

“HATE SPEECH” AND THE NEED FOR MORAL STANDARDS IN COMMUNICATIVE INTERACTION

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Introduction

As colleges and universities struggle to cope with the numerous differences their students and faculty embody, the problem of “hate speech” — verbal and symbolic expression thought by many to reinforce inequalitarian social relations — has become a central focus of educational scholarship and policy-making. In the most blatant and disturbing cases, hate speech is intended to demean or humiliate those at whom it is directed, typically people of color, lesbians, gays, the mentally or physically challenged, and women, regardless of their race, sexual orientation, ability, and religion. Less blatant examples include careless or insensitive comments, jokes, and other expressions that are painful to those who hear or see them, regardless of the intent of the person by whom they are uttered or written.

In this essay I begin by discussing the currently dominant framework within which the issue of hate speech is being debated. I describe this framework as “legalistic” because it draws heavily on the discourses of the Fourteenth and First Amendments. I then argue that this framework is inadequate to the issue of hate speech and discuss the need for extra-legal standards for communicative interaction. While the question of which specific standards will be adequate to the different communicative relations in which we participate is itself open to debate, on my view, such a debate is potentially more fruitful, educationally, than the one currently underway.

Legalism

We live in a society where, over time, the law has been invoked as a means of regulating an increasingly wide variety of social interactions.¹ The very language with which we conceptualize and discuss our desires, needs, and conflicts is often highly legalistic.² When responding to another’s painful experience, one may lament “there ought to be a law,” as if the existence of a law would have been sufficient to prevent the hurt or, perhaps, at least provide some compensation, once it had been experienced. Typically, appeals to the law are framed in terms of different rights. Smokers appeal to their right to smoke, while non-smokers appeal to their right to clean air. Pro-choice advocates appeal to a woman’s right to privacy, while pro-life advocates appeal to a fetus’s right to life. Concerns about environmental destruction often evoke claims regarding purported rights of plants and animals; these claims run up against counter-claims pertaining to property and employment.

Often, depending on their political preferences, those discussing the issue of hate speech on college campuses align themselves with either the Fourteenth or First Amendment — with either the value of “equal protection” or that of “free speech.” In light of this broader tendency to rely more and more heavily on the law, it is not surprising that hate speech, too, is often conceived legalistically.

On university campuses where hate speech has become an issue, administrators have tried to cope by adopting legalistic policies that define certain speech as “discrimination.” At the University of Michigan, for instance, “discriminatory utterances” are those

based on race, color, creed, religion, national origin, sex, sexual orientation, ancestry, age, marital status, handicap or Vietnam-era status that [have] the effect of creating an intimidating, hostile or offensive environment for academic pursuits, employment, housing, or participation in a university activity.³

Similarly, the University of Pennsylvania proscribes

any behavior, verbal or physical, that stigmatizes or victimizes individuals on the basis of race, ethnic or national origin...and that has the effect of interfering with an individual's academic or work performance; and/or creates an intimidating or offensive academic, living, or work environment.⁴

The University of Wisconsin forbids comments that "demean the [victim's] race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age...or which create an intimidating, hostile, or demeaning environment for education."⁵ At the University of Connecticut, discriminatory speech includes "derogatory names, inappropriately directed laughter, inconsiderate jokes, and conspicuous exclusion [of another student] from conversation."⁶

The rationale for these speech codes is that the school environment, including certain utterances, can be inimical to various educational pursuits and may therefore constitute discrimination under federal and state statutes. According to this rationale, "discrimination" is not limited to the overt blockage of some desired aim through, for example, denying admission or financial aid on the basis of race, sex, etc. Speech, whether verbal or symbolic, can be just as discriminatory when it humiliates and demoralizes individuals who are members of certain marginalized groups, such as those mentioned in the University of Michigan policy. When speech is conceived as potentially discriminatory, words are not viewed as mere verbiage or symbolic expression, they are seen as having a material dimension: words can *wound*.⁷ The harm in hate speech accrues not only to the specific individual to whom it is addressed, but also to all members of his or her group; in this sense speech directed at one person can be viewed as a kind of "collective defamation."⁸ Creating a non-discriminatory school environment, it is reasoned, will entail certain limitations on expression.

Those holding the view that some speech needs to be regulated in order to create an environment where all can learn often question the extent to which the ideal of "free speech" is actually operative in schools and in society generally. For example, some feminists argue that pornography (which is usually defended on First Amendment grounds) entails men's free speech, while systematically denying that of women. Those seeking to eliminate pornography by invoking the Fourteenth Amendment often argue that women cannot speak freely because of the way in which women are "constructed symbolically" by pornographers:⁹

Pornography...is a form of forced sex, a practice of sexual politics, an institution of gender inequality....Along with rape and prostitution in which it participates, pornography institutionalizes the sexuality of male supremacy, which fuses the erotization of dominance and submission with the social construction of male and female. Gender is sexual. Pornography constitutes the meaning of that sexuality. Men treat women as who they see women being. Pornography constructs who that is.¹⁰

Others have made a similar argument in regard to the ideal of free speech in academic settings. According to this argument, power relations structured partly by race, gender, and class, among many other differences, make free speech practically impossible. In classrooms, as in the society of which they are a part, not everyone feels themselves to be, or actually is, equally free to speak. Speech codes seek to redress the inequalities that are thought to embody and perpetuate inequalities in the classroom and that interfere with genuinely "free" expression. Thus Judith Martin and Gunther Stent wish to argue: "Only when insults, harassment, disrespect and obscenity are banned [in universities] can people engage in truly substantive argument."¹¹

In reaction against those seeking to categorize hate speech as a kind of discrimination, strong advocates of free speech generally argue that universities violate the First Amendment when they seek to proscribe forms of expression now widely thought to exacerbate recognized oppressions. Those making this argument have the courts on their side. In June 1992, a St. Paul municipal

ordinance aimed against bigotry was found unconstitutional on the grounds that it violated the First Amendment. (The ordinance made it a misdemeanor to place a symbol or characterization where it is likely to “[arouse] anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender.”) Similarly in academia, federal district courts have found the policies at the University of Wisconsin and the University of Michigan, mentioned above, to be unconstitutional — again on the grounds that they violate the First Amendment.

In addition to arguing against speech codes on constitutional grounds, free speech proponents also often argue that advancing the aims of historically disadvantaged groups actually requires a strong First Amendment. Lacking a right to free speech, the argument goes, these groups would be unable to criticize the policies and preferences of the dominant classes who would have the power to squelch inconvenient criticisms.

The legal status of speech codes aside, there are other reasons for questioning the efficacy of rules intended to govern communicative interaction. First, for practical purposes, rules that merely proscribe certain speech will tend to be inadequate to the complexities actually encountered in communication. In large part, this is because meaning is highly context dependent; a slur in one situation can be a term of endearment in another. A rule intended to proscribe the infantilization of women might forbid the use of “babe” when reference is being made to adult females. Surely, for many women, it *is* demeaning, even frightening, to be called “babe” by an unfamiliar man on the street — “hey babe, lookin’ good.” But the same phrase, uttered by a friend or lover can be an affirmation of intimacy and approval. The possible significance of this one phrase when uttered (or written) in countless other situations suggests why rules for communicative interactions can tend to be unhelpful.

In addition, rules can have the unintended consequence of encouraging moral disengagement. Rules enumerating expressions that will not be tolerated specify the outer limits of accountability; as long as a speaker refrains from engaging in proscribed speech, he or she has met his or her obligation, as defined by the rules.¹² Yet mere restraint can be inadequate to the needs of the situation at hand. One may refrain from using racial slurs, for example, while harboring sentiments that will foreclose the possibility of open or equitable conversation with persons of races other than one’s own; slurs and epithets are not the only kinds of expressions capable of communicating hatred. Likewise, it is doubtful that rules forbidding the “conspicuous exclusion” of students from conversation will promote more inclusive communication. The process whereby one is excluded, or excludes others, from conversation is often subtle rather than conspicuous. Indeed, students may be excluded from conversations in which they are asked explicitly to participate. Some Black students, for example, express feelings of increased marginalization when called on to educate their white classmates about issues of racial oppression.¹³

The Need for Extra-legal Standards for Communicative Interaction

Efforts to address hate speech legalistically have failed consistently to lead to a consensus agreeable to both “protectionists” and free speech advocates. In part, this debate has continued without much progress because parties on both sides tend to hold absolutist views of the rights they defend.¹⁴ Mary Ann Glendon observes:

The tendency to frame nearly every social controversy in terms of a clash of rights...impedes compromise, mutual understanding, and the discovery of common ground. A penchant for absolute formulations... promotes unrealistic expectations and ignores both social costs and the rights of others.¹⁵

In addition to the tendency toward absolutism in regard to the values of equal protection and free speech is the fact that legal discourses generally are not well suited for addressing many of our responsibilities to others; in this country the law has always emphasized what the state will not require (or tolerate) over positive duties and obligations.¹⁶ Where communication is concerned, the

First Amendment asserts the individual's right to free speech, but not the legal right to be heard, nor the corresponding responsibility to listen.

For educational purposes, the impasse reached by those framing hate speech in terms of legal rights suggests the need to adopt a different, extra-legal language for discussing this issue; and on my view, recasting the issue in explicitly moral, in contrast to formally legal and rule-based, terms may prove helpful. Even the strongest advocates of free speech experience some speech as hateful and repellent, and discuss such speech as a necessary evil rather than as a social good. Fred Abrams, a highly vocal proponent of free speech, commenting on the June 1992 Supreme Court decision, mentioned above, described the symbolic speech that was protected as "vile" and "brutal" — hardly a description one would apply to speech one thinks ought to be *encouraged*, regardless of its legal status. Similarly, it is improbable that those holding firmly to the protectionist position would have their *own* speech suppressed if someone found it hurtful. Blacks, women, and homosexuals would fare very poorly in a society where they were legally prohibited from criticizing racist, sexist, and homophobic values. Indeed, many feminists have argued that "silencing" is itself a form of oppression; hence the recent emphasis on "finding voice," and "naming" experience.¹⁷ This argument informs university policies, such as the one implemented at Connecticut, forbidding the conspicuous exclusion of students from conversation. To the extent that the speech of those who have been historically marginalized is hurtful to more privileged others, one can well imagine efforts to use speech codes as a means of suppressing the very voices these codes are intended to promote.

Needed, it seems, are moral standards for communicative interaction. Whether one holds to the position that certain speech is so hurtful that it ought to be proscribed, or to the position that while certain speech is hurtful, all speech ought to be protected to ensure that hate speech can be criticized, one appeals implicitly to standards for communicative interaction. Acknowledging some speech as hateful implies an ideal of speech that is not problematic in this way.

Virtue Ethics

Recently several authors have argued that, for educational purposes, it is useful to characterize standards for communicative interaction as "virtues."¹⁸ The turn toward an ethic of virtue responds to criticisms of alternative traditions in moral theory that, some argue, fail to account for women's experiences and/or posit transcendent principles that are inadequate to the concerns actually encountered in daily life.¹⁹

According to one account within the virtues tradition, the specifically communicative virtues include "patience, tolerance for alternative points of view, respect for differences, a willingness and ability to listen thoughtfully and attentively, an openness to giving and receiving criticism, and honest and sincere self-expression."²⁰ Whether this particular constellation of virtues is adequate, let alone whether the language of "virtue" will be the most helpful for conceiving communicative standards, remain open questions. Here, beginning with the conviction that we on college campuses need *some* such standards, I will suggest a few of the potential benefits of conceiving of these standards as "virtues."

First, viewing standards for communicative interaction as virtues captures the normative dimensions of speech, but without proscribing certain utterances at the outset. Implicit in advocating certain communicative virtues is the idea that some ways of being in conversation *are* better than others. But the concept of virtue in general also implies that action will be informed by the particulars of the situation at hand. Thus Burnyeat stresses that practicing virtue requires a "general evaluative attitude" that enables a person to determine what is required under different circumstances.²¹ Where speech is concerned, this indicates the need to attend to such matters as the context where communication is occurring and the kind of relation binding the persons involved. It would seem that in some cases being "sincere," for example, will require a fairly full disclosure of one's

conscious motives, interests, and preferences; in others, far less self-disclosure is necessary. Much depends on the situation at hand.

A second advantage of considering communicative standards as “virtues” is that this provides a critical vantage point from which to examine existing communicative relations. Many, I assume, have noted that something akin to the communicative virtues enumerated above are present in at least some conversations, including those that can be sustained despite difficulties. As I understand them, communicative virtues are not abstract ideals, but rather qualities noted in the course of actual efforts to communicate. However, there are many circumstances that work against even the best efforts to instantiate such virtues; and while the concept of virtue does imply an element of choice, it also implies the need for an environment that is supportive of certain choices. Aristotle’s own arguments against social arrangements and local customs of his time were based on his belief that these could not support the practice of certain virtues, and hence, human flourishing.²² Thus, according to this particular strand in the virtues tradition, appeals to virtues generally imply the need to question, and to struggle to reform, conditions that thwart their exercise.

Third, and most important to my mind, conceiving communicative standards as virtues implies clearly *educational* efforts. Teachers’ willingness and ability to “model” these virtues will be key among such efforts. In large measure, we learn appropriate standards for communicative interaction through participation in communicative relations in which these standards are operative. While teachers cannot ensure that students will participate in ways that are expressive of the communicative virtues, they can endeavor to set the tone for classroom communication. Listening carefully to students’ perspectives; exercising patience as students struggle to express themselves; presenting one’s own positions honestly, and respecting those of others are a few of the ways in which teachers can foster communication that embodies the communicative virtues. Owing to developmental differences, perhaps more so in the elementary school than in the university, students will take many of their communicative cues from their teacher. However many adults, I imagine, find that their own conduct in conversation changes in relation to different partners. Some partners seem to draw out our best conversational selves, while others seem to thwart even our most concerted efforts. It is important to recognize that students’ own histories and established modes of self-expression will bear importantly on the quality of relations that can be established in schooling contexts. Generally speaking, however, when teachers express themselves in ways expressive of respect, patience, etc. one can anticipate that students will be more inclined to express themselves likewise.

Beyond modeling certain virtues, teachers can instruct students in ways that encourage the practice these virtues. Students who habitually jump to address issues and questions can be denied the floor; and conversely, those who are habitually reticent can be given time to formulate their views on the question or issue at hand. Students who tend to thoughtlessly dismiss others’ perspectives can be pressed to look for reasons why such perspectives have merit, or why, at least, they make sense. Students who “listen” only passively, without apparent regard for what others have to say can be asked to interpret and restate their classmates’ comments. Through these means, among many others, teachers can help to promote classroom relations expressive of such virtues as patience, respect, and careful listening. It may be objected that a classroom organized toward these virtues will require patience for racism and sexism. But I see no reason why this need be the case. Aside from the question of whether universities ought to be places where certain kinds of expressions, however repugnant, ought to be allowed, the virtues tradition itself can accommodate limitations on speech if the speech in question is inimical to fostering certain virtues.

As significant as modeling and other forms of pedagogy can be, in the absence of successful challenges to existing power relations, it is quite unlikely that classrooms will become places characterized by non-dominating communication. Such challenges may include creating forums where the voices of historically marginalized students are encouraged and valorized, and where historically privileged students are called on to exercise conversational restraint. This not only

responds to one of the primary concerns motivating the implementation of speech codes — the fact that some students have been silenced — but also to the conditions for actually acquiring virtues: participating in situations that are supportive of these virtues. Arranging classrooms in ways that will tend to privilege the voices of students who are typically marginalized also communicates the idea that colleges and universities recognize the effects of long-standing prejudice, and that these cannot be overcome simply by asserting that the First Amendment ensures that everyone is truly equally free to express him or her self.

Educationally, it can be argued that classroom arrangements enabling the voices of those who were previously silenced are potentially beneficial to all the students involved. The benefits that may accrue to students whose self-expression is facilitated are fairly apparent. Learning is facilitated when students are free to ask questions, present ideas for confirmation or criticism, engage in conversations that support the processes of acquiring and creating new knowledge, reevaluating beliefs and assumptions, and formulating new ideas and further questions. In large measure, it is the lack of such participation that underlies the argument that “silencing” is a form of oppression.²³

But those who are encouraged to exercise conversational restraint stand to benefit as well. Education itself is largely a process of revising existing understandings in light of new “experiences,” including experiences manifested most immediately as verbal communication.²⁴ Not every experience with the once unfamiliar will be educational, but, on a Deweyan view, such experience is necessary to the process of education. Immaturity, or the lack of certain experiences is a condition of growth. To the extent that current patterns of conversational dominance and subordination limit the experiences of the dominant, these patterns can be seen as anti-educational.

Summary

Legalistic policies intended to proscribe hate speech on college campuses have failed to remedy the problem they address. Even if Constitutional grounds were found to support such policies, it is not apparent that banning certain expressions would have the desired result of making college campuses places where, communicatively, all students can flourish. Rules forbidding some expressions and the exclusion of students from conversation are inadequate to promote the aims of open and equitable conversation, and may have the unintended consequence of lessening students’ sense of responsibility in regard to communicative relations. One can be well within the rules and still practice racism and sexism without immediate consequence, as long as one is discrete. I have argued that there is a need for extra-legal standards for communication and explored some of the advantages of conceiving of these standards as virtues. Conceptualized as virtues, these standards are well-suited for accommodating the different communicative contexts in which we participate; encourage a critical analysis of social arrangements that thwart communication; and have strong implications for educational practice.

1. See, for example, Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991); and Judith N. Shklar, *Legalism* (Cambridge: Harvard University Press, 1976).

2. *Ibid.*

3. Cited by Richard Harwood, “America’s New Era of Curbed Speech,” *Salt Lake Tribune* (14 May, 1993), 23 (A).

4. Cited by Jonathon Raush, *Kindly Inquisitors: The New Attacks on Free Thought* (Chicago: University of Chicago Press, 1992), 133.

5. *Ibid.*, 132.

6. *Ibid.*, 133.

7. For a discussion of the specific harms that words can inflict see, for example, Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado, and Kimberle Williams Crenshaw, *Words that Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (Boulder: Westview Press, 1993).
8. Isabel Winkerson, "Foes of Pornography and Bigotry Join Forces," *New York Times*, 12 March 1993, 16 (B).
9. See, for example, Andrea Dworkin and Catharine A. MacKinnon, *Pornography and Civil Rights: A New Day for Women's Equality* (Minneapolis: Organizing Against Pornography, 1988).
10. Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Boston: Harvard University Press, 1987), 148.
11. *New York Times*, op-ed page, (March 20, 1991), cited by Jonathon Raush, *Kindly Inquisitors: The New Attacks on Free Thought* (Chicago: University of Chicago Press, 1992), 26.
12. On the issue of how formalized rules and standards can induce moral anomie see, for example, Audrey Thompson, "The Baby with a Gun: A Feminist Inquiry into Plausibility, Certainty and Context in Moral Education," *Philosophy of Education 1990* ed. David Erickson (Normal, Ill.: Philosophy of Education Society, 1991), 238-59.
13. Mary Leach, "Can We Talk? A Response to Burbules and Rice," *Harvard Educational Review* 62, no. 2 (1992): 261.
14. Of course, not all those addressing the issue of hate speech hold to an absolutist view. See, for example, Cass R. Sunstein, *The Partial Constitution* (Cambridge: Harvard University Press, 1993).
15. Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Macmillan, 1991), xi.
16. For a general discussion of the inadequacy of legal standards as guides for teachers see, for example, Kenneth A. Strike, "The Legal and Moral Responsibility of Teachers," in *The Moral Dimensions of Teaching*, ed. John I. Goodlad, et al. (San Francisco: Jossey-Bass, 1991), 188-223.
17. See for example, Ellsworth, "Why Doesn't This Feel Empowering? Working Through the Repressive Myths of Critical Pedagogy," *Harvard Educational Review* 59, no. 3 (1989): 297-324; and Maria C. Lugones and Elizabeth V. Spelman, "Have We Got a Theory for You! Feminist Theory, Cultural Imperialism, and the Demand for 'The Woman's Voice,'" *Women's Studies International Forum* 6, no. 6 (1983): 573-581.
18. Nicholas C. Burbules, *Dialogue in Teaching: Theory and Practice* (New York: Teachers College Press, 1993); Amy Gutmann, *Democratic Education* (Princeton: Princeton University Press, 1987); David T. Hansen, "The Emergence of a Shared Morality in a Classroom," *Curriculum Inquiry* 22 (1992): 345-361; Suzanne Rice and Nicholas C. Burbules, "Communicative Virtues and Educational Relations," in *Philosophy of Education 1992*, ed. H. A. Alexander (Normal, Ill.: Philosophy of Education Society, 1993), 34-44; and Nicholas C. Burbules and Suzanne Rice, "Dialogue Across Differences: Continuing the Conversation," *Harvard Educational Review* 61, no. 4 (1991): 393-416.
19. See, for example, Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1982); and, Seyla Benhabib, "The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Moral Theory," in *Women and Moral Theory*, ed. Eva Feder Kittay and Diana T. Meyers (Totowa, N.J.: Rowman and Littlefield, 1987), 154-177.
20. Rice and Burbules, "Communicative Virtues," 35.
21. M. F. Burnyeat, "Aristotle on Learning to be Good," *Essays on Aristotle's Ethics*, ed. Amelie Oksenberg Rorty (Berkeley: University of California Press, 1980), 72.
22. Martha C. Nussbaum, "Non-Relative Virtues: An Aristotelian Approach," *Midwest Studies in Philosophy* XIII (1988): 33-34.
23. Lugones and Spelman, "Have We Got a Theory for You!" 573.
24. John Dewey, *Democracy and Education* (New York: Macmillan, 1916), 1-53.