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Liberalism and Campus Hate Speech

In this article, I develop a liberal argument in favor of certain narrowly drawn rules prohibiting hate speech. The argument steers a middle course between those who reject all forms of campus hate-speech regulation and those who favor relatively sweeping forms of regulation. Like those who reject all regulation, I argue that rules against hate speech are not viewpoint-neutral. Like those who favor sweeping regulation, I accept the claim that hate speech can cause serious psychological harm to those at whom it is directed. However, I do not believe that such harm can justify regulation, sweeping or otherwise. Instead, I argue that some forms of hate speech inflicts on their victims a certain kind of wrong, and it is on the basis of this wrong that regulation can be justified. The kind of wrong in question is one that is inflicted in virtue of the performance of a certain kind of speech-act characteristic of some forms of hate speech, and I argue that rules targeting this speech-act wrong will be relatively narrow in scope.1

Hate Speech, Harassment, and Neutrality

Hate-speech regulations typically provide for disciplinary action against students for making racist, sexist, or homophobic utterances or for engaging in behavior that expresses the same kinds of discriminatory attitudes.2 The stimulus for the regulations has been an apparent upsurge in racist, sexist, and homophobic incidents on college campuses over the past decade. The regulations that have actually been proposed or enacted vary widely in the scope of what they prohibit.

The rules at Stanford University are narrow in scope. They require that speech meet three conditions before it falls into the proscribed zone: the speaker must intend to insult or stigmatize another on the basis of certain characteristics such as race, gender, or sexual orientation; the speech must be addressed directly to those whom it is intended to stigmatize; and the speech must employ epithets or terms that similarly convey “visceral hate or contempt” for the people at whom it is directed.3

On the other hand, the rules of the University of Connecticut, in their original form, were relatively sweeping in scope. According to these rules, “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.” Explicitly mentioned as examples of proscribed speech were “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 ‘hypersensitivity’ of the targeted individual or group.”

Even the narrower forms of hate-speech regulation, such as we find at Stanford, must be distinguished from a simple prohibition of verbal harassment. As commonly understood, harassment involves a pattern of conduct that is intended to annoy a person so much as to disrupt substantially her activities. No one questions the authority of universities to enact regulations that prohibit such conduct, whether the conduct be verbal or not. There are three principal differences between hate-speech rules and rules against harassment. First, hate-speech rules do not require a pattern of conduct: a single incident is sufficient to incur liability. Second, hate-speech rules describe the offending conduct in ways that refer to the moral and political viewpoint it expresses. The conduct is not simply annoying or disturbing; it is racist, sexist, or homophobic.

The third difference is tied closely to the second and is the most important one: rules against hate speech are not viewpoint-neutral. Such rules rest on the view that racism, sexism, and homophobia are morally wrong. The liberal principle of viewpoint-neutrality holds that those in authority should not be permitted to limit speech on the ground that it expresses a viewpoint that is wrong, evil, or otherwise deficient. Yet, hate-speech rules rest on precisely such a basis. Rules against harassment, on the other hand, are not viewpoint-biased. Anyone in our society could accept the prohibition of harassment because it would not violate their normative political or moral beliefs to do so. The same cannot be said for hate-speech rules because they embody a view of race, gender, and homosexuality contrary to the normative viewpoints held by some people.

If I am correct in claiming that hate-speech regulations are not viewpoint-neutral, this will raise a strong prima facie case against them from a liberal perspective. . . .

Viewpoint-neutrality is not simply a matter of the effects of speech regulation on the liberty of various groups to express their views in the language they prefer. It is also concerned with the kinds of justification that must be offered for speech regulation. The fact is that any plausible justifi-
cation of hate-speech regulation hinges on the premise that racism, sexism, and homophobia are wrong. Without that premise there would be no basis for arguing that the viewpoint-neutral proscription of verbal harassment is insufficient to protect the rights of minorities and women. The liberal who favors hate-speech regulations, no matter how narrowly drawn, must therefore be prepared to carve out an exception to the principle of viewpoint-neutrality.

The Harms of Hate Speech

Many of the proponents of campus hate-speech regulation defend their position by arguing that hate speech causes serious harm to those who are the targets of such speech. Among the most basic of these harms are psychological ones. Even when it involves no direct threat of violence, hate speech can cause abiding feelings of fear, anxiety, and insecurity in those to whom it is targeted. As Mari Matsuda has argued, this is in part because many forms of such speech tacitly draw on a history of violence against certain groups. The symbols and language of hate speech call up historical memories of violent persecution and may encourage fears of current violence. Moreover, hate speech can cause a variety of other harms, from feelings of isolation, to a loss of self-confidence, to physical problems associated with serious psychological disturbance.

The question is whether or not the potential for inflicting these harms is sufficient ground for some sort of hate-speech regulation. As powerful as these appeals to the harms of hate speech are, there is a fundamental sticking point in accepting them as justification for regulation, from a liberal point of view. The basic problem is that the proposed justification sweeps too broadly for a liberal to countenance it. Forms of racist, sexist, or homophobic speech that the liberal is committed to protecting may cause precisely the kinds of harm that the proposed justification invokes. The liberal will not accept the regulation of racist, sexist, or homophobic speech couched in a scientific, religious, philosophical, or political mode of discourse. The regulation of such speech would not merely carve out a minor exception to the principle of viewpoint-neutrality but would, rather, eviscerate it in a way unacceptable to any liberal. Yet, those forms of hate speech can surely cause in minorities the harms that are invoked to justify regulation: insecurity, anxiety, isolation, loss of self-confidence, and so on. Thus, the liberal must invoke something beyond these kinds of harm in order to justify any hate-speech regulation.

Liberals who favor regulation typically add to their argument the contention that the value to society of the hate speech they would proscribe is virtually nil, while scientific, religious, philosophical, and political forms of hate speech have at least some significant value. Thus, Mary Ellen Gale says that the forms she would prohibit “neither advance knowledge, seek truth, expose government abuses, initiate dialogue, encourage participation, further tolerance of divergent views, nor enhance the victim’s individual dignity or self-respect.” As an example of such worthless hate speech Gale cites an incident of white students writing a message on the mirror in the dorm room of blacks: “African monkeys, why don’t you go back to the jungle?” But she would protect a great deal of racist or sexist speech, such as a meeting of neo-Nazi students at which swastikas are publicly displayed and speeches made that condemn the presence of Jews and blacks on campus.

Although Gale ends up defending relatively narrow regulations, I believe liberals should be very hesitant to accept her argument for distinguishing regulable from nonregulable hate speech. One problem is that she omits from her list of the values that valuable speech serves one which liberals have long considered important, especially for speech that upsets and disturbs others. Such speech, it is argued, enables the speaker to “blow off steam” in a relatively nondestructive and nonviolent way. Calling particular blacks “African monkeys” might serve as a psychological substitute for harming them in a much more serious way, for example, by Lynchings or beatings.

Gale could respond that slurring blacks might just as well serve as an encouragement and prelude to the more serious harms. But the same can be said of forms of hate speech that Gale would protect from regulation, for example, the speech at the neo-Nazi student meeting. Moreover, liberals should argue that it is the job of legal rules against assault, battery, conspiracy, rape, and so on to protect people from violence. It is, at best, highly speculative that hate speech on campus contributes to violence against minorities or women. And while the claim about blowing off steam is also a highly speculative one, the liberal tradition clearly puts a substantial burden of proof on those who would silence speech.

There is a more basic problem with any effort to draw the line between regulable and nonregulable hate speech by appealing to the value of speech. Such appeals invariably involve substantial departures from the principle of viewpoint-neutrality. There is no way to make differential judgments about the value of different types of hate speech without taking one or another moral and political viewpoint. Gale’s criteria clearly illustrate this as they are heavily tilted against the values of racists and sexists, and yet she does not adequately address the question of how a liberal position can accommodate such substantial departures from viewpoint-neutrality.

I do not assume that the principle of viewpoint-neutrality is an absolute or ultimate one within the liberal framework. Liberals do defend some
types of speech regulation that seem to rely on viewpoint-based claims. For example, they would not reject copyright laws, even if it could be shown—as seems plausible—that those laws are biased against the views of people who regard private property as theft. Moreover, the viewpoint-neutrality principle itself rests on deeper liberal concerns which it is thought to serve. Ideally, a liberal argument for the regulation of hate speech would show that regulations can be developed that accommodate these deeper concerns and that simultaneously serve important liberal values. I believe that there is such a liberal argument. In order to show this, however, it is necessary to examine a kind of wrong committed by hate speakers that is quite different from the harmful psychological effects of their speech.

**Subordination and Speech Acts**

Some proponents of regulation claim that there is an especially close connection between hate speech and the subordination of minorities. Thus, Charles Lawrence contends, “all racist speech constructs the social reality that constrains the liberty of non-whites because of their race.” Along the same lines, Mari Matsuda claims, “racist speech is particularly harmful because it is a mechanism of subordination.”

The position of Lawrence and Matsuda can be clarified and elaborated using J. L. Austin’s distinction between perlocutionary effects and illocutionary force. The perlocutionary effects of an utterance consist of its causal effects on the hearer: infuriating her, persuading her, frightening her, and so on. The illocutionary force of an utterance consists of the kind of speech act one is performing in making the utterance: advising, warning, stating, claiming, arguing, and so on. Lawrence and Matsuda are not simply suggesting that the direct perlocutionary effects of racist speech constitute harm. Nor are they simply suggesting that hate speech can persuade listeners to accept beliefs that then motivate them to commit acts of harm against racial minorities. That again is a matter of the perlocutionary effects of hate speech. Rather, I believe that they are suggesting that hate speech can inflict a wrong in virtue of its illocutionary acts, the very speech acts performed in the utterances of such speech.

What exactly does this speech-act wrong amount to? My suggestion is that it is the wrong of treating a person as having inferior moral standing. In other words, hate speech involves the performance of a certain kind of illocutionary act, namely, the act of treating someone as a moral subordinate.

Treating persons as moral subordinates means treating them in a way that takes their interests to be intrinsically less important, and their lives inherently less valuable, than the interests and lives of those who belong to some reference group. There are many ways of treating people as moral subordinates that are natural as opposed to conventional: the status of these acts as acts of subordination depend solely on universal principles of morality and not on the conventions of a given society. Slavery and genocide, for example, treat people as having inferior moral standing simply in virtue of the affront of such practices to universal moral principles.

Other ways of treating people as moral subordinates have both natural and conventional elements. The practice of racial segregation is an example. It is subordinating because the conditions imposed on blacks by such treatment violate moral principles but also because the act of separation is a convention for putting the minority group in its (supposedly) proper, subordinate place.

I believe that the language of racist, sexist, and homophobic slurs and epithets provides wholly conventional ways of treating people as moral subordinates. Terms such as ‘kike’, ‘faggot’, ‘spic’, and ‘nigger’ are verbal instruments of subordination. They are used not only to express hatred or contempt for people but also to “put them in their place,” that is, to treat them as having inferior moral standing.

It is commonly recognized that through language we can “put people down,” to use the vernacular expression. There are many different modes of putting people down: putting them down as less intelligent or less clever or less articulate or less skillful. Putting people down in these ways is not identical to treating them as moral subordinates, and the ordinary put-down does not involve regarding someone as having inferior moral standing. The put-downs that are accomplished with the slurs and epithets of hate speech are different from the ordinary verbal put-down in that respect, even though both sorts of put-down are done through language.

I have contended that the primary verbal instruments for treating people as moral subordinates are the slurs and epithets of hate speech. In order to see this more clearly, consider the difference between desirously calling someone a “faggot” and saying to that person, with equal derision, “You are contemptible for being homosexual.” Both utterances can treat the homosexual as a moral subordinate, but the former accomplishes it much more powerfully than the latter. This is, I believe, because the conventional rules of language make the epithet ‘faggot’ a term whose principal purpose is precisely to treat homosexuals as having inferior moral standing.

I do not believe that a clean and neat line can be drawn around those forms of hate speech that treat their targets as moral subordinates. Slurs and epithets are certainly used that way often, but not always, as is evidenced by the fact that sometimes victimized groups seize on the slurs that historically have subordinated them and seek to “transvalue” the terms. For example, homosexuals have done this with the term ‘queer’, seeking to turn it into a term of pride rather than one of subordination.
The absence of a neat and clean line around those forms of hate speech that subordinate through speech acts does not entail that it is futile to attempt to formulate regulations that target such hate speech. Rules and regulations rarely have an exact fit with what they aim to prevent: over- and underinclusive rules are pervasive in any system of rules that seeks to regulate conduct. The problem is to develop rules that have a reasonably good fit. Later I argue that there are hate-speech regulations that target subordinating hate speech reasonably well. But first I must argue that such speech commits a wrong that may be legitimately targeted by regulation.

**Speech-Act Wrong**

I have argued that some forms of hate speech treat their targets as moral subordinates on account of race, gender, or sexual preference. Such treatment runs counter to the central liberal idea of persons as free and equal. To that extent, it constitutes a wrong, a speech-act wrong inflicted on those whom it addresses. However, it does not follow that it is a wrong that may be legitimately targeted by regulation. A liberal republic is not a republic of virtue in which the authorities prohibit every conceivable wrong. The liberal republic protects a substantial zone of liberty around the individual in which she is free from authoritative intrusion even to do some things that are wrong.

Yet, the wrongs of subordination based on such characteristics as race, gender, and sexual preference are not just any old wrongs. Historically, they are among the principal wrongs that have prevented—and continue to prevent—Western liberal democracies from living up to their ideals and principles. As such, these wrongs are especially appropriate targets of regulation in our liberal republic. Liberals recognize the special importance of combating such wrongs in their strong support for laws prohibiting discrimination in employment, housing, and public accommodations. And even if the regulation of speech-act subordination on campus is not regarded as mandatory for universities, it does seem that the choice of an institution to regulate that type of subordination on campus is at least justifiable within a liberal framework.

In opposition, it may be argued that subordination is a serious wrong that should be targeted but that the line should be drawn when it comes to subordination through speech. There, viewpoint-neutrality must govern. But I believe that the principle of viewpoint-neutrality must be understood as resting on deeper liberal concerns. Other things being equal, a departure from viewpoint-neutrality will be justified if it can accommodate these deeper concerns while at the same time serving the liberal principle of the equality of persons.

**Targeting Speech-Act Wrong**

If I am right in thinking that the slurs and epithets of hate speech are the principal instruments of the speech-act wrong of treating someone as a moral subordinate and that such a wrong is a legitimate target of regulation, then it will not be difficult to formulate rules that have a reasonably good fit with the wrong they legitimately seek to regulate. In general, what are needed are rules that prohibit speech that (a) employs slurs and epithets conventionally used to subordinate persons on account of their race, gender, religion, ethnicity, or sexual preference, (b) is addressed to particular persons, and (c) is expressed with the intention of degrading such persons on account of their race, gender, religion, ethnicity, or sexual preference. With some modification, this is essentially what one finds in the regulations drafted by Grey for Stanford.

Restricting the prohibition to slurs and epithets addressed to specific persons will cause many speech-act wrongs of subordination. But it will not capture them all. Slurs and epithets are not necessary for such speech acts, as I conceded earlier. In addition, it may be possible to treat someone as a moral subordinate through a speech act, even though the utterance is not addressing that person. However, prohibiting more than slurs and epithets would go a high risk of serious overinclusiveness, capturing much speech that performs legitimate speech acts such as stating and arguing. And prohibiting all use of slurs and epithets, whatever the context, would mandate
accommodating liberal concerns

I have argued that regulations should target those forms of hate speech that inflict the speech-act wrong of subordination on their victims. This wrong is distinct from the psychological harm that hate speech causes. In targeting speech-act subordination, the aim of regulation is not to prohibit speech that has undesirable psychological effects on individuals but, rather, to prohibit speech that treats people as moral subordinates. To target speech that has undesirable psychological effects is invariably to target certain ideas, since it is through the communication of ideas that the psychological harm occurs. In contrast, targeting speech-act subordination does not target ideas. Any idea would be free from regulation as long as it was expressed through a speech act other than one which subordinates: stating, arguing, claiming, defending, and so on would all be free of regulation.

Because of these differences, regulations that target speech-act subordination can accommodate the liberal concerns underlying viewpoint-neutrality, while regulations that sweep more broadly cannot. Consider the important Millian idea that individual development requires that people be left free to say things that are wrong and to learn from their mistakes. Under the sort of regulation I endorse, people would be perfectly free to make racist, sexist, and homophobic assertions and arguments and to learn of the deficiencies of their views from the counterassertions and counterarguments of others. And the equally important Millian point that public dialogue gains even through the expression of false ideas is accommodated in a similar way. Whatever contribution a racist viewpoint can bring to public discussion can be made under regulations that only target speech-act subordination.

The liberal fear of trusting the authorities is somewhat more worrisome. Some liberals have argued that the authorities cannot be trusted with impartial enforcement of hate-speech regulations. Nadine Strossen, for example, claims that the hate-speech regulations at the University of Michigan have been applied in a biased manner, punishing the racist and homophobic speech of blacks but not of whites.

Still, it is not at all clear that the biased application of rules is any more of a problem with rules that are not viewpoint-neutral than with those that are. A neutral rule against harassment can also be enforced in a racially discriminatory manner. There is no reason to think a priori that narrowly drawn hate-speech rules would be any more liable to such abuse. Of course, if it did turn out that there was a pervasive problem with the biased enforcement of hate-speech rules, any sensible liberal would advocate rescinding them. But absent a good reason for thinking that this is likely to happen—not just that it could conceivably happen—the potential for abusive enforcement is no basis for rejecting the kind of regulation I have defended.

Still remaining is the problem of precedent: even narrowly drawn regulations targeting only speech-act subordination could be cited as precedent for more sweeping, antiliberal restrictions by those at other universities or in the community at large who are not committed to liberal values. In response to this concern, it should be argued that narrowly drawn rules will not serve well as precedents for would-be censors with antiliberal agendas. Those who wish to silence socialists, for example, on the ground that socialism is as discredited as racism will find scant precedential support from regulations that allow the expression of racist opinions as long as they are not couched in slurs and epithets directed at specific individuals.

There may be some precedent-setting risk in such narrow regulations. Those who wish to censor the arts, for example, might draw an analogy between the epithets that narrow hate-speech regulations proscribe and the “trash” they would proscribe: both forms of expression are indecent, ugly, and repulsive to the average American, or so the argument might go.

Yet, would-be art censors already have precedents at their disposal providing much closer analogies in antiobscenity laws. Hate-speech regulations are not likely to give would-be censors of the arts any additional ammunition. To this, a liberal opponent of any hate-speech regulation might reply that there is no reason to take the risk. But the response will be that there is a good reason, namely, to prevent the wrong of speech-act subordination that is inflicted by certain forms of hate speech.

Conclusion

There is a defensible liberal middle ground between those who oppose all campus hate-speech regulation and those who favor the sweeping regulation of such speech. But the best defense of this middle ground requires the recognition that speech acts of subordination are at the heart of the hate-
speech issue. Some forms of hate speech do wrong to people by treating them as moral subordinates. This is the wrong that can and should be the target of campus hate-speech regulations.

NOTES

1. In a discussion of the strictly legal issues surrounding the regulation of campus hate speech, the distinction between private and public universities would be an important one. The philosophical considerations on which this article focuses, however, apply both to public and private institutions.

2. In this article, I will focus on the restriction of racist (understood broadly to include anti-Semitic, sexist, and homophobic expression. In addition to such expression, regulations typically prohibit discriminatory utterances based on ethnicity, religion, and physical appearance. The argument I develop in favor of regulation applies noncontroversially to ethnicity and religion, as well as to race, gender, and sexual preference. But in a later section I argue against the prohibition of discriminatory remarks based on appearance. I understand ‘speech’ as whatever has nonnatural meaning according to Grice’s account, i.e., any utterances or actions having the following nested intentions behind them: the intention to produce a certain effect in the audience, to have the audience recognize that intention, and to have that recognition be the reason for the production of the effect. See Paul Grice, “Meaning,” in his Studies in the Way of Words (Cambridge, Mass.: Harvard University Press, 1989), pp. 220–21. On this Gricean account, not only verbal utterances but also the display of symbols or flags, gestures, drawings, and more will count as speech. Although some commentators have produced counterexamples to this account of speaker’s meaning, I do not believe that they pose insurmountable problems. See Robert Fogelin, “Review of Grice, Studies in the Way of Words,” Journal of Philosophy 88 (1991): 217.


7. Ibid., p. 176.

8. Ibid.

9. I think liberals could argue that the deviation of copyright laws from viewpoint-neutrality is both minor and reasonable, given the extreme rarity of the anti-property view in our society and given the great social value that such laws have been seen as serving.
20. This concern should be distinguished from the idea that any hate-speech regulation is a step down the slippery slope to the totalitarian control of ideas. That idea is difficult to take seriously. Even for nations that have gone much farther in regulating hate speech than anything envisioned by liberal proponents of regulation in the United States, countries such as England, France, and Germany, the idea that they are on the road to totalitarianism is preposterous.