

University of Nebraska - Lincoln

DigitalCommons@University of Nebraska - Lincoln

URCA: The NCHC Journal of Undergraduate
Research & Creative Activity

National Collegiate Honors Council

2018

Free to Hate: Can We Justify Curbing Hateful Speech?

Logan Drake
University of Iowa

Follow this and additional works at: <http://digitalcommons.unl.edu/ureca>

 Part of the [Educational Methods Commons](#), [Gifted Education Commons](#), and the [Higher Education Commons](#)

Drake, Logan, "Free to Hate: Can We Justify Curbing Hateful Speech?" (2018). *URCA: The NCHC Journal of Undergraduate Research & Creative Activity*. 3.

<http://digitalcommons.unl.edu/ureca/3>

This Article is brought to you for free and open access by the National Collegiate Honors Council at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in URCA: The NCHC Journal of Undergraduate Research & Creative Activity by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

Free to Hate: Can We Justify Curbing Hateful Speech?

Logan Drake

University of Iowa

Introduction

Hate speech and free speech, and the relationship between the two, have been prominent in the news lately, especially regarding speech on college campuses. It seems to me, however, that the debate usually lacks nuance. One side is portrayed as being free speech absolutists, while the other is seen as creating rules and restrictions that send us down a road towards totalitarianism and tyranny. In reality, however, very few people actually desire either of these extremes. No one wants tyrannical totalitarianism, and nearly everyone will admit that there needs to be, at the very least, restrictions on who can speak in what order, to avoid everyone shouting at once. Free speech, like all rights, must be balanced against other, sometimes conflicting, rights. Whether the right to free speech wins out over other rights and values will depend on the context. After all, there is bound to be less free speech in the military, where order and hierarchy are often more prized than free thought. On a college campus, however, the freedom to discuss and debate ideas is prized much more highly¹.

What principle or principles, then, should be used to determine when free speech wins out over other rights or how other rights and the right to free speech interact? A useful case study to analyze these questions is that of hate speech. Free speech sounds like a great idea until it goes “too far” and people begin shouting hateful slurs at one another (similar instances seem to pop up with almost any freedom taken far enough). But is hate speech harmful enough to justify encroachments on the nearly sacred right to free speech? Here I will explore several principles that seek to determine when hate speech can be justifiably limited, sacrificing the right to free speech for some other value or values. I conclude that there are principled reasons to justifiably limit some, but not all, instances of hate speech.

What Is Hate Speech?

First, it is important to note that “speech” here can generally be understood to mean “expression.” I am not simply talking about the freedom to speak, but the freedom to express oneself generally. The freedom of speech is understood to encompass non-speech expressions of one’s self or identity, including displaying yard signs or wearing certain types of clothing to express one’s culture or identity.

Hate speech generally is defined as “speech that is intended to insult, offend, or intimidate a person because of some trait (race, religion, sexual orientation, national origin, or disability)”². In “Does freedom of speech include hate speech?” Caleb Yong provides us with

¹ Van Mill, David. Freedom of Speech. <https://plato.stanford.edu/archives/win2017/entries/freedom-speech/>

² Merriam-Webster

four more specific and useful categories of hate speech: (i) targeted vilification, (ii) diffuse vilification, (iii) organized political advocacy for exclusionary and/or eliminationist policies, and (iv) other assertions of fact or value which constitute an adverse judgment on an identifiable group. For my purposes, I will focus on (i), (ii), and (iv), which cover much of what we typically think of when we think of hate speech.

The first two categories involve “vilification,” which Yong defines as speech whose “dominant intention is to wound, insult, or intimidate the audience, motivated by hostility towards or contempt for the audience’s... identity.”³ Targeted vilification is vilificatory speech which is directed at a specific individual or small group of individuals. Targeted vilification often involves choosing words for their potential to wound, instead of choosing words for their ability to best communicate a message. Targeted vilification can include slurs, but also, as Yong puts it, “imperatives like ‘Go home!’, or assertions like ‘You [epithet] are everywhere’, which seem to embed some evaluative opinion favoring the exclusion of racial and religious minorities.”⁴ Diffuse vilification, on the other hand, is directed at either a partly sympathetic public audience or at a wide and indeterminate audience. This can include examples similar to those above, such as saying “[epithet] are everywhere” or using slurs in conversation, while not directing them at a particular individual. Diffuse vilification can also be expressed without speech, as in the infamous Nazi march in Skokie, Illinois in which members of the Nazi Party intimidated the city’s Jewish population by making the presence of their infamously anti-Semitic party known.

The final category, “assertions of fact or value which constitute an adverse judgment on an identifiable group,” represents what I think of as “toned down” or “cleaned up” hate speech. Instead of shouting racial slurs at an individual or performing a mock slave auction while in blackface⁵ (examples of targeted and diffuse vilification), assertions of fact or value provide more “civil” arguments and reasoning that may get at the same end goal. Instead of shouting at one particular immigrant to go home, a person may assert in political discussions that immigrants are taking jobs that should go to natural-born citizens, or that certain racial groups have different values that are not compatible with local values.

In some cases, the speech may not strictly qualify as hate speech under the “intends to insult or offend” definition; in many of these cases the intention can be disputed or may not involve a direct intention to insult. I think it is important to include this category of speech in these discussions, however, as this category captures much of the most hotly debated contemporary free speech issues. The assertions of fact or value category reminds me most clearly of author Charles Murray, who has written on numerous occasions about the distribution of IQ scores across races. He argues that, on average, black people have lower IQs than white or Asian people and concludes that various immigration, social welfare, affirmative action, and wealth-redistribution policies are counter-productive, as they waste resources trying to bring up people who are (on average) inherently less intelligent.

³ Yong, Caleb. Does freedom of speech include hate speech? Page 13 link.springer.com/article/10.1007%2Fs11158-011-9158-y

⁴ Yong, page 15

⁵ As some white students did at the University of Wisconsin in the 1980s, see [nytimes.com/1988/10/26/us/education-inquiry-on-fraternity-slave-auction.html](https://www.nytimes.com/1988/10/26/us/education-inquiry-on-fraternity-slave-auction.html)

Murray's writings are based on scientific⁶ data collection and the way he discusses his data and conclusions is civil, with no apparent intention to offend or attack particular groups. Regardless, the conclusions he draws are often in line with the sorts of people who throw around *less* civil arguments and participate in both targeted and diffuse vilification. Many have accused him of simply dressing up more clearly vile forms of hate speech in an effort to make them "friendlier" and less reprehensible. I believe cases of this sort present the most difficult and complicated free speech issues and will return to Murray and general assertion of fact or value cases later on.

Mill's Defense of Free Speech

Before exploring how hate speech might be justifiably limited under a principle of free speech, it is important to see just what the value of a right to free speech is. One of the most cited defenses of free speech comes from John Stuart Mill in *On Liberty*. Mill's argument focuses on the importance of free speech to the *progress* of humanity, which depends on understanding the world as best we can and getting to the best ideas available. Mill believes that free speech is a powerful tool for getting at the best ideas and driving humanity forward. In the "marketplace of ideas," good and bad ideas compete with each other, with the good ideas winning out through debate in virtue of their being better, while bad or outdated ideas are shown to be wrong by better, contradictory ideas.

Mill points out that an opinion or idea can be either true or false, and argues that, either way, there is value in allowing the idea to be freely spoken. If an opinion is true, there is obviously value in not limiting the communication of the idea, so it can become more well-known and drive humanity forward. And if an opinion is false, Mill argues that it can help validate true opinions, as a true idea seems more believable when it is compared to other false ideas that do not work, or do not work as well as the true idea. Mill argues that the free expression of false ideas allows us to understand true opinions as a *living* truth instead of a simple dead dogma; we can feel and really believe the truth instead of just blindly accepting ideas as true, as we would need to do if false ideas were somehow banned from being expressed.

Mill also presents several objections to the principle of free speech and responds to them. I will summarize three such objections and his responses here. (i) Would there be value in limiting extreme views? The "extremeness" of a view is subjective, Mill argues, and your ideas have a big problem if they cannot be defended against extreme views. (ii) The truth will prevail eventually, regardless of the existence of a free marketplace of ideas. This may be true, Mill says, but relying on this principle will inevitably slow the progress of humanity. The principle of free speech is still the best and fastest way to drive humanity forward. (iii) Does this principle provide an incentive to always have disagreement? This seems messy and potentially harmful. It may be messy, Mill replies, but there is a value to disagreement and a diversity of views. A large set of views allows us to most quickly get at the best ideas. Plus, there is usually at least some truth in most views. This final note brings us to yet another reason for supporting free speech: every view has at least a sliver of truth. Limiting or preventing any view from being

⁶ Some, myself included, question just how scientific some of the data he uses is, but it is nevertheless much *more* scientific than shouting "immigrants take jobs" or "go home!"

communicated is bound to limit humanity's access to true ideas, and slow progress in the process.

Mill's Harm Principle and Hate Speech

Mill, however, is not quite a free speech absolutist, though he does come much closer than many other philosophers. He proposes "one simple principle" to determine when one's liberty, including one's right to free speech, may be infringed. The principle is known as the harm principle, and he argues that it provides the only justification for interfering with the right to free speech. The harm principle states that the sole end for which individuals or society can put limits on a person's liberty (including free speech) is self-protection. Put another way, the harm principle says that the only justifiable interference with a person's liberty is to prevent the direct, serious harm of another person.

The harm principle provides rather strict criteria for limiting hate speech, resulting in almost no limiting of speech. Most think Mill would agree with limits on speech that presents a clear and present danger, such as the "no shouting fire in a crowded theater" restriction in the US. Additionally, Mill does consider emotional harm to be real harm, and because of this the harm principle could conceivably limit *some* instances of targeted vilification, the particularly threatening sorts that create real and serious harm to the person being immediately vilified; Yong calls it a "psychic assault" similar to (or worse than, in some cases, I would argue) a slap in the face. If the harm is serious enough, it seems as if we could use the harm principle to limit some instances of targeted vilification.

Diffuse vilification and assertions of fact or value would usually *not* be able to be limited under the harm principle. Even though these actions may ultimately produce harm, they would do so in an indirect way, while the harm principle requires a direct connection between the speech act and the harm. A select few instances of diffuse vilification may fall under the "shouting fire in a crowded theater" exception and incite immediate violence, but this would be a minority of diffuse vilification cases. The harm principle gives us a very limited tool for limiting hate speech, justifiably limiting only a small subset of instances of targeted vilification and an even smaller subset of diffuse vilification, while placing no limits on assertions of fact or value.

Feinberg's Offense Principle and Hate Speech

Joel Feinberg has presented another principle for limiting liberty which is relevant to free speech discussions: the offense principle. In some ways we can see the offense principle as "lowering the bar" of the harm principle, allowing less harmful acts to fall under its jurisdiction. Feinberg himself is adamant that his offense principle ranges over *offenses*, which are a completely different sort of thing from harms, but I believe it makes sense to think of offenses as a (usually) lesser form of harm. The principle reads that "it is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offense...to persons other than the actor."⁷ That is to say, if a limit on some speech act could realistically be expected to prevent a serious offense, that is a good reason to limit that speech act. Again, this principle always needs to be balanced against other rights and values, so it does not hold that it is

⁷ Van Mill, David. Freedom of Speech.

always justified to prevent any offense. Like the harm principle, the offense principle does not seek to prevent all offenses, but only serious offenses, and only when preventing the offense is more valuable than other values that may be preserved by allowing the offense.

The offense principle seems able to justifiably limit more hate speech than the harm principle. Virtually all acts of targeted vilification would fall under the category of “extremely offensive” to the person being targeted, and there would be limited value in the speech beyond the expression of the speaker’s emotional state or feelings about the person being targeted. This expression of feelings seems to me to be of very limited value, especially when there are much more constructive and less offensive means of communicating the same core idea. As Yong puts it, “the targeted nature of this category of speech means that the dominant intention is reasonably construed as an attempt to wound and insult; if there were a real intention to communicate a particular evaluative opinion or political preference, the speaker would not direct the speech at such a narrow audience, still less an audience that is clearly the least likely to be persuaded of that view.”⁸

In addition, many acts of diffuse vilification could also be limited under the offense principle, as the mere statement of such vilificatory comments could easily be quite offensive to the group being vilified, or to anyone who does not agree or approve of the vilification. Again, most forms of diffuse vilification carry comparatively limited value because the intention is to wound or intimidate. It seems then that the interest of limiting offense could often outweigh the value of the offensive speech.

Cases of assertions of fact or value are more difficult to evaluate, as the value of the speech seems greater here. Charles Murray, for example, by appealing to actual data and drawing conclusions from it, is participating in a much more civil and valuable discussion than those shouting racial slurs and demanding the end of affirmative action, even if their stated policy preferences are, in the end, not dissimilar. There is not a one-size-fits-all answer for this topic when it comes to the offense principle. In certain cases, the offense to be prevented will be greater than the value of the speech to be limited, while in others the speech may be valuable and worth protecting and allowing, despite the offense it will bring about. These cases can be and are difficult to adjudicate, but the offense principle at least provides a general tool to analyze the situation. There will be some clear-cut cases where the offense obviously outweighs the speech’s value and vice versa. In other cases, the balance may be up for debate.

Democracy and Hate Speech

A third view on the limiting of hate speech takes a slightly different approach. The view from democracy states that even if speech is not harmful or offensive per se, it can be limited if it is incompatible with democracy. That is, speech that is not directly harmful or offensive to individuals or groups can still be harmful to democracy, which is of great value, and this harm to democracy is grounds for limiting the speech.

David Van Mill puts it this way: “The argument from democracy contends that political speech is essential not only for the legitimacy of the regime, but for providing an environment

⁸ Yong, page 15

where people can develop and exercise their goals, talents, and abilities. If hate speech... curtail[s] the development of such capacities in certain sections of the community, we have an argument, based on reasons used to justify free speech, for prohibition.”⁹

I believe this view can be related back to Mill’s harm principle, though perhaps not in a way that Mill himself would approve. Mill’s idea is that an open and fair marketplace of ideas will result in the best ideas winning out. I see the limiting of hate speech as *enabling* an open and fair marketplace of ideas, not as antithetical to it. Mill may not have specifically stated that the marketplace of ideas needs to be open and fair, but his arguments seem to assume this.

Additionally, even if Mill did not intend this, it seems to me as if the marketplace of ideas argument *only* works when it is open and fair. The value of the marketplace, of good ideas winning out over poorer ideas, works best when there are as many ideas as possible. Mill himself argues that even poor, false ideas should be allowed, as they help validate the truth of the better ideas. With hate speech allowed, the exchange of ideas is not open and fair. Some groups of individuals have their ideas unfairly devalued because of attacks on them and their group membership. This represents a devaluing of an idea in the marketplace because of its *speaker*, not because of the idea’s actual value. Hate speech can lead to individuals and groups being less likely to speak because they feel attacked, endangered, and devalued. It can also lead to others being less likely to fairly listen to and respect the voices of these individuals and groups, as they see and hear the hate speech and internalize it in such a way as to (intentionally or not) devalue speakers from those groups. This is harmful to the devalued individuals, but also to the marketplace of ideas and to democracy, both of which will be deprived of alternative voices and insights, which are valued based on all of Mill’s reasoning above.

Again, the idea here is not that the argument from democracy allows us to limit all devaluing of ideas based on the speaker. I devalue my grandfather’s view on medical care compared to my doctor’s, and I do so based on the speaker. The argument from democracy does not seek to tell my grandfather to never hand out medical advice, however baseless. Instead, the argument from democracy again weighs the value of the speech versus other values, but it points out especially the value of democracy and of the fair and equal marketplace of ideas.

All three categories of hate speech can easily fall under this category. The value of targeted and diffuse vilification is limited and their harms to groups and individuals, and to democracy and the marketplace of ideas, seems large. Even assertions of facts or values seem more clearly relevant here than under the offense or harm principles. Charles Murray’s assertions may be more valuable and productive than targeted and diffuse vilification but can still have the effect of devaluing the perspectives of others and causing harm to democracy and the marketplace of ideas in the process.

The argument from democracy still does not *decisively* conclude that Charles Murray’s assertions specifically should be limited, but I believe it makes the best case of the three examined here. While the issue would still need to be debated, with the exact value and harms more specifically laid out, the argument from democracy could potentially be used to justify the limiting of speech similar to Charles Murray’s work on race and intelligence.

⁹ David Van Mill. Freedom of Speech. <https://plato.stanford.edu/entries/freedom-speech/>

In Defense of Protecting Hate Speech

Before I conclude, it is worth mentioning that there are reasonable arguments in favor of protecting hate speech. These arguments usually do not hold that the content of hate speech itself is valuable, but that the *expression* of hate speech holds value for society. Marcus Schulzke argues this in “The Social Benefits of Protecting Hate Speech and Exposing Sources of Prejudice.” “The protection of hate speech allows those who are hateful to make their beliefs public,” he says, “thereby exposing prejudices that might otherwise be suppressed to evaluation by other members of society.” This transparency, he argues, provides two benefits to society. (i) It cultivates social trust by “making it easier to discover who holds beliefs that should exclude them from positions of authority, responsibility, and influence.” (ii) The open expression of hatred actually helps with efforts to *combat* hatred, by revealing prejudiced members of society who need to be either persuaded or discredited.¹⁰

This view pushes back against the argument from democracy without totally discrediting it. It grants that democracy and the open and fair marketplace of ideas have value, but it points out that allowing hate speech to be evaluated by society out in the open also has value. In my view, this serves to further complicate instances like Charles Murray but leaves the conclusion on instances of targeted and diffuse vilification unchanged. While there is value in the public airing of prejudices and hatred, the harms to the targeted individuals and groups seem greater than this value in instances of targeted and diffuse vilification. With Murray-like cases, this view offers yet another value to be considered in the weighing of the speech’s overall value.

Conclusion

We can conclude from all this that by using a plurality of the harm principle, the offense principle, and the argument from democracy, it is possible to construct a very strong argument to limit the targeted vilification category of hate speech, a strong argument to limit many instances of diffuse vilification, and a reasonable case to sometimes limit assertions of fact or value which constitute an adverse judgment on an identifiable group.

An interesting and relevant distinction that I have not mentioned is how exactly speech is to be limited. The two most considered mechanisms are legal prohibition and social coercion. This distinction is frequently mentioned in many contemporary free speech debates, including that of Charles Murray. The argument goes that while Murray should not be *legally* prohibited from making his arguments, it is perfectly fine for society to protest and ostracize him for doing so. Mill would not be a fan of this line of reasoning. He argued that social coercion can be as tyrannical as a corrupt government, terming it the “tyranny of the majority.” The principles and arguments laid out here can be used as justifications for legal prohibitions, or for social coercion. I believe that there are grounds for having a higher bar for legal prohibitions versus social

¹⁰ Schulzke, Marcus. The Social Benefits of Protecting Hate Speech and Exposing Sources of Prejudice. link.springer.com/article/10.1007%2Fs11158-015-9282-1

coercions (and of course, it is difficult to require everyone in a society to subscribe to one principle to determine when one is justified to use social coercion), but it is also worth remembering Mill's point that the tyranny of the majority can actually be more difficult to undo than government overreach if it goes too far. Legally prohibiting certain sort of speech also introduces the complication of determining what sort of punishment would be appropriate for violating the prohibitions.

Ultimately, I believe the harms of targeted and diffuse vilification are great enough to be limited both socially and legally, backed by all of the views discussed here. The social versus legal distinction only further complicates the analysis of instances of assertions of fact or value. The answer will depend in each case on the value of the speech; on the amount of harm being caused to individuals, groups, democracy and the marketplace of ideas; and on how strictly society wants to limit speech socially and legally. There may very well be a different answer on what to do about Murray-like cases when it comes to legal prohibitions versus social coercion. What I have offered here is certainly not a one-size-fits-all hate speech solution, but such solutions are rarely the best. Instead, I hope that these views are a step towards a more nuanced and productive discussion on free speech and hate speech.