

# Hate Speech in the Marketplace of Ideas\*

Steven P. Lee

**Abstract** In this paper, I consider the issue of restrictions on hate speech in the context of the argument for free expression based on the idea that the realm of public communication is a “marketplace of ideas.” What is the nature of the analogy with the economic marketplace implied by this phrase? Can maximizing the prospects for attaining truth in the realm of public communication (if this is its proper goal) be fruitfully compared with maximizing preference satisfaction in the economic market? And, does the analogy prove too much, in that arguments for government interference in economic markets based on the existence of “market imperfections” might be taken to justify analogous interference in the case of speech? Can hate speech be understood as analogous to a market imperfection?

**Keywords** Marketplace of ideas • Hate speech • Market imperfections • Government regulation of speech

Freedom of speech or expression is a highly valued right in democratic political systems, but the extent to which it is recognized or valued varies among Western democracies. “The American approach is *exceptional*,” Frederick Schauer notes: “the American First Amendment, as authoritatively interpreted, remains a recalcitrant outlier to a growing international understanding of what the freedom of expression entails.”<sup>1</sup>

---

\*For valuable comments on an earlier version of this paper, I would like to thank Richard De George, Alistair Macleod, William Nelson, Jonathan Schonsheck, and the editor of this volume.

<sup>1</sup>Frederick Schauer, “The Exceptional First Amendment,” Harvard University Kennedy School of Government, Faculty Research Working Papers Series No. RWP05-021, 2004: 2, [http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP05-021/\\$File/rwp\\_05\\_021\\_schauer\\_SSRN.pdf](http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP05-021/$File/rwp_05_021_schauer_SSRN.pdf). An opposing position is taken by C. Edwin Baker, “Hate Speech,” Penn Law Public Law and Legal Theory Research Paper Series, 2-4, <http://papers.ssrn.com/abstract=1105043>. Baker claims that the exceptionalism is at the level of academic theory rather than legal practice.

S.P. Lee (✉)

Hobart and William Smith Colleges, Geneva, New York

e-mail: [lee@hws.edu](mailto:lee@hws.edu)

The American legal right to free speech is exceptional, for example, in its treatment of hate speech. “There appears to be a strong international consensus that the principles of freedom of expression are either overridden or irrelevant when what is being expressed is racial, ethnic, or religious hatred,” while “the United States remains steadfastly committed to the opposite view.”<sup>2</sup> American free speech ideas have traditionally been highly influential on other democracies, but the current American exceptionalism shows that that influence has declined.<sup>3</sup> In this paper, I explore part of the theoretical basis of this aspect of American free-speech exceptionalism.

It has been over 15 years since the issue of hate speech was hotly debated at the height of the “culture wars.” But the issue remains salient, for democratic nations are becoming more heterogeneous and, in the face of this increasing diversity, ethnic, racial, and religious tensions have remained a serious problem. Does a person have a moral right (against the government) not to be restricted in the use of hate speech, or is it morally acceptable for the government to restrict hate speech, and, if so, on what basis?

The basic feature of a legal right to free speech or expression is protection from government interference with acts that would otherwise be open to legal restriction due to their harmfulness.<sup>4</sup> Such a right exempts from legal restriction a group of acts that violate the harm principle, which, for some liberals, is the basic principle justifying legal restriction in general. From this perspective, the most obvious moral justification for such a right would be deontological, for example, in terms of a requirement of liberty based on respect for individual autonomy. But a free-speech right has also often been justified on consequentialist grounds, as in John Stuart Mill’s discussion in *On Liberty*. Given the *prima facie* harmfulness of some acts protected by the right, a consequentialist defense must find a broader consequentialist advantage in the legal right, a justification for a second-order constraint on government interference in speech.<sup>5</sup> Such a defense is often expressed by pointing to the consequentialist advantage of the “marketplace of ideas” that that right supports.<sup>6</sup> My focus will be on this sort of consequentialist justification.<sup>7</sup>

---

<sup>2</sup>Schauer, 6, 8. See also, Joshua Cohen, “Freedom of Expression,” *Philosophy and Public Affairs*, Vol. 22, No. 3 (Summer, 1993): 208. But the Danish cartoon controversy suggests that some Western democracies are willing to permit at least some forms of hate speech.

<sup>3</sup>Schauer, 30–32.

<sup>4</sup>Thomas Scanlon, “A Theory of Freedom of Expression,” *Philosophy and Public Affairs*, Vol. 1, No. 2 (Winter, 1972): 204–226. It is important to note that the legal right of free speech is a right against the government, that is, as Scanlon observes, it is a matter of legitimate legal authority.

<sup>5</sup>Schauer, 28.

<sup>6</sup>There are also other bases for a consequentialist argument for a legal right to free speech, such as claims that this right would allow individuals to better achieve self-realization, provide a necessary condition for a successful democracy, or provide a way to keep the government honest.

<sup>7</sup>But it should be recognized that an argument against hate speech restrictions based on a principle of liberty or autonomy would not settle the matter from a deontological perspective. Other principles may shift the conclusion in favor of restrictions. The principle of equality, for example, has figured in debates about hate speech when it is argued that allowing certain cases of hate speech to go unrestricted amounts to the law’s treating members of groups who are the target of the speech as less than equal citizens.

It is a familiar trope to refer to the public arena as a “marketplace of ideas” in order to justify a legal right to free speech. A number of important Supreme Court opinions have made use of it.<sup>8</sup> Justice Oliver Wendell Holmes formally introduced the idea in his dissent in *Abrams vs U.S.*: “the ultimate good desired is better reached by free trade in ideas ... the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>9</sup> The “ultimate good desired” is the discovery of truth and the avoidance of falsehood, and allowing freedom of speech in the marketplace of ideas will maximize our chances of achieving this goal. “The truth can be expected to emerge only when all ideas are free to compete for rational acceptance.”<sup>10</sup> The implicit analogy is, of course, with the economic marketplace, where free competition is said to be the best means to achieve the goal of economic efficiency. Freedom of speech may be likened to the freedom of economic exchange; each creates a marketplace whose operations have outcomes that most increase social value. The marketplace of ideas increases social value by allowing the truth to be more readily attained.

Ronald Coase defends this analogy.<sup>11</sup> Writing (in 1974) when Keynesian regulatory ideas were still most influential on economic policy, he uses the analogy between the two marketplaces to call implicitly into question the extent of economic regulation. He takes issue with the view that “in the market for goods, government regulation is desirable whereas, in the market for ideas, government regulation is undesirable and should be strictly limited.”<sup>12</sup> There is a “paradox” in this view: “government intervention which is so harmful in the one sphere becomes beneficial in the other.”<sup>13</sup> He asserts: “There is, no fundamental difference between these two markets and, in deciding on public policy with regard to them, we need to take that into account.”<sup>14</sup> He concludes that we should be consistent, by either increasing regulation in the marketplace of ideas or lessening it in economic markets. It seems clear that he prefers the latter, though this is suggested rather than asserted.<sup>15</sup> I will adopt Coase’s terms for the two spheres, the *market for goods* (MG) and the *market for ideas* (MI).

---

<sup>8</sup>One commentator notes that the marketplace analogy was used explicitly or implicitly in at least 125 opinions in 97 Supreme Court cases between 1919 and 1995. W. Wat Hopkins, “The Supreme Court Defines the Marketplace of Ideas,” *Journalism and Mass Communications Quarterly*, Vol. 73, No. 1 (Spring, 1996): 41.

<sup>9</sup>*Abrams v. United States*, 250 U.S. 616, 630 (1919).

<sup>10</sup>David Kelley and Roger Donway, “Liberalism and Free Speech,” in *Democracy and Mass Media*, ed. Judith Lichtenberg (New York: Cambridge University Press, 1990), 83.

<sup>11</sup>Ronald Coase, “The Market for Goods and the Market for Ideas,” *The American Economic Review*, Vol. 64, No. 2 (May, 1974): 384.

<sup>12</sup>*Ibid.*, 384.

<sup>13</sup>*Ibid.*, 386. In a bit of *ad hominem*, Coase claims that intellectuals and members of the press support this paradoxical view because ideas are their stock and trade, *Ibid.*, 388.

<sup>14</sup>*Ibid.*, 389. Coase is careful to say that he claims only that each market should be approached in the same way in regard to regulation, not that regulatory policy should necessarily be the same in each.

<sup>15</sup>Ironically, my conclusion will be that we resolve the paradox by following the former path.

But what is the nature of the analogy to which Coase refers between the MG and the MI? The analogy may have surface plausibility, but its details are unclear. Wat Hopkins complains that despite all the references to the analogy in Supreme Court decisions, the “opinions are virtually devoid of definitions of the term [marketplace of ideas] or explanations as to how the model works.”<sup>16</sup> What is the analogical argument? Consider another famous analogical argument, the teleological argument for the existence of God, also called the Design Argument. In one version, a watch and the universe are said to share the property of possessing regularity and mechanism. In the case of the watch, this property entails that it has an intelligent designer. The conclusion is that the universe also has an intelligent designer. A brief reflection on this argument can tell us something about the nature and value of analogical arguments in general. This argument has historically been very controversial, and it may not have convinced many to believe in God’s existence. But it has been fruitful in suggesting factors that need to be addressed. In themselves, analogical arguments are generally weak, but they can be valuable in calling our attention to features of a subject we might otherwise overlook or the import of which we might not otherwise appreciate.

On this model, the analogical argument for freedom in MI may be presented as follows. First, the primary subject (MI) is *relevantly* like the analogue (MG). Second, both MI and MG have a certain characteristic *y*. Third, as a result of its having characteristic *y*, MG has an additional characteristic *x*. The conclusion is that the MI has characteristic *x* as well. What are *x* and *y*? The conclusion of the argument is that the government should not interfere in MI, so we could take *x* to be: “functions best without government interference.” But what is *y*? Both MG and MI involve a kind of *competition*. One way to formulate *y* is: “the characteristic of involving a competition for choice by individuals among a set of alternatives offered by other individuals, with positive or negative aggregate social consequences depending on which choices are made.” The general idea is that MG involves a competition for individuals’ choices among goods and services, as MI involves a competition for individuals’ choices among ideas, and that there will be positive or negative overall consequences for society depending on how the aggregate choices come out, which ones “win” the competition. So, the argument is:

(P1) MI is relevantly like MG.

(P2) MI and MG both involve a competition for choice by individuals (consumers, recipients) who are offered items (goods and services, ideas) among a set of alternatives offered by other individuals (producers, originators<sup>17</sup>), with positive or negative aggregate social consequences depending on which choices are made.

(P3) Because it involves such a competition, MG functions best (maximizes positive aggregate social consequences) without government interference.

(C) Therefore, MI also functions best without government interference.

---

<sup>16</sup>Hopkins, 42.

<sup>17</sup>I will understand the category of producer or originator to include “middlepersons,” that is, those who convey the goods or ideas from the producer or originator to the consumer or recipient.

What is supposed to count, for MI, as *best functioning*? If maximizing preference satisfaction is the goal of MG, what is the goal of MI? The classic answer, as elaborated by Mill, is that the goal of allowing unhindered freedom of speech is to attain the truth or, we might say, to maximize the likelihood of attaining the truth (as no process can guarantee its attainment). Allowing unhindered freedom of speech is most efficient at achieving this goal. MI functions best when it does this. So, the conclusion is that MI maximizes the likelihood of attaining the truth when the government does not interfere, as MG maximizes preference satisfaction when left alone by the government. Despite some doubts about whether this should be seen as the goal of MI, I will, with Mill, assume for the moment that it is.<sup>18</sup>

It is important to note that the labels “originator” and “recipient” of ideas in MI, analogous to “producer” and “consumer” of goods and services in MG, are misleading in at least two respects. First, as with producers and consumers, there is not one group of people who originate ideas and another group who receives them. Everyone does both – we all both originate and receive ideas, as we all both produce and consume goods and services. Second, the terms “originator” and “recipient” mask the dialogical nature of the exchange in ideas. Ideas are developed in exchange; they do not burst forth fully formed from the forehead of one individual. So, for example, in passing on an idea, a recipient will often also be an originator, altering the idea and often making it better.

To evaluate the soundness of this argument, we need to consider the acceptability of the premises. (The inclusion of “relevantly” in (P1) is meant to guarantee the argument’s validity.) (1) Is the first premise, which claims that the analogy is appropriate, given what the argument from it attempts to establish, acceptable? (2) In (P2), do MI and MG have the characteristic attributed to them? (3) Does MG function in the way that (P3) asserts?

1. To determine whether MI is relevantly like MG, we must ask what (P2) means regarding MI. What is a “competition” of ideas, and how is it connected with the search for truth? What is the nature of the “choice” involved in the competition, and what is the role of originators and recipients of ideas? Here is one answer. Ideas get communicated by originators to recipients through speech, broadly understood. Recipients encounter different ideas competing for their acceptance or allegiance. Recipients choose among the ideas they encounter some over others by deciding which better represent the truth, and, in doing so, come to believe them. They then communicate the chosen ideas to others in their speech. One could say, then, that some ideas “win” the competition by being spread more widely among members of the community through speech (and coming to be believed by greater numbers of those members) than competing ideas. If the ideas that “win” are more likely to be true, this will have positive aggregate social consequences, presumably because true ideas lead to more successful action in the world.

---

<sup>18</sup>Mill was sensitive to the need to avoid interference in speech not just from government, but also from public opinion. In addition to free speech’s being the surest path to truth, Mill also thought that it promoted individual development.

So, what (P1) asserts is that this competition among ideas in MI is sufficiently similar to the competition among goods and services in MG that a claim about the implications of the competition in MG applies to MI. I will consider two arguments denying that competition in the two cases is sufficiently similar.

The first argument against (P1) claims that being a participant in the competition among goods and services is very different from being a participant in the competition among ideas. Jill Gordon denies that Mill would accept the analogy. She claims that the analogy reflects the view “that market behavior represents paradigmatically the kind of freedom to which we aspire, so speech and action must be free ... in the same manner.” In her view, “the market metaphor connotes a dog-eat-dog world in which the public good can scarcely find a place among competing self-interested beings,” and she finds Mill to be more interested in cooperation than in competition.<sup>19</sup> This is related to a point of Mark Sagoff’s, that there is an important distinction between *preferences* and *values*.<sup>20</sup> The MG is for maximizing the preference satisfaction of consumers, and the MI, especially the realm of political discourse, is for advancing the values of citizens. A similar idea is offered by Cass Sunstein, who warns of the dangers of taking political sovereignty for consumer sovereignty.<sup>21</sup>

As a point of logic, dissimilarity between MG and MI does not by itself show the analogy to be faulty. (After all, the universe is much larger than a watch.) If competition plays the same role in MI as it does in MG, in the way the argument asserts, the fact that the participants in each are (or should be) operating under different capacities (satisfying preferences for MG participants and advancing social values for MI participants) does not, without more, show the analogy inapplicable. There is legitimate concern about the sad state of MI in contemporary society, where, due in part to the role of media in conflating the public sphere and the economic market, the MI seems increasingly driven by manipulated preferences.<sup>22</sup> But this historical contingency does not by itself show the analogy to be faulty.

The second argument against (P1) points to certain problematic assumptions that seem required to support the claim that MI has the features the analogy requires. Edwin Baker sets out three assumptions he claims are necessary for MI to promote the attaining of the truth.<sup>23</sup> First, truth is objective and discoverable. Second, people are basically rational, in that the contingency of their individual histories does not control how they perceive the world and they are able to sort through the clutter of messages to perceive the truth claims therein. Third, the discovery of the truth is desirable, in that it is the strongest basis for action, and it resolves value conflicts.

---

<sup>19</sup>Jill Gordon, “John Stuart Mill and the ‘Marketplace of Ideas,’” *Social Theory and Practice*, Vol. 23, No. 2 (Summer, 1997): 235, 246.

<sup>20</sup>Mark Sagoff, “Values and Preferences,” *Ethics*, Vol. 96, No. 2 (Jan., 1986): 301.

<sup>21</sup>Cass Sunstein, “The Future of Free Speech,” *The Little Magazine*, Vol. 2, No. 2 (March–April 2001): 4.

<sup>22</sup>For a discussion of the harmful role of the media in the public sphere, see Owen Fiss, “Why the State,” in *Democracy and Mass Media*, 136. Some see in the internet a counter-trend.

<sup>23</sup>C. Edwin Baker, *Human Liberty and Freedom of Speech* (New York: Oxford University Press, 1992), 6–7.

Baker argues these assumptions fail.<sup>24</sup> First, what passes for truth in public discussion is not objective, because it tends to favor the interests of some over others. Second, people are often not rational in that their feelings and ideological tendencies determine their choice of ideas, and they are susceptible to rhetoric and manipulation. Third, there is no truth available through public discussion that can resolve all value conflicts, since their resolution falsely presupposes that people's real interests do not conflict. This contrasts with the plausibility of the analogous assumptions in the case of MG. First, that people have certain preferences is objective and discoverable, which is why preference-satisfaction forms of utilitarianism replaced hedonistic forms.<sup>25</sup> Second, people may not be rational about the preferences they hold, but they are generally rational about satisfying the preferences they in fact have.<sup>26</sup> Third, individual and group conflicts insure that some preferences will be left unsatisfied, but this fact does not cast into doubt the idea of maximizing preference satisfaction. It seems then that the two markets are not relevantly alike.

But this argument is too quick. Baker's criticism of the first assumption depends largely on the significant role that values play in discussions in MI, and normative claims are where the greatest question arises regarding objectivity. This is close to his position in criticism of the third assumption, so I will respond to these together. The MI can work in the face of irresolvable value conflicts because the truth it can yield may be simply how most effectively to get along in the face of those conflicts. In regard to Baker's criticism of the second assumption, the analogy does not require that participants in MI are rational all of the time, only some of the time, for MI does not guarantee attainment of the truth, but only that the likelihood of its attainment will be greater. So far at least, (P1) seems to be acceptable.

2. What about (P2), which asserts that both MG and MI are forms of competition? Both involve individuals (consumers, recipients) choosing among a set of alternatives, itself a result of choices by the other individuals (producers, originators), resulting in some of these alternatives being more frequently chosen than others and so "winning" the competition. Further, there are aggregate social consequences, positive or negative, depending on which of the alternatives are the winners. In the case of MG, goods and services are the alternatives, and *being chosen* amounts to changing hands from producers to consumers. In the case of MI, ideas are the alternatives, but what *being chosen* means may be more complicated. Roughly, we may say that for ideas to be chosen in MI means their being accepted as true or valuable by more of the choosers than competing ideas. Under this, or similar, explication, (P2) seems to be acceptable.

3. The third premise claims that, because MG involves the sort of competition indicated in (P2), MG functions best without government interference.

---

<sup>24</sup>Ibid., 12–16.

<sup>25</sup>The preferences themselves are, of course, subjective rather than objective.

<sup>26</sup>There are however doubts based on historical evidence about whether free market choices do maximize preference satisfaction. One example is the market victory of the VHS format over the Betamax format for videotaping, where the latter seems to clearly have been the superior system.

Here, “functioning best” means resulting in choices that maximize aggregate preference satisfaction. This is the familiar point about the economic efficiency of the market. When producers and consumers freely choose what to produce and consume, the resulting competition among goods and services leads to choices that maximize preference satisfaction. The market could, of course, be understood as having other goals, with the resulting different forms of “best functioning.” For example, the goal might be understood to be the satisfaction of needs rather than wants or preferences, but I will set this possibility aside.

Is (P3) acceptable? Does the MG function best without government interference? Even on a *laissez-faire* model, some government involvement is required to create the conditions for a free market. The market itself is a form of legal constraint. The government must, for example, sanction force and fraud through the criminal law to insure that economic choices are free, and it must provide mechanisms in civil law to determine and enforce judgments when individuals are harmed by others through market activity. Though this sort of *involvement*, which is constitutive of the market, should perhaps not be seen as *interference* of the sort that *laissez-faire* proponents proscribe, this bare-bones government involvement is not sufficient. Regulative as well as constitutive rules are needed. There are, in the market, sources of friction, market failures, inevitable *imperfections* or impediments to efficiency. There are, for example, negative externalities, cases where market transactions impose unwanted harm on individuals not consenting to or directly participating in the transactions that the tort law is insufficient to deal with. Such harm undercuts aggregate preference satisfaction.<sup>27</sup>

So, the government must interfere (or interfere further) in the market to insure higher levels of preference satisfaction. For example, the government may take action against producer monopolies in some areas and allow regulated producer monopolies in others; it may subsidize the growth of small businesses or certain industries; it may enact tariffs to protect producers; it may monitor certain industries for worker safety and quality of production; it may engage in consumer education; and so forth. Many of these involvements are understood as efforts to “mimic the market,” to produce outcomes it is thought that the market would have produced in the absence of the imperfections, and so will both interfere with the choices of producers and consumers *and* help to maximize preference satisfaction. So (P3) must be recast.

(P3') As a result of its involving a competition for choices by individuals among a set of alternatives offered by other individuals, with positive or negative aggregate social consequences depending on which choices are made, MG functions best (meaning, maximizes preference satisfaction) only through some specific forms of government interference.

*Laissez-faire* simply does not cut the mustard. As a result of these changes in (P3), the conclusion needs to be reformulated if the argument is to remain valid.

---

<sup>27</sup> There are other problems as well, such as imperfections revealed by the public goods problem, the problem of imperfect information (beyond that caused by fraud), high transaction costs, producer monopolies, and high barriers to entering the market.

(C') Therefore, MI also functions best only through some specific forms of government interference.

So, the analogy between MI and MG turns out to support some government interference in MI.

But this seems to be a trivial result. We all know that some government interference in MI is justified, if only to include the restriction of shouting “fire” in a crowded theatre. In particular, the new argument says nothing so far about the legitimacy of hate-speech restrictions. But let us see if there is anything more interesting and more to the point to be wrung from this analogy.

In a discussion of the internal conflicts faced today by many ethnically diverse newly-democratizing states, Jack Snyder and Karen Ballentine argue that the recommendation of “unconditional freedom of speech is a dubious remedy.”

Just as economic competition produces socially beneficial results only in a well-institutionalized marketplace, where monopolies and false advertising are counteracted, so too increased debate in the political marketplace leads to better outcomes only when there are mechanisms to correct market imperfections.<sup>28</sup>

This is instructive because it suggests a rationale for restrictions on hate speech. Hate speech is a kind of speech likely to inflame the ethnic conflicts, undermining democracy, so that complete liberalization may be counterproductive.

Returning to the analogy, can the comparison between MG and MI tell us something about the specific government interferences in MI that might be acceptable? In comparing MG and MI, Coase asserts that “the case for government intervention in the market for ideas is much stronger than it is, in general, in the market for goods,” and he suggests that one of the bases of interference in MI is the same as in MG, namely, “when there exist what are commonly referred to as neighborhood or spillover effects, or ... ‘externalities’.”<sup>29</sup> Perhaps the idea of hate speech restrictions can be tied to a form of negative externality in the MI. To make the case for this, however, it is important to reflect further on the goals of speech in MI.

It may be better to think of there being not a single MI, but a number of MIs. In adjudicating free speech cases, Hopkins notes, “The [Supreme] Court, certainly, has identified a conglomerate of marketplaces, each of which possesses its own parameters, dynamics, and audience.”<sup>30</sup> The distinction among the MIs is partially defined by the differing goals each of them has. To appropriate an insight of Wittgenstein’s, we do different things with language, so the goals of language use will vary from one area to another. For example, one might say that the goal of *commercial speech* is persuasion, rather than the attainment of truth, and this, as some commentators suggest, would open up commercial speech to a higher level of permissible restrictions than other MIs.<sup>31</sup> On the other hand, *scientific speech* is

<sup>28</sup>Jack Snyder and Karen Ballentine, “Nationalism and the Marketplace of Ideas,” *International Security*, Vol. 21, No. 2 (Autumn, 1996): 6.

<sup>29</sup>Coase, 389.

<sup>30</sup>Hopkins, 45.

<sup>31</sup>See, for example, Baker, *Human Liberty and Freedom of Speech*, 197–206.

probably the clearest case where the goal of the enterprise is the attainment of truth, and where restrictions on speech would be counterproductive.<sup>32</sup> So, generally, different regulatory regimes would be permissible in the case of different MIs. The goals, directly or indirectly, help to provide an answer to the question of what interferences are acceptable.

The goal of the MI defines what counts as a negative externality, and thus what may count as a permissible interference. A particular outcome of an activity is a negative externality only in relation to the goal of the activity in which it occurs. In MG, indirect harm caused by economic transactions is a negative externality, and thus a possible opening to legitimate interference, because such harm undermines the goal of maximizing preference satisfaction. There may be value in the government stepping in to attempt to mimic the market. So, the questions are: (1) what is hate speech and what is the MI in which it occurs; (2) what is the goal proper to that particular MI; and (3) would consequences of hate speech count as negative externalities in that area?

1. Hate speech, as the term is normally understood, may refer to four different kinds of language use: (a) racial, ethnic, or religious epithets; (b) demonstrably false empirical claims about racial, ethnic, or religious groups (such as Holocaust denial); (c) promotion of or incitement to racial, ethnic, or religious hatred or violence; and (d) the creation of a hostile social environment in regard to gender, racial, ethnic, or religious categories.<sup>33</sup> These uses seem to have in common a tendency to create or reinforce social hierarchies, especially, to keep members of groups low on such hierarchies “in their place.” Characterizing hate speech as speech that tends to create or reinforce social hierarchies has two virtues. First, it takes away some of the problematic vagueness of the term and, second, it sets aside as extraneous issues such as concern with the psychological harm it is said to cause. Understood in this way, the MI in which hate speech occurs is *political speech*, public speech designed to influence opinions and sway decisions in regard to matters of social or public policy, broadly understood.<sup>34</sup> The idea is that hate speech is used, explicitly or implicitly, to promote an agenda in public or social policy as this involves the hierarchical positioning of one such group over another. This could include, for example, efforts to bully members of some groups into submission or silence, thereby limiting their influence in the public debate. In any case, this form of speech expressing hatred of or directing hatred at social groups seems to be the most serious candidate for legal restriction.

---

<sup>32</sup>The chief goal of the enterprise need not be that of its individual participants, which may often be career advancement, for example. Moreover, there are clearly restrictions on scientific speech seen as necessary for achieving the goal of the enterprise (though mostly imposed professionally and not by government), but these restrictions are probably constitutive rather than regulative, as discussed earlier in regard to MG.

<sup>33</sup>Schauer, 5–6.

<sup>34</sup>Some commentators, such as Alexander Meiklejohn, argue that political speech is the only form of expression protected by the first amendment, but this is not the only area where the moral acceptability of speech restrictions arises. See Meiklejohn, *Free Speech and Its Relation to Self Government* (New York: Harper Brothers, 1948).

2. What is the goal proper to political speech? It is not, I believe, the attainment of truth in the same sense that this is the goal of scientific speech. The prominent role of values in political speech precludes the attainment of a truth acceptable to all. The point is not that value claims are merely subjective, but rather that, under some idea of “reasonable pluralism,” there may be little prospect of resolving differences in values among participants in the community.<sup>35</sup> As a result, as suggested earlier, the truth that political speech seeks is the truth about the best way to get along in the face of the value conflicts. But, to borrow a distinction from Rawls, this is not a truth simply about a *modus vivendi*, that is, a way of proceeding that manages for a time to satisfy all of the participants’ self-interest. Rather, it is a truth with a minimal moral content, specifically, that all members of the community are to be regarded as equal participants in political speech exchanges. The source of this moral content is the democratic idea of all the members of a society being equal participants in the process of self-governance.<sup>36</sup> As a result, the goal of political speech, borrowing a phrase from Sunstein, is that of “producing a deliberative democracy among political equals.”<sup>37</sup>

3. It seems clear that some of the consequences of hate speech count as negative externalities under the goal proper to political speech, so understood. If hate speech were carefully defined as speech that explicitly treats other participants in the political speech community as less than equal, it would undermine the goal of political speech, and so count as a negative externality. For example, as many have pointed out, racial, ethnic, or religious epithets used in public communication normally express the view that members of the target group are in some sense inferior to members of other groups, less than full and equal participants in public life.<sup>38</sup> Such an effect, counting against the goal of political speech, would be a negative externality, the avoidance of which might justify government interference in political speech. This argument does not focus on all the harm hate speech does, which includes a variety of forms of suffering of those discriminated against. Instead its focus is on a particular sort of harm, that defined in terms of its undermining the goal of political speech.<sup>39</sup>

---

<sup>35</sup>“Reasonable pluralism” is a Rawlsian idea. See also Cohen, 223–224.

<sup>36</sup>There is, of course, a large issue involved in justifying this moralized departure, however minimal, from a *modus vivendi*.

<sup>37</sup>Cass Sunstein, “Free Speech Now.” *The University of Chicago Law Review*, Vol. 59, No. 1 (Winter, 1992): 255–315.

<sup>38</sup>For a discussion of this, based on the theory of speech acts, see Andrew Altman, “Liberalism and Campus Hate Speech: A Philosophical Examination,” *Ethics*, Vol. 103, No. 2 (Jan., 1993): 302. Note that this analysis would not apply to all insults because the idea of a social hierarchy of groups is not relevant to many of them, and it may not apply equally to the four types of hate speech mentioned earlier. It may, for example, apply differently to epithets than to reasoned empirical claims about group inferiority.

<sup>39</sup>Thus, this argument departs from a purely utilitarian accounting of hate speech, since not all harms are relevant; in contrast, in the MG, all harms are relevant because the goal of MG is identical with the end sought by the utilitarian, the maximization of preference satisfaction.

Jeremy Waldron points out that historically in the United States, despite the First Amendment, free speech was not recognized as an important value (think of the Alien and Sedition Acts) until it became clear that free speech did not threaten the state, that the state was not so fragile as to shrivel in the face of open criticism. What is now fragile, he suggests, is the recent achievement of “the position of minority groups as equal members of a multiracial, multiethnic, or religiously pluralistic society,” and this may justify restriction of hate speech, which threatens that achievement.<sup>40</sup> This achievement is part of the goal of political speech, as I have characterized it.

This conclusion is only *prima facie*. Even assuming the soundness of the above argument, there are other morally relevant factors to be considered, which may limit the acceptability of government restriction of hate speech. These include the tendency of government to mishandle power ceded to it. Even democratic governments prove often incompetent and occasionally maleficent in its exercise of power, or simply unwilling or unable to challenge an unequal status quo. In this regard, Scanlon discusses the role of “linking empirical beliefs” in a theory of freedom of expression. One of these beliefs is that “governments, whether elected or not, have a settled tendency to try to silence their critics.”<sup>41</sup>

An account of hate speech restriction must include a discussion of the risk of government’s misusing or abusing its power, were it permitted to be restrictive. There are some ways to limit this risk, for example, by careful drafting of the relevant legislation.<sup>42</sup> In addition, there are alternative means by which a government may seek to reduce imperfections in MI, and some may be less risky than others in terms of the dangers they pose. For example, as often noted, the government’s having the power to regulate speech *content* is more dangerous than its having the power to regulate speech *form*, especially in the realm of political speech.<sup>43</sup> Indeed, some forms of formal, content-neutral regulation of political speech (such as requiring permits for political demonstrations or facilitating the distribution of information on public issues) are generally thought unproblematic from a free-speech perspective. But it may be that more than formal regulation is required.<sup>44</sup> As with any area of public policy that involves power given to the government, we must consider the harm to be avoided through exercise of the power against reasonable (nonparanoid) expectations about the risk of government misuse or abuse of that power. What I hope

---

<sup>40</sup>Jeremy Waldron, “Free Speech and the Menace of Hysteria,” *New York Review of Books*, Vol. 55, No. 9 (May 29, 2008): 44.

<sup>41</sup>Thomas Scanlon, “Content Regulation Reconsidered,” in *Democracy and the Mass Media*, 337.

<sup>42</sup>See on this Waldron’s response to a letter by Perry Link, who criticized the above-referenced article on the grounds, “What to do About Hate Speech,” *New York Review of Books*, Vol. 55, No. 12 (July 17, 2008): 52.

<sup>43</sup>For a discussion of these points, see Cohen, 213–216.

<sup>44</sup>The attempt to provide a content-neutral basis for hate speech regulation is part of what is behind the attempt to justify hate speech restrictions by putting them under the Court’s categories of “fighting words” or “harassment,” which are presumed to be content-neutral and through which some speech restrictions may be allowed.

to have shown is that there is some important harm, defined in terms of the goal of political speech, to be avoided.<sup>45</sup>

Thus, even though my argument does not establish the all-things-considered justifiability of restrictions on hate speech, the conclusion that there is some good reason in favor of such restriction is important. The issue is morally complex, however, and this complexity may be represented by an observation similar to one made by Mill in the first chapter of *On Liberty*. Mill observed a sort of equivocation historically revealed in the term “liberty.” In the conflict of liberty and authority, liberty originally entailed self-government, freedom from authoritarian rule, but then, with the achievement of self-government, it came to entail restrictions on that government itself, as in the avoidance of the tyranny of the majority. Similarly, we might say that “tolerance” or “diversity” originally entailed freedom of speech, as this was understood as tolerance for a diversity of ideas. But with the substantial achievement of free speech, we may now come to realize that free speech can undermine or interfere with the tolerance and diversity of society itself, which may then entail acceptable restrictions on free speech itself.

---

<sup>45</sup>On this point, see Waldron, “Free Speech and the Menace of Hysteria.”



<http://www.springer.com/978-90-481-8998-4>

Freedom of Expression in a Diverse World

Golash, D. (Ed.)

2010, X, 220 p., Hardcover

ISBN: 978-90-481-8998-4