship.

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I Why Protect Freedom of Speech?

Respecting freedom of speech is important for a variety of reasons. First, as J. S. Mill argued long ago, free and unfettered debate is vital for the pursuit of truth. If knowledge is to grow, people must be free to put forth ideas and theories they deem worthy of consideration, and others must be left equally free to criticize them. Even false ideas should be protected, Mill argued, so that the truth will not become mere dogma, unchallenged and little understood. "However true [an opinion] may be," he wrote, "if it is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth" (Mill, 1978, p. 34). It helps, of course, if the competition among ideas is fair and all sides have an equal opportunity to have their ideas expressed. Censorship is therefore only one of the dangers to the marketplace of ideas; unequal access to the media is another.

Free speech is also an essential feature of democratic, efficient and just government. Fair, democratic elections cannot occur unless candidates are free to debate and criticize each other's policies, nor can government be run efficiently unless corruption and other abuses can be exposed by a free press. But beyond that, there is an important sense in which freedom of speech provides a necessary precondition for the protection of other rights and therefore for justice. Free and open debate about the nature and limits of other rights to privacy, religion, equal treatment, and the rest is vital if society is to reach sound and fair decisions about when and how those other rights must be defined and respected. We cannot expect sound political deliberation, including deliberation about rights themselves, without first securing freedom of speech.

A third value, individual autonomy, is also served by free speech. In chapter III of *On Liberty*, "Of Individuality, as One of the Elements of Well Being," Mill writes that "He who lets the world, or his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation.…Among the works of man, which human life is rightly employed in perfecting and beautifying, the first in importance surely is man himself" (Mill, 1978, p. 56). Mill's suggestion is that the best life does not result from being forced to live a certain way, but instead is freely chosen without coercion from outside. But if Mill is right, then freedom of speech as well as action are important to achieve a worthwhile life. Free and open discussion helps people exercise their capacities of reasoning and judgment, capacities that are essential for autonomous and informed choices.

Besides these important social advantages of respecting free speech, including learning the truth, securing efficient, democratic and just government, and promoting individual autonomy, freedom of expression is important for its own sake, because it is a basic human right. Not only does free speech *promote* autonomy, as Mill argued, but it is also a *reflection* of individual autonomy and of human equality. Censorship denigrates our status as equal, autonomous persons by saying, in effect, that some people simply cannot be trusted to make up their own minds about what is right or true. Because of the ideas they hold or the subjects they find interesting, they need not be treated with the same respect as other citizens with whom they disagree; only we, not they, are free to believe as we wish. Viewed that way, denying free speech is much like establishing an official religion: it says to some citizens that because of their beliefs they are less than equal members of society. So, unlike the previous arguments, which see speech as an instrument to realize other important values, here the claim is that free speech must be protected out of respect for the fact that each adult in the community is entitled to be treated as an equal among others (Dworkin, 1996, ch. 8).

Because it serves important social goals, and also must be respected in the name of equal citizenship, the right to speak and write freely is perhaps the most important of all rights. But beyond that, two further points also need to be stressed. Free speech is fragile, in two respects. The first is the chilling effect that censorship poses. Language banning hate speech will inevitably be vague and indeterminate, at least to some extent: words like "hate" and "denigrate" and "victimize," which often occur in such rules, are not self-defining. When such bans bring strict penalties, as they sometimes do, they risk sweeping too broadly, capturing valuable speech in their net along with the speech they seek to prohibit. Criminal or civil penalties therefore pose a threat to speech generally, and the values underlying it, as people consider the potential risks of expressing their opinions while threatened by legal sanctions. Censorship risks having a chilling effect.

The second danger of censorship, often referred to as the "slippery slope," begins with the historical observation that unpopular minorities and controversial ideas are always vulnerable to political repression, whether by authoritarian regimes hoping to remain in power, or elected officials desiring to secure re-election by attacking unpopular groups or silencing political opponents.

For that reason, it is important to create a high wall of constitutional protection securing the right to speak against attempts to limit it. Without strong, politically resistant constraints on governmental efforts to restrict speech, there is constant risk – demonstrated by historical experience – that what begins as a minor breech in the wall can be turned by governmental officials and intolerant majorities into a large, destructive exception.

Protecting speech is essential if society is to protect truth, autonomy, efficiency, democracy, and justice; it also must be protected if we are to show equal respect for others with whom we differ. Censorship is also risky, I have argued, given the dangers of chilling effects and slippery slopes. Given all this, it is not surprising that the United States Supreme Court has sought ways to protect freedom of speech. So before considering hate-speech regulations, it will be helpful to look briefly at how the US Supreme Court has understood the First Amendment's guarantee of freedom of speech.

II Free Speech and the Constitution

The Supreme Court has not always interpreted the First Amendment's free speech and press clauses in a manner consistent with speech's importance. Early in the twentieth century people were often jailed, and their convictions upheld, for expressing unpopular political views, including distributing pamphlets critical of American military intervention in the Russian revolution (*Abrams* v. *United States*, 1919). Then, in the McCarthy era of the 1950s, government prosecuted over a hundred people for what was in effect either teaching Marxism or belonging to the Communist Party (*Dennis* v. *United States*, 1951). Beginning in the 1960s, however, the US Supreme Court changed direction, interpreting the Constitution's command that government not restrict freedom of speech as imposing strict limits on governmental power to censor speech and punish speakers.

Pursuing this goal, the first defined "speech" broadly, to include not just words but other forms of expression as well. Free speech protection now extends to people who wear arm bands, burn the flag, and peaceably march. The Court has also made a critically important distinction, between governmental regulations aimed at the *content* or *ideas* a person wishes to convey and content-neutral restrictions on the *time*, *place*, *and manner* in which the speech occurs. Thus, government is given fairly wide latitude to curtail speakers who use bullhorns at night, spray-paint their ideas on public buildings, or invade private property in order to get their messages across. But when governmental censors object not to how or where the speech occurs, but instead to the content itself, the Constitution is far more restrictive. Here, the Supreme Court has held, we are at the very heart of the First Amendment and the values it protects. Indeed, said the Court, there is "no such thing as a false idea" under the US Constitution (*Gertz*. v. *Robert Welch*, *Inc*., 1974).

Wary of the chilling effect and the slippery slope, the Supreme Court has therefore held that government cannot regulate the content of speech unless it falls within certain narrowly defined categories. These constitutionally "unprotected categories" include libel (but criticisms of public officials must not only be false but uttered "maliciously" to be libelous), incitement to lawlessness (if the incitement is "immanent," such as yelling "Let's kill the capitalist!" in front of an angry mob), obscenity (assuming that the speech also lacks substantial social value), and "fighting words" (like "fascist pig" that are uttered in a face-to-face context likely to injure or provoke immediate, hostile reaction). In that way, each of these unprotected categories is precisely defined so as not to endanger free expression in general. Like Ulysses tying himself to the mast, the Supreme Court uses the unprotected-categories approach to reduce the chance that we will return to a time when constitutional protections were vaguely defined and government was left free to issue vaguely worded sedition statutes, stifle dissent and lock up critics. Harmless advocacy of revolution, for example, is now constitutionally protected, as is virtually all criticism of public officials.

Applying these principles, the Supreme Court held in 1989 that a "flag desecration" is constitutionally protected (*Texas* v. *Johnson*, 1989). Texas's statute had defined "desecration" in terms of the tendency to "offend" someone who was likely to know of the act. But, said the Court in striking down the statute, not only does flag burning involve ideas, the statute is not viewpoint neutral. Because it singled out one side of a debate – those who are critical of government – the law must serve an especially clear and important purpose. Mere "offense," the justices concluded, was insufficiently important to warrant intrusion into free expression.

In light of this constitutional history, it is not surprising that attempts to ban hate speech have fared poorly in American courts. Responding to various acts of racist speech on its campus, the University of Michigan passed one of the most far-reaching speech codes ever attempted

at an American university: it prohibited "stigmatizing or victimizing" either individuals or groups on the basis of "race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status." According to a "Guide" published by the University to help explain the code's meaning, conduct that violates the code would include a male student who "makes remarks in class like 'Women just aren't as good in this field as men,' thus creating a hostile learning atmosphere for female classmates." Also punishable under the code were "derogatory" comments about a person's or group's "physical appearance or sexual orientation, or their cultural origins, or religious beliefs" (*Doe* v. *University of Michigan*, 1989, pp. 857–8). To almost nobody's surprise, the Michigan Code was rejected as unconstitutional, on grounds that it violated rights both to free speech and to due process of law. The case was brought by a psychology instructor who feared that his course in developmental psychology, which discussed biological differences between males and females, might be taken by some to be "stigmatizing and victimizing." The Court agreed with the professor, holding that the Michigan code was both "over-broad" and "unconstitutionally vague." A second code at the University of Wisconsin soon met a similar fate, even though it banned only slurs and epithets (*UMV Post* v. *Board of Regents of the University of Wisconsin*, 1991).

Confirming these lower court decisions, the Supreme Court in 1992 ruled unconstitutional a city ordinance making it a misdemeanor to place on public or private property any "symbol, object, appellation, characterization or graffiti" that the person knows or has reasonable grounds for knowing will arouse "anger, alarm or resentment" on the basis of race, color, creed, religion, or gender (*R.A.V.* v. *City of St Paul*, 1992, p. 2541). In overturning a juvenile's conviction for placing a burning cross on a black family's lawn, the majority held that even if the statute were understood very narrowly, to limit only "fighting words," it was nonetheless unconstitutional because it punished only some fighting words and not others. In so doing, argued one justice, the law violated the important principle of content neutrality: it censored some uses of fighting words, namely those focusing on race, color, creed, religion, or gender, but not others. It prescribed political orthodoxy. Other justices emphasized that no serious harm had been identified that could warrant restrictions on speech. The law, wrote Justice White, criminalizes conduct that "causes only hurt feelings, offense, or resentment, and is protected by the First Amendment" (*R.A.V.* v. *City of St. Paul*, 1992, p. 2559).

Perhaps, however, the Court has gone too far in protecting hate speech. Advocates of banning hate speech commonly claim it harms its victims. "There is a great difference," writes Charles Lawrence, "between the offensiveness of words that you would rather not hear because they are labelled dirty, impolite, or personally demeaning and the injury [of hate speech]" (Lawrence, 1990, p. 74). Elsewhere he describes hate speech as "aimed at an entire group with the effect of causing significant *harm* to individual group members" (Lawrence, 1990, p. 57, emphasis added). Richard Delgado similarly claims that it would be rare for a White who is called a "dumb honkey" to be in a position to claim legal redress since, unlike a member of an historically oppressed group, it would be unlikely that a white person would "suffer *harm* from such an insult" (Delgado, 1982, p. 110, emphasis added).

But are these writers correct that various forms of hate speech cross the boundary from the distressing and offensive to the genuinely harmful? To weigh their claim, we will first ask how we are to understand the concept of harm. Once that is clear, we can then proceed to the question of whether hate speech is in fact harmful, and then to whether it should be banned on other grounds.

III Harm and Offense

To claim that someone has been harmed is different from claiming she has been wronged. I can break into your house undetected, do no damage, and leave. While I have wronged you, I might not have harmed you, especially if you didn't know about it and I didn't take anything.

What then must be the case for wronging somebody to also constitute a harm? First, to be harmed is not merely to experience a minor irritation or hurt, nor is it simply to undergo an unwanted experience. Though unwanted, the screech of chalk on the blackboard, an unpleasant smell, a pinch or slap, a brief but frightening experience, and a revolting sight are not harms. Harms are significant events. Following Joel Feinberg, I will assume that harms occur not when we are merely hurt or offended, but when our "interests" are frustrated, defeated, or set back (Feinberg, 1984, pp. 31–51). By interests he means something in which we have a stake – just as we may have a "stake" in a company. So while many of our interests are obviously tied to our wants and desires, a mere want

does not constitute an interest. A minor disappointment is not a frustration of interests in the relevant sense. Feinberg thus emphasizes the "directional" nature of interests that are "set back" when one is harmed, pointing out that the interests are "ongoing concerns" rather than temporary wants. Genuine harms thus impede or thwart people's future objectives or options, which explains why the unpleasant memory or smell and the bite's itch are not harms while loss of a limb, of freedom, and of health are. Harms can therefore come from virtually any source: falling trees, disease, economic or romantic competitors, and muggers are only a few examples.

It seems clear therefore why government is concerned about harm and its prevention. Whether caused by other people or by nature, to be harmed is never trivial; it involves a setback or frustration of an interest of a person. For government to ignore genuinely harmful acts requires justification; sometimes such a justification is easy to see, as when competition causes economic harm or a person injures another in self-defense. But, absent such a justification, there is a *prima facie* case that harmful actions should not be allowed.

We now turn to the question of whether hate speech causes harm. In discussing this, we will consider various types of harm that might result, as well as making important distinctions between group and individual harm, between cumulative and individual harm and between direct and indirect harm.

IV Group Harm

One typical form of hate speech is directed not at any particular individual but at a group: fliers attacking racial and religious minorities are typical examples. But why might it be thought that attacks on groups are harmful? Here are some possibilities.

Larry May argues that attacks on groups harm people "vicariously." Because people care about others in their group, an attack on any one of them is in effect an attack on them all. He terms this state "solidarity." "If people are in a state of solidarity," he writes, "in which they identify the interests of others as their own interests, then…vicarious harm is possible" (May, 1987, p. 115). But that seems wrong: even assuming people are in a state of solidarity and identify strongly with the interests of others in the group, and also assuming that the hate speech harms the interests of its specific subject in some way, it still does not follow that others in the group are harmed by such an attack. Even such an attack on a family member might not result in such vicarious *harm*, though it could surely cause distress, anger, and resentment. Attacks on group members cause harm only if they also frustrate others' interests, understood as limiting ongoing objectives or options. But group "solidarity" is not normally like that; no doubt other group members are often distressed, but to suffer distress is not, by itself, a harm.

Perhaps, however, the harm caused by attacks aimed at a racial or other group is to the group itself rather than to any particular individual. But what sense can be made of such a claim, that the group itself is somehow harmed? It may seem that groups are not the sort of thing that *can* be harmed, only individual members. But consider corporations. Not only do they have duties and rights (they can sue and be sued, be held legally liable, and be fined) but they also have goals and objectives (namely to make a profit or to achieve some charitable goal if they are not-for-profit corporations). Nor is the corporation's goal reducible to the interests of its members: individuals involved with the corporation may care little or nothing about whether the corporation makes a profit, worrying instead about their salary, job security, work conditions, status among others, or whatever. So because corporations have independent goals, it seems that corporations can also be harmed. Exxon Corporation, for example, was probably harmed by the Alaskan oil spill, and certainly US auto makers were harmed by competition from the Japanese in the 1980s.

It is far from clear, however, how the analogy with corporations can be extended to religious, racial, or other groups. Consider the group of people on board an airplane. *Individuals* on the airplane can be harmed, of course, but it makes little sense to ask after a crash whether, in addition to all the deaths, the *group* itself was harmed. One reason that some groups, like corporations, can be harmed while others, such as people on airplanes, cannot is that corporations exist in a legal environment that provides them with their own, independent goal: both their charter and the legal context in which they function define their purpose as making profits for shareholders. A second point, besides legally defined purpose, is that corporations have an organizational structure whose purpose is to achieve the goal. For these reasons, sense can be made of a corporation being harmed in its pursuit of its goals. The situation is different, however, for racial, religious, ethnic, or cultural groups. These groups are socially, not legally created,

and obviously do not have a charter defining their goals; nor do they have the organizational structures that allowed us to make sense of a corporation's goals. Lacking a purpose, they therefore cannot be harmed in its pursuit.

It might be argued in response, however, that at least some groups, like religious ones, *can* have defined goals: The goal of the Jewish people, it is sometimes said, is to be a "light unto the nations," and that of Evangelical Christians, to preach salvation. But again it is unclear how to make sense of these "group" goals without assuming there is somebody else, God, who has established the purpose for the groups. But then it would be God, and not the group itself, that has the goal. On the other hand, if God has not established such a purpose then it seems reasonable to think of the goal as residing in individual members, not in the group itself. Similarly, a people or nation are sometimes said to have goals such as creating "socialist man" or achieving "manifest destiny," but again this depends on an organizational structure, usually a government, that represents the people and pursues the objective. Take that structure away, and the "group" goal dissolves.

The claim that hate speech harms a racial, religious, or ethnic group is therefore best not taken literally. Group harm is best understood as a shorthand way of suggesting individual members have been harmed. What sort of harm is then at issue, exactly? And how might hate speech cause it?

V Cumulative vs. Individual Harm

To give this argument its due, we must first distinguish between harms flowing from *individual* actions and *cumulative* harms. Often what is a singly harmless act can be damaging when added to other similar acts. One person walking across a lawn does little damage, but constant walking will destroy the lawn. Indeed the single act might be entirely without negative effect. Pollution, for instance, is often harmful only cumulatively, not singly. Though one car battery's lead may do no harm to those who drink the water downstream, when added to the pollution of many others the cumulative harm can be disastrous.

Further, the fact that it was singly harmless is no justification for performing the act. The complete response to a person who insists that he had a right to pollute since his action did no damage is that if everyone behaved that way great harm would follow: once a legal scheme protecting the environment is in place, criminal law is rightly invoked even against individually harmless acts on grounds of cumulative harm.

It might then be argued that even if individual hate speech acts do not cause harm, it should still be banned because of its cumulatively harmful effects. What might that harm consist in? Defending hate speech codes, Mari J. Matsuda writes that "As much as one may try to resist a piece of hate propaganda, the effect on one's self-esteem and sense of personal security is devastating. To be hated, despised, and alone is the ultimate fear of all human beings.…[R]acial inferiority is planted in our minds as an idea that may hold some truth" (Matsuda, 1989, p. 25). Besides the distress caused by the hate speech, Matsuda is suggesting, hate speech victims may also be harmed in either of two ways: reduced self-esteem or increased risk of violence and discrimination. I will begin with self-esteem, turning to questions of violence and discrimination in the next section.

VI Cumulative Harm to Self-esteem

What then is self-esteem? Following Rawls, let us assume that by "self-esteem" or "self-respect" we mean the sense both that one's goals and life-plan are worthwhile and that one has talents and other characteristics sufficient to make their accomplishment possible (Rawls, 1971, pp. 440–6). Loss of self-esteem might therefore constitute harm because it reduces motivation and willingness to put forth effort. If hate-speech victims believe they have little or no chance of success, their future options will be reduced, rather as former slaves are sometimes said to have had their futures foreclosed as a result of the attitudes they inherited from slavery.

Assuming loss of self-esteem is a harm, how plausible is Matsuda's suggestion that hate speech has the (cumulative) effect of reducing it? Many factors can reduce self-esteem. Demeaning portrayals of one's group in the media, widespread antisocial behavior of others in the group, family breakdown, poor performance in school and on the job, drugs, and even well-intended affirmative action programs all may lessen self-esteem. Indeed, I suggest that, absent those other factors, simply being subject to hate speech would not significantly reduce self-esteem. An otherwise secure and confident person might be made angry (or fearful) by racial or other attacks, feeling the speaker is ignorant, rude, or stupid.

But without many other factors it is hard to see that hate speech by itself would have much impact on self-esteem. Gerald Gunther, who as a Jew was subjected to some of the worst hate speech imaginable, nevertheless opposes speech codes. While writing eloquently of the distress such speech caused, there is no suggestion that the speech had an impact on the self-esteem of an otherwise self-confident person (Gunther, 1990).

But even assuming hate speech does reduce self-esteem to some degree, notice how far the argument has strayed from the original, robust claim that hate speech should be banned because it causes harm. First each individual act must be added to other acts of hate speech, but then it must also be added to the many other, more important factors that together reduce self-esteem. Given the importance of protecting speech I discussed earlier, and the presumption it creates against censorship, Matsuda's argument that it reduces self-esteem seems far too speculative and indirect to warrant criminalizing otherwise protected speech.

VII Discrimination and Violence as Indirect Harms

But surely, it may be objected, the real issue is simply this: hate speech should be banned because it increases racial or other forms of hatred, which in turn leads to increased violence and discrimination – both of which are obviously harmful. That is a serious claim, and must be taken seriously. Notice first, however, that this effect of hate speech, if it exists, is only indirect; hate speech is harmful only because of its impact on others who are then led in turn to commit acts of violence or discrimination. The claim is not that the speech itself directly caused the harm, but instead that it encouraged attitudes in people who then, on their own, acted wrongly and harmed others.

There are important problems with this as an argument for banning hate speech. One, epistemological, problem is whether we really know that the link exists between hate speech, increased hatred, and illegal acts. Suppose we discovered a close correlation between reading hate speech and committing acts of violence – what have we proved? Not, as might be thought, that hate speech causes violence. Rather, we would only know that *either* (A) reading such material increases hatred and violence, *or* (B) those who commit hate crimes also tend to like reading hate speech. The situation with respect to hate speech mirrors arguments about violence and pornography: the observation that rapists subscribe in greater proportion to pornographic magazines than do non-rapists does not show we can reduce rape by banning pornography. Maybe people who rape just tend also to like pornography. Similarly, reduction in hate speech might, or might not, reduce hate-related crime, even assuming that those who commit hate crimes are avid readers of hate literature.

Nor is it clear that hate speech has the effect on people's attitudes that the argument assumes. Consider an example reported recently in Mizzoula, Montana, where a vandal threw a brick through a window of the house of a Jewish family that had put a Menorah in their window to celebrate Hanukkah. In response, much of that overwhelmingly Christian city simply put pictures of a Menorah in their own windows, published in the local newspaper. Far from encouraging anti-Jewish hatred, this act seemed to have the opposite effect. Indeed it seems clear that members of groups whom hate-speech regulations are aimed to protect are themselves aware that hate speech can sometimes be beneficial. At my university alone, we have had two incidents in which acts of hate speech were perpetrated by members of the attacked group itself. Evidently, those students believed that rather than increasing hatred they could use hate speech to call attention to problems of racism and anti-semitism and increase people's sympathy, just as occurred in Mizzoula. We cannot assume, therefore, that censoring hate speech would reduce hatred. The reaction in Mizzoula, to meet racist speech with more speech, not only avoided censorship but also allowed people to make a powerful statement of their feelings about the importance of respecting the rights of others in their community.

It is unclear, I am suggesting, that regulating hate speech really would reduce hatred, let alone reduce hate crimes. And that uncertainty matters in the case of speech. Pollution, walking on the grass, and other activities that are less important than speech, and less threatened by governmental regulation, can be restricted without clear demonstration of their harmful effects. We need not wait to see for certain that a product is toxic to ban it; sometimes only a reasonable suspicion is enough if the product is relatively unimportant and the risks it may pose are significant. But speech, I have argued, is not like that. Freedom of expression is of great social value, enjoys the status as a basic right, and is in real danger due to slippery slopes and chilling effects.

There is a further problem, in addition to the epistemological one we have been discussing, with the argument that, by increasing hatred, hate speech in turn leads to more violence and discrimination. Any accused criminal, including one whose acts were motivated by racial or group hatred, must be shown to have *mens rea* or "guilty mind" in order to be convicted. That means, roughly, that the accused must have been aware of the nature of the act, aware that it was illegal or wrong, and was *able to have complied with the law*. But if the person could have complied with the law, then it follows that despite having read or heard the hate speech, and (we are now assuming) thereby had his hatred increased, he must still have been able to ask himself whether he wished to *act* on the basis of that attitude. Between the desire and the action comes the decision. Criminals are not zombies, controlled by their desires and unable to reflect on the nature and quality of their actions. It is no excuse that the criminal acted on a strong desire, whether it was to be wealthy without earning money, have sex without another's consent, or express hatred of a group through violent acts or discrimination.

This means, then, that we have on hand two different ways of dealing with acts of violence and discrimination motivated by hatred: by using government censorship in an effort at thought control, trying to eliminate hatred and prejudice, or by insisting that whether people like somebody or not they cannot assault them or discriminate against them. My suggestion is that passing and vigorously enforcing laws against violence and discrimination themselves is a better method of preventing indirect harm than curtailing speech. Government should not be in the business of making people like each other; it should, however, insist that we treat each other fairly and respect each other's rights. Indeed, using the power of government to persuade people how they should live and whom they should like seem quite incompatible with Mill's claim, discussed earlier, that individual autonomy and freedom are part of the valuable life. Even if we could, through government, force people to share our attitudes it is not clear we should try.

VIII Offensive Expression and Epithets

I have argued that hate speech should not be banned on the ground of preventing harm. But government often restricts behavior that is not strictly speaking harmful: it prevents littering, for instance, and limits how high we build our buildings, the drugs we take and the training our doctors receive, to mention only a few examples. Some of these restrictions are controversial, of course, especially ones that seem designed only to keep us from harming ourselves. But others, for example limiting alterations of historic buildings and preventing littering, are rarely disputed. Government also limits various forms of public behavior that are grossly offensive, revolting, or shocking. An assault on the sense of smell and hearing, unusual or even common sexual activities in public, extreme provocations of anger, or threats that generate great anxiety or fear, are generally regarded as examples of behavior that can be restricted although they do not cause genuine harm.

Charles Lawrence suggests that this argument also applies to hate speech. The experience of being called "nigger," "spic," "Jap," or "kike," he writes, "is like receiving a slap in the face. The injury is instantaneous" (Lawrence, 1990, pp. 68–9). He describes the experience of a student who was called a "faggot" on a subway: "He found himself in a state of semi-shock, nauseous, dizzy, unable to muster the witty, sarcastic, articulate rejoinder he was accustomed to making" (Lawrence, 1990, p. 70).

Sometimes, of course, hate speech can be banned, even speech about important public issues. A Nazi yelling about the virtues of Fascism in a public bus or library, for example, can be asked to stop by a policeman. But that is not *content* regulation, unless somebody yelling just as loudly about the virtues of patriotism or of the Republican Party would be permitted to remain. Neutral regulations that prevent people from disturbing others, without regard to what is being said, do not raise the same constitutional and political issues as does content regulation of political speech.

But because of speech's critical importance and government's tendency to regulate and limit political discussion to suit its own ends, I have argued, it is important to limit governmental censorship to narrowly and precisely defined unprotected categories. This provides a more secure protection of speech than allowing officials to balance, case by case, the relative costs and benefits of individual laws government might wish to pass limiting free speech. Assuming that we might wish to keep this unprotected-categories approach, how might offensive hate speech be regulated? One possibility is to allow government to ban speech that "causes substantial distress and offense" to those who hear it. Were we to adopt such a principle, however, we would effectively gut the First

Amendment. All kinds of political speech, including much that we would all think must be protected, is offensive to somebody somewhere. "Fuck the draft" is but one of many examples of constitutionally protected offensive speech (*Cohen* v. *California*, 1971); burning the American Flag is another (*Texas* v. *Johnson*, 1989).

Nor would it work to limit the unprotected category to all speech that is distressing and offensive to members of historically stigmatized groups, for that too would sweep far too broadly. Speech critical of peoples, nations, and religious institutions and practices often offends group members, as do discussions of differences between the races and sexes. Social and biological scientists sometimes find themselves confronted by people who have been deeply wounded by their words, as the instructor who got in trouble at the University of Michigan over his comments about sex-linked abilities illustrates. Or what about psychologists who wish to do research into group IQ differences? Should only those who reach conclusions that are not offensive be allowed to publish? Or should we perhaps simply ban research into any topic that offends? Such examples can be repeated endlessly, of course; it is virtually impossible to predict what might be taken as offensive. Even Malcolm X's autobiography might be punishable; he says at one point that "I'd had too much experience that women were only tricky, deceitful, untrustworthy flesh" (Malcolm X, 1964, p. 226).

Others, however, have suggested another, less sweeping approach: Why not at least ban racial or other *epithets* since they are a unique form of "speech act" that does not deserve protection. Unlike other forms of protected speech, it is claimed that epithets and name calling are constitutionally useless; they constitute acts of "subordination" that treat others as "moral inferiors" (Altmann, 1993). Racial, religious, and ethnic epithets are therefore a distinct type of speech act in which the speaker is subordinating rather than claiming, asserting, requesting, or any of the other array of actions we accomplish with language. So (it is concluded) while all the other types of speech acts deserve protection, mere epithets and slurs do not.

The problem with this argument, however, is that epithets are *not* simply acts of subordination, devoid of social and political significance or meaning, any more than burning a flag is simply an act of heating cloth. Besides "subordinating" another, epithets can also express emotion (anger or hatred, for example) or defiance of authority. And like burning or refusing to salute the flag (both protected acts), epithets also can be seen to express a political message, such as that another person or group is less worthy of moral consideration or is receiving undeserved preferences. That means, then, that however objectionable the content of such epithets is they go well beyond mere acts of "subordination" and therefore must be protected.

It is worth emphasizing, however, that although people have a political and constitutional *right* to use such language, it does not follow that they *should* use it or that they are behaving decently or morally when they exercise the right. A wrong remains a wrong, even if government may for good reason choose not to punish it. I am therefore in no way defending on moral grounds those who utter hate speech – an impossible task, in my view – but instead have tried to show why meeting hatred with more speech, as was done in Mizzoula, is a better response than governmental censorship. Nor is it correct to think that because government allows people to speak it is thereby condoning either the speech or the speaker. Government doesn't condone Christians, Jews, Muslims, and atheists by merely allowing them to exercise their religious freedom, as it would if it established and financed one religion. In religious matters, as well as in the case of speech, government's job is to remain neutral.

What, finally, should be said when a university is seeking to prevent harassment by limiting speech that creates a "hostile" environment for faculty and students? Clearly, a university could on aesthetic grounds prevent people from hanging banners or other material from their windows and doors, or pasting billboards on public walls. But again such a regulation must be content neutral; a state university cannot ban some messages while leaving other students, with different, less controversial and offensive views, to express themselves. (Private universities, since they are not run by government and therefore not bound by the First Amendment, are free to impose whatever orthodoxy they choose.)

More than most places, a university is committed to scholarship and the pursuit of knowledge. Freedom of inquiry is its life-blood. That means, however, that nobody can be guaranteed never to be offended or upset. (How often are students in a religion class deeply offended by what they hear? Or conservative Christians by openly gay, or pro-choice speech?) Being forced to confront people with widely different views and attitudes, including those whom we dislike and who dislike us, is rarely easy or

pleasant; but it can also be an important part of acquiring an education. Once it is admitted that for purposes of regulating speech *content* there is no such thing as a false idea, Nazi marches have as much constitutional value as civil rights marches, swastikas as much value as anti-war or Israeli symbols, and emotionally charged speeches by members of the Klan as much value as Martin Luther King's "I Have a Dream" speech. Indeed, it is rare that hate speech is merely expressive and does not have at least some political or social content. However offensive and stupid Louis Farrakhan's description of Jews as "blood-sucking" may be, it is more than contentless expression of emotion.

None of this implies, however, that genuine harassment, whether in the workplace or university, should be protected. But harassment is not hate speech. For one thing, to suffer harassment requires more than hearing an offensive remark. Genuine harassment requires a pattern of behavior, not just a single event, and must occur in a context in which its intended victim(s) are made to feel sufficiently intimidated or distressed that their ability to perform is impeded. Nor would verbal harassment be limited to "hate speech" directed at women and racial or ethnic minorities. Vulgar, sexually explicit language directed at a religiously conservative white male could be part of a pattern of harassment of him, for example, as could verbal attacks aimed at people for being short, or in a fraternity, or long haired, or even (a personal concern of mine) being bald. Nor, finally, are acts of harassment limited to speech; other actions (making late-night noise or dumping litter, for example) would also have to be included under a genuine anti-harassment regulation. The point, then, is not that people have a free speech right to harass others. Rather, it is that a ban on harassment would be both broader and narrower than a ban on hate speech. To avoid the charge that they are disguised censorship, harassment regulations must ban more than hate speech as well as avoid treating hate speech per se as harassment.

But how, then, should others respond to those, on a university or off, who are offended and distressed when others exercise their right to speak? When children call each other names and cruelly tease each other, the standard adult response is to work on both sides of the problem. Teasers are encouraged to be more sensitive to others' feelings, and victims are encouraged to ignore the remarks. "Sticks and stones can break my bones, but names can never hurt me" was a commonplace on the playground when I was a child. A minimum of self-assurance and toughness can be expected of people, including students at college.

Like the sexual freedoms of homosexuals, freedom of speech is often the source of great distress to others. I have argued, however, that because of the risks and costs of censorship there is no alternative to accepting those costs, or more precisely to imposing the costs on those who find themselves distressed and offended by the speech. Like people who are offended by homosexuality or interracial couples, targets of hate speech can ask why *they* should have to suffer distress. The answer is the same in each case: Nobody has the right to demand that government protect them against distress when doing so would violate others' rights. Many of us believe that racists would be better people and lead more worthwhile lives if they didn't harbor hatred, but that belief does not justify restricting their speech, any more than the Puritans' desire to save souls would warrant religious intolerance, or Catholics' moral disapproval of homosexuality justify banning homosexual literature.

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