Module 3: Anger: Hate Speech and Fighting Words

Introduction

In this module we will examine the boundaries of free speech and then focus on the issue of hate speech, which is said to be motivated by the vice of anger. One of the key concepts will be what constitutes "fighting words" as this determination is at the center of several Supreme Court cases. Given the nature of this topic the readings will draw heavily from Supreme Court decisions which are not always written in "easy to read" language. These cases should be read with an eye on a general grasp of the issues in the case and not for a complete understanding of what the Justices are arguing. We begin by looking at the importance of free speech as argued by John Stuart Mill.

Part 1: John Stuart Mill

Mill argued that speech must be free even if offensive. The only legitimate restriction on speech is if it causes harm to others, or would most likely result in harm. This is reflected in many (but not all) of the legal limitations on speech in the U.S. Part of our focus will be to evaluate if the current legal limitations are enough, or should other forms of speech, most notably hate speech, be criminalized?

But first let us ask a more general question to establish the case for having any free speech. Why is free speech important?

Mill set out **four reasons** in support of free speech:

1. "...if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility."
2. "...though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied."
3. "...even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds.
4. "...the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground and preventing the growth of any real and heartfelt conviction from reason or personal experience..."

One of the things Mill does not do is provide for any grounds under which offensive conduct can be restricted. Mill seems to think liberty allows us to speak or act offensively. But does liberty entail that all offensive conduct is morally acceptable? We will look at one philosopher who generally agrees with Mill, but offers an account of why we should limit liberty in some cases of offensive conduct.

So why is free speech important to Mill?

1. It encourages new or better ideas to come out.
2. It is conducive to the happiness of citizens if they can express themselves.
3. Free and open expression allows us to use our capacities and think for ourselves.

Granted, most all of us would agree that free speech is important, but what are the limits of free speech? Before we go any further I'd like to test your own intuitions about free speech using the following cases:

Case #1: **The Canoeist**

Mr. Boomer was eventually found **guilty** and paid a fine. Did he exceed the bounds of free speech? What was the **harm** in his actions? Notice the judge's reasoning for allowing the trial to go forward. He cites " **fighting words** " as the reason why Mr. Boomer's action was not free speech. According to the courts, fighting words are a subclass of harmful speech. Was the speech in this case likely to cause a fight? Keep this in mind as we will return to this concept later and ask if it qualifies as a harm.

Case #2: The Driver

Imagine a man driving on the freeway who is cut off by another driver. Is he free to curse at the other driver? How about honking his horn and shaking his fist (or perhaps offering a one finger salute)? Clearly these would both be offensive to the other driver but they do not strike us as harmful. Perhaps, like the canoeist it may be a case of "fighting words" (but this happens every day and rarely leads to a fight). Suppose instead of reacting as described above, our driver simply pulls out a realistic looking (but not really real) gun and taps it on the window as he passes drivers who offend him. Certainly there is no real harm, but might we not conclude that the mere threat of serious harm qualifies as a harm?

Case #3: Mooning

Clearly the act described to the right was both **offensive** and **disrespectful** . It is also quite clear that it was a form of expression that serves to communicate an opinion. Ask yourself this general question: Is mooning a form of free speech? Then consider why you answer as you do. Is there a **harm** in mooning? Is there a threat contained within mooning (as threats of harm are often counted as crossing the boundaries of free speech). If there is no harm or threat, what is it about mooning that would make it fall outside the bounds of free expression? (Nudity, of course, but on what grounds do you criminalize this?).

We can now establish two general criteria for the limitations on free speech.

1. In order to be free speech it must not cause harm (What constitutes a harm again becomes the key question.).
2. In order to be free speech it must not threaten harm or foreseeably lead to harm.

Setting aside the debate about what a harm is for a moment, what does the law say about the limits of free speech?

Part 2: The Law (as Defined through Court Cases)

The courts have attempted to make a major distinction when it comes to limiting free speech. They have ruled that restricting the content, viewpoint, or ideas behind speech is never acceptable. However, restricting time, place, and manner of speech is acceptable. For instance, we could pass a law that prevented you from speaking using bullhorns at night since it only restricts the **manner** of speech. We could not, however, pass a law that prevented you from speaking against the government using a bullhorn as that would target the **message** or idea of your speech.

Within this distinction between restricting the manner but not the message of speech, the courts have upheld laws restricting free speech for the following reasons:

Libel/slander/false advertising

> For instance, lying about you in public in order to damage or harm to your reputation. To qualify as libel/slander the speech must not only be false, but also "malicious." False advertising involves lying about, or misrepresenting a product or service.

Inciting harm or probability of harm

> For instance, yelling "fire" in a crowded theater (when there is no fire) is likely to cause harm to people. Or, shouting "kill the capitalist" in front of an angry mob of communists. Or, the use of fighting words (saying "fascist pig" in a face-to-face context that is likely to provoke a fight).

National security

> This requires that citizens cannot divulge secrets of the government or military when this information is dangerous or harmful to our nation. For instance, reporting the location of a secret military operation going on behind enemy lines.

Obscenity

> Obscenity is expression that lacks any social value (pornography, nude dancing) unless it's "art." This can include language or actions, but is most prominently used to restrict pornography, which is generally defined as sexually obscene material.

Of these four, the first three are directly related to claims of "harms" whereas the fourth does not require any harm in order for society to restrict speech. Of course, **obscenity** is very difficult to define as is "artistic value," but it is interesting to note that the courts do not require the state to show harm in order to restrict speech lacking any social value. Is there a justification for this? If there is a justification for limiting obscenity; what sorts of things can we think of that meet this definition of obscenity? Keep this issue in mind as we will return to the subject of obscenity/pornography in Module 4.

We might also take issue over the concept of "fighting words." Fighting words as a legal

limitation on speech arises out of the case: *Chaplinsky* v. *New Hampshire* . The case involved a Jehovah's witness who addressed a police officer as a "God dammed racketeer" and "a damned fascist **"** This court ruling established the concept of "fighting words" as: extremely hostile personal communication likely to cause immediate physical response, "no words being forbidden except such as have a direct tendency to cause acts of violence by the persons to whom individually the remark is addressed." Thus "fighting words" are not protected free speech. Yet, what specifically constitutes fighting words?

Cohen v. California

WEBLINK: Click here to read the Cohen v. California case

This case involved a challenge to the concept of fighting words as established in Chaplinsky. Cohen was convicted of "fighting words" for wearing a jacket with the words "Fuck the draft" inside a Los Angeles county courthouse during the Vietnam war. However, the court overturned this conviction, thereby rewriting the concept of fighting words. The court redefined fighting words as:

> *Those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.*

In redefining fighting words, the court sought to avoid the problem of letting the individual listener be the deciding factor in determining if any given statement would be fighting words. This definition avoids this problem by importing an "ordinary citizen" clause as the test of fighting words. In avoiding one problem, however, the Supreme Court may have created another problem in that who is an ordinary citizen and what sorts of words will provoke a fight with them? As we will see, the Cohen ruling has a huge impact on other cases of "fighting words" and of hate speech in particular.

Texas v. Johnson

WEBLINK: Click here to read the Texas v. Johnson case

This case posed the several questions: Does flag burning constitute fighting words? Is an action like flag burning a form of free speech? Is there something special about the American flag which deserves special legal protection from desecration? The court, in a 5-4 decision, found that flag burning was a legitimate form of free expression which did not constitute fighting words nor did the flag warrant a special protection from desecration. As with any 5-4 decision, the case almost went the other way. Several Justices thought that a restriction on flag burning was not a restriction on the content of the speech, only the method of the speech. They also thought that it was not asking much to preserve the national symbol that so many had died for. The majority, by contrast, thought it was the greatest expression of our countries commitment to free speech to allow even the burning of the national symbol.

Thus far we have looked at the current legal restrictions of free speech in an attempt to determine the limits of free speech. It is important to remember that other limitations may

exist. In the next section we will explore some additional speech limitations that people have proposed.

Part 3: Other Speech Limitations?

So far we have examined the "classic" limitations of free speech. These classic limits are:

- **Harmful** speech: Libelous or slanderous communication.
- **Inciteful** speech: Communication such as yelling fire in a crowded theater. This category includes the "fuzzy" concept of fighting words.
- **Obscenity:** Communication with no social, political, cultural, or artistic value- another "fuzzy" concept.

However, in addition to these classic limitations we should consider three other limitations that have been proposed in recent times. These "new" limitations consist of:

- **Offensive** speech: Includes flag burning, cursing, and even some art.
- **Dangerous** speech: Books on "how to build a bomb" or "how to make chemical weapons."
- **Hate** speech: Includes racial and ethnic epitaphs intended to harass or upset particular groups.

VIDEO: The following video brings to light several of the issues posed by both the classic and the new proposed limitations on speech.

Should we restrict offensive speech or dangerous speech?

When considering "offensive speech," we know that Mill would oppose any restriction based on offense. Certainly we would not want to say all offensive speech should be restricted (as what can we say that doesn't offend at least one person?). However, we might apply Feinberg's offense principle which would generate a limited restriction on offensive speech. According to Feinberg's offense principles, some forms of speech are so offensive that they justify a restriction. In addition, when such offensive speech is intended to offend, it may be motivated by a vice such as anger, spite, or hatred.

For instance, take the case of flag burning. Imagine if during a Veteran's Day parade someone who hates the military decides to burn a flag as the veterans commemorate their sacrifice and the loss of their friends. The flag burner does this with the full knowledge and intent to deeply offend the veterans. What should we say about a case like this? Mill would understand that this action would give deep offense, but since offense does not qualify as a harm, the action is therefore permissible. The Supreme Court has ruled that flag burning is a form of free speech. (It cannot be fighting words since the ordinary American does not react violently, although veterans in this parade might well react violently.) Feinberg, however, would argue that this action can be prevented due to its offensive nature. Feinberg lays out some guidelines to determine if an offense was warranted. Among these guidelines Feinberg asked us to balance the following:

The reasonable avoidability of the offense

1. Assesses the intensity and duration of the offense as well as the anticipation of particular reaction. (Do you know in advance that your action will cause offense of high intensity and long duration?) In this case, the flag burner is well aware of

the intense offense the act will have.

2. The ability of unwilling witnesses to avoid the display. (Did they sit and watch a full hour of an offensive TV show only to later claim offense or were they stuck in a room with the action without a way to avoid or withdraw from it?) Clearly, those in the parade cannot easily avoid the flag burner as they march by, nor did they "seek out" the flag burner; he came to them.
3. Did the witnesses "assume the risk" of being offended? (Did you pay to enter a freak-show, for example?) Given the attendance of a Veterans Day parade, one clearly does not expect to see a display of flag burning.

The reasonableness of the offender's actions

1. The personal importance and social value of the action. Granted the flag burner may really have a message to share.
2. The availability of alternative times and places to perform the action. The flag burner did not have to share his message at this particular time and place.
3. The motive of the action. (Was this intended to offend?) It seems clear that the flag burner did intend to offend the veterans.

As a result, Feinberg would hold that in this case flag burning was not free speech and therefore should be restricted. This is not to say that Feinberg is against flag burning in all cases. Suppose the parade was instead a protest against government policies and some of the protesters burn flags. In re-examining the criteria above Feinberg would likely allow the flag burning in that case. In this sense, Feinberg offers a middle of the road approach between the total allowance of offensive acts like Mill advocates, and the complete restriction of offensive acts proposed by others. What might Aristotle have concluded conclude about offensive acts like flag burning? Though we cannot be certain, it would seem that in the Veterans Day parade case, Aristotle would find this action to be a less than virtuous display (especially for children and others to see at a parade). It seems likely that he would oppose flag burning in this case and some other cases as well on the grounds that it is disruptive to the state and sets a bad example for others.

Federal Communications Commission v. Pacifica Foundation ET AL.

This case focused on the offensive speech contained in a radio broadcast of George Carlin's in which he discussed the words you cannot say on TV. One listener complained about the language used in Carlin's broadcast, and the FCC took the broadcaster to court. The case went to the Supreme Court which, in another 5-4 ruling, found that the FCC could establish regulations concerning the broadcasting of such words. Below is a partial clip of Carlin's offending comedy bit. (If foul language bothers, you feel free to skip it.)

AUDIO: George Carlin-Seven Words You Can't Say On TV

Thought Question: Dangerous Speech

Specific to **dangerous speech** : What is the harm in my having a book on how to build a bomb? There is no harm or even threat of harm in simply having the information. Acting on it is another story. Yet, we can clearly see the advantage for security by restricting

dangerous speech. Suppose I am a survivalist who is planning for the end of the world. I have built a large bunker in my backyard and have it stocked with books on how to build weapons to defend myself. Are there any grounds for restricting my access to this information? Is such a restriction practical? For instance, one famous case involves the book *Hitman* , a manual for how to commit murder, which was used in a multiple murder. Its author is really a housewife who wrote the book after watching detective shows and reading murder mysteries. (The publisher was sued and the book is no longer published, but the information is still out there.)

Part 4: Should hate speech be a crime?

Perhaps the most contentious issue of free speech in the past few years is the move to restrict hate speech. Since such speech is motivated by anger or hatred, its very nature stems from vice. Several attempts have been made to regulate not only hate speech but to designate certain actions as hate crimes. The difference is whether or not it is speech or action motivated by hate. Hate crime laws often increase the penalties for crimes when they are motivated by hate. Hate speech codes are often found in universities as an attempt to combat, among other things, sexism, bigotry, homophobia, and racism on campus. We will discuss campus hate speech codes in the next section. First, we should look at several Supreme Court cases involving hate speech/hate crimes.

R.A.V. v. City of St Paul

WEBLINK: Click to read the case R.A.V. v. City of St Paul

In this case some youths made a makeshift cross out of a broken chair and burned it on the lawn of a black family in the middle of the night. Although they could have been prosecuted for trespassing, they were instead charged with an ordinance that read:

> *Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika,*
> *which one knows or has reasonable grounds to know arouses anger, alarm or resentment in*
> *others on the basis of race, color, creed, religion or gender commits disorderly conduct and*
> *shall be guilty of a misdemeanor.*

Similar to hate speech/crime laws and codes, this ordinance targeted the motive of the actor rather than the act itself. However, this led the Supreme Court to overturn this ordinance on the grounds that it was a law targeting specific messages of speech and not just the manner of the speech. Since the law targets only speech aimed at "race, color, creed, religion and gender" and not all speech, it was clearly targeting the content of the message rather than the manner in which the speech was expressed. This decision, though consistent with prior Supreme Court rulings in that you can restrict the manner but not message of speech, creates a problem for any attempt to regulate hate speech or hate crimes as they also target the message of speech. One way to avoid this problem is to employ the concept of "fighting words" to combat hate speech. The case of *Collin v . Smith* is one such example.

Collin v. Smith (also known as *Village of Skokie v. National Socialist Party*)

WEBLINK: Click here to read the Collin v. Smith case

In this case the American Nazi Party wanted to hold a march in Skokie , Illinois . Skokie was the home of 40,000 Jews, several thousand of whom were survivors of Nazi concentration camps. The city was unable to stop the march but was able to get a court to ban the display of the swastika during the march on the grounds that the display of the swastika in Skokie constituted "fighting words." (Marching a swastika through a Jewish

suburb would be like the Ku Klux Klan marching through Harlem ; we would expect a violent response.) The Nazis went to the state Supreme Court, which ruled that the city could not ban the swastika because it did not qualify as fighting words to the "ordinary citizen." This is an odd consequence of the *Cohen* decision because, though the "ordinary citizen" may not react violently to a swastika, the ordinary citizen is aware that a concentration camp survivor would likely react violently to the swastika.

Still, the reasoning in the Skokie case was also applied, in part, in *R.A.V. v. City of St. Paul* and *Texas v. Johnson* (the flag burning case). In both of these cases, the court ruled that neither activity would necessarily spark a violent response in the ordinary citizen.

Thought Question

What words would spark a violent response in the ordinary citizen?

Given the court rulings in these cases, nothing targeting a specific race, gender, ethnicity, ideology, or sexual orientation would qualify as those are specific groups, not an "ordinary citizen." What then can I say to anyone which we can reasonably expect a violent response?

Taken together *Collin v. Smith* and *R.A.V v. St Paul* create a sizable challenge to attempts to prohibit hate speech. As hate speech targets a specific group and not an "ordinary citizen" it is difficult to employ fighting words to justify a restriction. Nor can we limit hate speech by targeting its content. This does not mean that all hate speech is legally allowable. The case of *Virginia v. Black* demonstrates how at least some forms of hate speech can be restricted.

Virginia v. Black

WEBLINK: Click here to read the case Virginia v. Black

This case involved the state of Virginia 's attempt to regulate cross burning. The statute in question read:

> "It shall be unlawful for any person or persons, with the intent of intimidating any person or
> group of persons, to burn, or cause to be burned, a cross on the property of another, a highway
> or other public place. Any person who shall violate any provision of this section shall be guilty
> of a Class 6 felony.
>
> "Any such burning of a cross shall be *prima facie* evidence of an intent to intimidate a person or
> group of persons."

Mr. Black led a rally in which a cross was burned, which lead to his arrest, prosecution, and conviction. The case (like so many of these cases) ended in a divided court which made two points of interest.

1. It is constitutional for a state to prohibit cross burning when it intends to

intimidate others. This is a content-neutral restriction because it is a limitation upon intimidation regardless of who is intimidating or what the message of the intimidator is.

2. It is unconstitutional for a state to consider all cross burnings as inherently intimidating. Certainly there are contexts in which a cross burning is done to intimidate, but there are others where it is not.

As a result the court allowed that cross burning, typically cited as a form of hate speech, can be restricted in contexts where it is done with the intent to intimidate. Yet, at the same time, the court overturned Mr. Black's conviction as it was never proven that his particular cross burning was an attempt to intimidate. One other case where the courts have upheld attempts to restrict hate speech/crimes is *Wisconsin v. Mitchell.*

Wisconsin v. Mitchell

WEBLINK: Click here to read the Wisconsin v. Mitchell case

This case involved an assault on a young man by group (including Mitchell) who assaulted him strictly because of his race. Where the ordinary punishment would have been a maximum of 2 years, Mitchell was given 7 years due to a provision which increased penalties when someone "intentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person . . ." Mitchell attempted to appeal his conviction and succeeded in the Wisconsin Supreme Court which held the provision was targeting "offensive thought" in that two assaults are punished differently just because we disapprove of what was in one assaulter's mind more than the other's.

The U.S. Supreme Court overruled the Wisconsin Supreme Court, holding that it was permissible for Wisconsin to increase the penalties for crimes motivated by bias. The Court found that this case was different from *R.A.V.* in that the law in *R.A.V.* was targeting the content of speech whereas the law in *Mitchell* was targeting the motive for action. In other words, *Mitchell* was not a free speech case because there was no speech involved, there was only Mitchell's criminal actions and his motives. The *Mitchell* case then allows for increased punishments for "hate crimes" just as the *Black* case allows for a restriction on "hate speech" intended to intimidate.

Part 5: Words Which Wound, Liberalism, and Hate Speech

Of all the Supreme Court decisions we have looked at, perhaps the most referenced was the *R.A.V.* decision written by Justice Scalia. As we have read, this decision had a huge impact on hate speech laws, making it more difficult for them to pass constitutional challenge. This decision is not without its critics. In "Words Which Wound" Masuda and Lawrence offer a challenge to the *R.A.V.* ruling. Below is a paraphrase of their arguments.

Masuda and Lawrence: "Words Which Wound"

The thesis of this article is that Justice Scalia's majority decision in the *R.A.V. vs. St. Paul* case was wrong. In deciding the case in favor of St. Paul , the Minnesota Supreme Court said:

> "Burning a cross in the yard of an African American family's home is deplorable conduct that the City of St. Paul may without question prohibit. The burning cross is itself an unmistakable symbol of violence and hatred based on virulent notions of racial supremacy. It is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear" (pg. 269)

The Minnesota court relied upon history which clearly tells us the i

ntent, meaning, and intimidating effect of R.A.V.'s actions in determining that this "method" of speech (not content) was objectionable. Scalia seems to ignore this history and the actual impact upon the Jones family, who awoke to find a cross burning in their lawn just two weeks after moving into an all-white neighborhood. Given the history, context, and effect of R.A.V.'s actions it should be clear that any "message" he had to express was secondary to the terror, offense, and intimidation hoisted upon the Jones. The St. Paul ordinance did not restrict hateful content, but instead restricted a "hateful manner" of speech. Just as I can express my utter disdain for you, but not by using "fighting words," so too could R.A.V. have expressed his racial hatred in a non-hateful way.

Scalia's opinion casts R.A.V. in the role of victim of state discrimination against his minority viewpoint. Scalia does so without any consideration of the real victim of this case-the Jones family. The First Amendment should be viewed as an attempt to maximize public discourse. Given the nature of hate speech-terrorizing and intimidating groups-it should be clear that protection of hate speech is contrary to the goal of the First Amendment. A restriction on hate speech will only serve to enhance public discourse.

Hypothetical Case: Imagine two classrooms, both dedicated to "free speech" and the goals set out by Mill. In classroom X, all students are free to express any viewpoint they wish, including insulting others and attacking them personally. In classroom Y, all students are free to express any viewpoint they wish, but they are required to do so civilly, without insults or personal attacks on others. Which classroom is best conducive to promotion of free speech?

Another area where hate speech has created controversy is on college campuses around the country. Some instances of hate speech on campus as compiled by Charles R. Lawrence III in his article "If He Hollers Let Him Go: Regulating Racist Speech on Campus" include:

- University of Michigan : "Greek Rites of Exclusion." Racist leaflets in dorms, white students paint themselves black, and place rings in their noses at "Jungle parties."
- Northwest Missouri State University : White Supremacists distribute flyers stating, "The Knights of the Ku Klux Klan are Watching You."
- Temple University : White Student Union Formed.
- Memphis State University : Bomb Threats at Jewish Student Union.
- Dartmouth College : Black professor called "a cross between a welfare queen and a bathroom attendant" and the *Dartmouth Review* purported to quote a black student, "Dese boys be sayin' that we be comin' here to dartmut an' not takin' the classics."
- Purdue University : Counselor finds "Death Nigger" scratched on her door.
- Smith College : African student finds message slipped under her door that reads, "African Nigger do you want some bananas? Go back to the Jungle."
- University of Michigan : Campus radio station broadcasts a call from a student

who "joked": "Who are the most famous black women in history? Aunt Jemima and Mother Fucker."

- University of Michigan : A student walks into class and sees this written on the blackboard: "A mind is a terrible thing to waste-especially on a nigger."

It is instances like these (and many others) that motivate many to seek "hate speech codes" at universities to protect students from such a hostile environment. Though several authors advocate pro or con positions, perhaps Andrew Altman's work is the most balanced in its approach. His arguments are summarized below.

Andrew Altman: Liberalism and Campus Hate Speech

Conservatives, and many liberals, have held that hate speech restrictions are illegitimate because they are not "viewpoint-neutral" rules of speech. If there is an error here, it is that they do not allow at least some restrictions on hate speech. Other liberals favoring such hate speech codes perhaps err in being overbroad on what can be restricted. Altman attempts a middle ground in which some hate speech can be criminalized but restricts these to a minimum.

On many college campuses speech codes provide for disciplinary action for those who make racist, sexist, homophobic, or some similar types of expression.

For example, at Stanford speech must meet three conditions to be actionable:

1. Intent to insult or stigmatize based upon race, gender, or sexual orientation.
2. Speech is addressed directly to those stigmatized.
3. Speech must employ epithets or terms that convey "visceral hate or contempt" to those addressed.

Compare this to the overly broad rules at the University of Connecticut :

> *"Every member of the University is obligated to refrain from actions that intimidate, humiliate or demean persons or groups that undermine their security or self-esteem." This would include "making inconsiderate jokes... stereotyping the experiences, background, and skills of individuals, ... imitating stereotypes in speech or mannerisms [and] attributing objections to any of the above actions to 'hyper-sensitivity' of the targeted individual or group."*

Though the first code is significantly narrower than the second, both violate the liberal idea that speech codes ought to be viewpoint-neutral. Even the Stanford code is based in the idea that racist, sexist, and homophobic attitudes are morally wrong (or inferior). As such, there is a *prima facie* reason to reject both codes. Of course, many liberals still attempt to justify such codes on the grounds of psychological harms that hate speech inflicts upon its victims. One method of doing this draws on a comparison between the harms of the speech and the value of the speech.

For example, compare the harms associated with, and the value of allowing the following hateful expressions:

First , imagine a KKK rally or hateful speech expressed scientifically, philosophically,

religiously, or politically. Such speech may still cause psychological harm, but is (as Feinberg would say) easily avoidable. It also contains values we traditionally protect such as the right to rally, freedom of religion or of scientific, philosophical, or political freedom.

Second , take the case of the racist who writes: "African monkeys, why don't you go back to the jungle?" on the bathroom mirror of an African American's dorm room. This action causes psychological harm to the viewer who is directly targeted (and cannot easily avoid the display). Furthermore, it is done in a manner that does not possess the values mentioned in the first case.

As such, many liberals wish to uphold restrictions on cases like the second, while protecting the first type of expression. Does this utilitarian argument for minimal hate speech regulations persuade you?

Altman, who does not support this utilitarian restriction, finds that there is an alternative justification for holding that hate speech codes, despite not being "viewpoint-neutral," should be upheld. The reason that racist, sexist, and homophobic speech is thought to be immoral is that it is a method of subordinating these groups. In other words, these forms of speech are attempts to deny persons of their equality of moral standing. This is what hate speech codes should target-the preservation of equal standing in discourse. Just as we prohibit discriminations of employment and housings, minimal hate speech codes (such as Stanford's) prohibit discrimination of equal standing in university discourse. Such codes should never be mandatory, but if a university chooses a minimal code, that should be protected (although the courts have struck down several universities' hate speech codes around the country).

Notice, this view only allows prohibitions against speech that deprives others of moral equality (racism, sexism, and homophobia qualify) but does not allow prohibitions upon offensive or insulting displays (fat ass, slob, pig, etc.) as these do not deprive one of moral equality like the others. Are you persuaded by Altman? What objections to speech codes such as Stanford's might be offered?

Thought Question: Punishing Hate Crimes?

Imagine two crimes of assault. In the first case Mike beats up a man while calling him an "asshole." In the second case Rod beats up a man while calling him a "queer" (or some other term associated with hate speech). Both victims are beaten to the same degree, yet Mike's crime was not a crime of bias where Rod's appears to be. Considering all we have read about hate speech and hate crimes (such as the Mitchell case), should Rod be punished more than or the same as Mike? Why?

In many ways our examination of hate speech leaves us with more questions than answers. For instance: Should we restrict more speech, stick with the current legal standards, or backtrack to Mill's principle of harm as the only limitation? If we do stick with Mill, then what exactly qualifies as a harm? Or, if we move away from Mill and restrict hate speech, dangerous speech, or offensive speech, how do we define the boundaries of each? We cannot resolve all of these questions here. One area of speech that we will take another look at is obscenity as it is central to our next module.

Assignments

Activities so far

As you proceeded through Module 3, you should have participated in the following online activities: poll questions and readings.

If you have not, please make sure you go back and complete these before proceeding. Further activities for this unit are listed below.

- Poll Question: Should Mr. Boomer's actions be considered free speech?
- Poll Question: Should mooning be a crime?
- Poll Question: Do you agree with the courts that Cohen was not guilty of fighting words?
- Poll Question: Should flag burning be a crime?
- Poll Question: Should broadcasts like Carlin's be regulated by the government?
- Poll Question: Should dangerous speech be restricted?
- WEBLINK READING : *Cohen v. California*
- WEBLINK READING : *Texas v. Johnson*
- WEBLINK READING : *R.A.V. v. City of St. Paul*
- WEBLINK READING : *Village of Skokie v. National Socialist Party*
- WEBLINK READING : *Virginia v. Black*
- WEBLINK READING : *Wisconsin v. Mitchell*
- Poll Question: Is hate speech motivated by vice?
- Poll Question: Should hate speech be a crime?
- Poll Question: Do you agree with Scalia's opinion in the *R.A.V.* case?
- Poll Question: Should universities adopt minimal hate speech codes as Altman suggests?

Discussion Exercise

Choose one of the cases in this module which interests you and post a very brief synopsis of the case. Then answer the following questions:

1. What role, if any, does vice play in this case?
2. Should we conclude that a crime has occurred or was this really free expression? Why?
3. What does current law say about this case, and do you agree? Why or why not?