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Attack of the Utility Monsters
The New Threats to Free Speech

by Jason Kuznicki

Executive Summary

Freedom of expression is looking less and less like a settled issue. Challenges to it have lately arisen from the right, from the left, from Muslim perspectives, and even in the name of protecting children online. These challenges seem to share an underlying concern, namely that we must balance free expression against the psychic hurt that some expressions will provoke. Often these critiques are couched in language that draws or appears to draw, on the law and economics movement. Yet the cost-benefit analyses advanced to support restrictions on expression are incomplete, subjective, and self-contradictory.

Several examples help to illustrate this point, including flag-desecration laws, hate-speech laws in the United Kingdom and Canada, U.S. college and university speech codes, the Cairo Declaration on Human Rights in Islam, and the Megan Meier Cyberbullying Prevention Act, currently before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security. Although seemingly unrelated, these measures rely on a common assumption, namely that governments should provide emotional well-being to their citizens, even at the expense of free expression. This assumption discounts the emotional well-being of other citizens, neglects countervailing social considerations, and hands arbitrary power to governments.

The result is not more happiness, but a race to the bottom, in which aggrieved groups compete endlessly with one another for a slice of government power. Philosopher Robert Nozick once observed that utilitarianism is hard-pressed to banish what he termed *utility monsters*—that is, individuals who take inordinate satisfaction from acts that displease others. Arguing about who hurt whose feelings worse, and about who needs more soothing than whom, seems designed to discover—or create—utility monsters. We must not allow this to happen.

Instead, liberal governments have traditionally relied on a particular bargain, in which freedom of expression is maintained for all, and in which emotional satisfaction is a private pursuit, not a public guarantee. This bargain can extend equally to all people, and it forms the basis for an enduring and diverse society, one in which differences may be aired without fear of reprisal. Although world cultures increasingly mix with one another, and although our powers of expression are greater than ever before, these are not sound reasons to abandon the liberal bargain. Restrictions on free expression do not make societies happier or more tolerant, but instead make them more fractious and censorious.

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Introduction

Most people probably assume that the freedom of expression is an untouchable part of American life. They'd be wrong. A growing number of scholars, pundits, and activists have called for restrictions on this traditional American freedom. In an age when new media proliferate, the new censors claim that they want to "rebalance" the rights we all enjoy. "Time for a Muzzle," says a recent headline in the *Boston Globe*. "The online world of lies and rumor grows ever more vicious. Is it time to rethink free speech?"[1] Many seem to think it is.

Today's would-be censors often have extreme political views. Many come from the far right, the far left, and radical Islam. Indeed, the new censors are so ideologically scattered that they will probably never form an effective coalition. Yet their arguments are gaining ground, and they bear striking similarities to one another despite their proponents' deep differences elsewhere. In each case, we are asked to weigh the *right* to free expression against the psychological *hurt* that a particular expression may cause. Because the hurt is so great, we are told, the right should be restrained. We are asked to find a balance between free speech and hurt feelings.

This paper will argue that any such balance is illusory, and that even today, the traditional remedies to unwelcome speech remain effective: either don't listen, or reply with better speech of your own. Free speech doesn't need anything else to balance it, because in a free society, we may always balance "bad" speech with "good" speech. Attempting to balance free expression with censorship leads to a serious *im*balance in political power. The dynamics of this imbalance will be examined.

Mobile phones, social networking sites, YouTube, and other technologies that amplify controversial speech don't upset the balance between aggressive speakers and aggrieved targets because those who are hurt remain free to respond using the new media as well. The new technological developments may seem to help the bullies and the obnoxious, but they offer even more help to marginal groups and individuals, who in many cases depend on social networking to find friends, moral support, and an environment where they feel comfortable.

Indeed, the barriers to getting one's message out have probably never been lower, especially for marginalized or aggrieved groups. There has perhaps *never* been a time when unpopular minorities, mistreated individuals, and victims of defamation were better able to respond to distressing speech. Along the way, this paper will examine several outlets in which just this type of speech is occurring.

Those who would legally restrain emotionally hurtful speech—whether it be hate speech, blasphemy, defacement of national symbols, or just plain cyberbullying—have sometimes employed surprisingly sophisticated arguments. Some of these arguments draw on the methodologies of law and economics and public choice theory. In response, this analysis will apply similar tools to a much more skeptical end, and show that the cost-benefit analyses proposed in support of these measures are totally inadequate.

Could free speech really face new restrictions, in America of all places? Doesn't the First Amendment mean that it can't happen here, as it is now happening in Canada, the United Kingdom, or the Islamic world? One should not put so much faith in a string of words—not, at least, without a strong public commitment to carrying them out. After all, other parts of the U.S. Constitution have been watered down, sidestepped, or simply ignored. Without a principled defense, the First Amendment could easily be next. With each new medium, the idea of free expression must be rearticulated and defended anew. Although the original guarantees applied to paper, ink, and voice, their logic lives on in the age of YouTube.

Flag Desecration: An Overproduced Service?

For years, many American conservatives

have asked for a constitutional amendment to prohibit desecration of the U.S. flag. In particular, the 2008 Republican Party platform asks that, "[b]y whatever legislative method is most feasible, Old Glory should be given legal protection against desecration."[2]

There's a reason for this coyness about methods. In the 1989 case *Texas v. Johnson*, the U.S. Supreme Court held flag burning to be a constitutionally protected mode of free expression.[3] Barring a case that revisits the same territory, an amendment may be the only way of prohibiting flag desecration. This is not to say, however, that the chances are necessarily slim. In 2006, the last time an anti-desecration amendment was voted on, it failed in the U.S. Senate by just one vote.[4] Sen. Chuck Grassley (R-IA) sponsored both that effort and a similar resolution pending in the current session of Congress.[5]

Many conservative constitutional scholars condemned *Texas v. Johnson*,[6] but one argument in the wake of the case seems particularly well-considered. Eric Rasmusen's "The Economics of Desecration: Flag Burning and Related Activities" offers an analytical framework for understanding both the issue of flag burning and the new censors' motives more generally, regardless of where on the political spectrum they fall.[7] It is therefore worth examining at length. I will contend that it does not, however, offer a convincing argument in support of restrictions on private expressive conduct.

Rasmusen's work is based in the law and economics movement, a branch of legal studies that evaluates laws and legal conventions according to their economic efficiency. He proposes that laws prohibiting desecration may improve economic efficiency. If those who revere the flag experience a profound psychic harm, while those who desecrate it experience a relatively small psychic gain, then from a utilitarian standpoint, flag desecration is inefficient.[8]

Because the desecrators do not experience the harm felt by the venerators, Rasmussen argues that desecration is essentially a negative externality. The unpleasant aspect of the activity—that is, the bad feeling experienced by those who revere the object—is borne by another. An economist should thus expect an oversupply of desecration. This squares well with a common intuition: in a society where flag burning is legally permitted, it will happen far more than almost anyone would like.

Further, because *any* venerated symbol may eventually fall victim to desecration, in the long term we may not sufficiently venerate symbols in general. As long as desecration goes unpunished, there will be too much of it, and when there is too much desecration, we will underproduce venerated symbols because we fear their eventual fate. The market for symbols is depressed, as it were, because property rights in symbols are not sufficiently strong.

Yet this approach works best, I will argue, in a highly artificial set of circumstances. There must be one coherent set of venerated symbols; one agreed-upon definition of both veneration and desecration; no tradeoffs of short-term pain for long-term gain on the part of venerators; one shared, readily apparent scale of psychic pain and pleasure; and one consensus about how to map this scale of pain and pleasure onto dollar-value compensations. Without these, Rasmusen's conclusions will not be persuasive.

The problem, though, is that these conditions usually do not occur, and they may not even occur in the case of flag desecration itself. In our multicultural society, we find a bewildering array of competing objects of veneration—must we protect all of them, in all of their various modes? And if so, what if different acts of veneration do conflict with one another? Definitions of both veneration and desecration also vary wildly. And, even if we were somehow to make sense of this jumble, there might still be no way for a neutral observer to assess the relative gains and losses of satisfaction by venerators and desecrators, and to weigh them against one another, because no truly neutral observer can ever experience, or even imagine, the pain or the pleasure that these acts produce. Any attempt at neutral comparison will ultimate-

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ly rest on taking each side's word for how bad things really are.

Nor is the pain experienced by a venerator simple or straightforward. A wide variety of traditional responses may help to mitigate the psychic loss suffered by venerators, or even to turn them into long-term gains. Venerators' revenge may take many lawful forms, not the least of which is simply the satisfaction (profound at times) of thinking that the desecrator is a twit, and of feeling oneself morally superior to him. Desecrators may also bear something of their proper share of pain, as they will be shunned by neighbors and may face reduced economic opportunities. Those who desecrate religious symbols may be threatened with Hell and come to fear it. Although this last might not always impress the impious, it must surely assuage the feelings of the devout: if a desecrator is going to Hell, do we really need to punish him in the meantime?

Further, even the very act of bringing economics into the picture may be a desecration of sorts. Rasmusen's article assigns dollar values to the pains and pleasures experienced by venerators and desecrators of U.S. national symbols. These dollar values, although somewhat arbitrary, are essential to making an economically rigorous argument. Yet one can easily imagine a devoutly religious person finding something profane about putting a price on his reverence for the sacred symbols of his religion. Are we now to buy and sell the veneration of the Eucharist, too? It is curious enough, after all, to expect patriots to bargain dispassionately over the symbols that they would be willing to shed blood to protect.

As we shall see in a variety of examples throughout the following sections, Rasmusen's argument for a ban on desecration founders on the multiplicity of ordinary life. Yet a wide array of groups have adopted similar arguments and claimed that the "pain" outweighs the "gain" from many different expressive acts. Though flawed, many seem to find it, or something like it, an appealing approach to an undeniable problem.

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Flag Desecration: Some Gordian Knots

Even for Rasmusen's original example, desecration of the U.S. flag, there are tremendous difficulties of implementation when we commit to the law and economics approach. Consider Wikipedia's page on the proposed Flag Desecration Amendment, which prominently features a high-resolution image of the U.S. flag engulfed in flames. "The flag of the United States being burned," reads the caption.[9] Given the popularity of Wikipedia, this single act of flag-burning has perhaps caused more flag-venerators to suffer emotional upset than any other. Each additional venerator who sees this image no doubt feels his own hurt, and yet all of this hurt can be traced to but a single act of desecration.[10]

Should Wikipedia be culpable for publishing this image, based on the theory that psychic upset calls for penalties? If so, to what degree? Should we punish the original desecrator even more, thanks to the actions of Wikipedia's editors, over which he had no control? Should we forbid the posting of images of a desecrated flag even for educational purposes? Note that if we were to follow Rasmusen's argument, the case for prohibiting purely educational images seems especially strong. The wikipedians are not ideologically committed desecrators. They probably took almost no pleasure in posting the image. They may even have experienced some degree of upset themselves. Banning the posting of such an image would appear, in the utilitarian analysis, to make very sound sense.

The larger issue, however, is that it remains altogether unclear at which point a prohibition based on psychic upset should be enforced. Do we punish the actor? Or the communicator of the act? Or both? Do we punish more harshly as the communication is received more often? Each question is separable from the others, and each seems to raise substantial difficulties, particularly when time, place, and intent differ among them.

Reproducible media are only part of the

problem. What if, rather than desecrating an actual flag, I merely took some degree of pleasure in talking about burning a flag? (How do you know that I'm not taking such pleasure *right now*?) And what if speaking those words upset you even more than it entertained me? The cost-benefit analysis would remain exactly the same as in the burning of an actual flag, but it isn't clear where, if ever, the punishment should stop.

Further, what happens when banning flag desecration also stops someone from performing—as they see it—an act of worship? The question isn't merely rhetorical. The Westboro Baptist Church is a fundamentalist Calvinist church based in Topeka, Kansas. For years, a central activity of this church, and indeed virtually its only activity, has been to conduct public demonstrations against homosexuality. Notoriously, the church has picketed the funerals of murder victims and people who have died of AIDS. The church claims that it has conducted over 40,000 nonviolent protests since 1991. To judge by its schedule of upcoming protests, that number could easily be accurate.[11]

As the WBC understands it, Christians are bound by a religious duty to condemn the sins of the world, and also to condemn all those who are insufficiently robust in their own condemnations. This brings the WBC to condemn individuals and groups not otherwise associated with pro-gay advocacy, including both Jerry Falwell and the U.S. Marine Corps.

As part of their demonstrations, the members of the Westboro Baptist Church have repeatedly and publicly desecrated the American flag. Their website, godhatesfags.com, prominently features a photograph of an American flag being trampled on the ground. It should be emphasized that they consider such actions a religious duty. They are not just using a shocking act to make a point in a civic conversation. "The unique picketing ministry of Westboro Baptist Church has received international attention, and WBC believes this gospel message to be this world's last hope," says the church's website.[12]

To members of the Westboro Baptist Church, this is a matter of religion, and it's hard to doubt the sincerity of anyone who would conduct 40,000 protests in 18 years, although we may doubt their equanimity or prudence. So what do we do? Do we save the flag or save the faith, such as it is?

We might attempt to answer the question by siding with whoever hurts more, but even here there are problems. It might easily be argued that the religious fervor of any one of the WBC's members is more than equal to the patriotism of an average American, and that outrages against American patriotism are on the whole *less* upsetting. After all, in the last 18 years, how many patriotic demonstrations have *you* participated in?

The truth is that there are no good answers to these questions. We should also keep in mind that, in considering flag burning, we've chosen an especially easy example. Nearly all Americans know what constitutes respectful and disrespectful conduct toward national symbols, and we know which acts are likely to cross the line or cause offense to nearly everyone. Examples from other cultures, however, show that it isn't easy to universalize about what can, or will, offend in less-familiar contexts.

Consider the plight of Google Maps in Japan. The popular world-mapping service recently added a set of scanned historical maps showing how various parts of the country looked during the feudal era. With a single click, a browser could switch instantly from antique woodcut maps to a satellite photo of how the same area appears today.

Unfortunately, the maps indicated that certain places had been inhabited by *burakumin*—the untouchables in Japan's traditional Shinto-based caste system. One map of Tokyo even used the deeply offensive term *eta*, which means "filthy mass," to designate a neighborhood. In today's Japan, considerable prejudice still attaches to *burakumin* status, which carries with it connotations of poverty, impurity, and criminality.

Certain *burakumin* rights advocates protested the publication of these maps as derogatory,

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and one member of the Japanese Parliament declared that Google's system was "itself a form of prejudice." Google scrubbed the offensive words from the maps, but not everyone was satisfied. A radical *burakumin* liberation movement also exists in Japan; it appears in some ways analogous to the radical racial and sexual liberation movements of the West, which emphasize pride, visibility, and self-sufficiency. One of its representatives complained that "This is like saying those people didn't exist. There are people for whom this is their hometown, who are still living there now." As with gays and lesbians, some *burakumin* didn't want to remain in the closet, and these people were offended not by exposure, but by secrecy. The Japanese Justice Ministry is currently investigating the matter.[13]

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It is hard to escape the conclusion that regardless of what Google or the Japanese government does, *someone* will be offended. Situations like these can and do arise even in familiar cultural settings. Yet the further we move from the familiar, the less likely we are to be able to treat others with cultural sensitivity and understanding. (I, for one, have little idea what to do about the *burakumin*, and I do not envy Google's plight.) Although private, disunited speech may never fully satisfy everyone either, it does at least allow everyone to go their separate ways and agree to disagree. Sadly, this approach seems decreasingly popular in recent years.

Hurt Feelings on the Left

The broad appeal of legislating against purely psychic externalities becomes clear when we consider how this impulse appears not only among conservatives, but also in liberals who advocate hate-speech laws. Here, the groups who suffer hurt include racial, religious, and sexual minorities. The offenders are those individuals who make hateful statements about them. By analogy to anti-desecration laws, we might say that some would forbid "hate speech" because the speaker gains only a small satisfaction from it, while the listener suffers greatly. And, supporters will claim, this is true not only when such speech incites or accompanies violence, but also simply when, on balance, it causes more negative emotions than positive ones.[14]

Although the First Amendment, as it is interpreted today, makes laws against hate speech broadly unconstitutional, there is still reason for concern. Countries with similar legal traditions to our own have enacted laws punishing hate speech. Similar provisions have appeared in American college and university speech codes. And throughout U.S. history, other constitutional provisions have been considerably softened, including those found in the Bill of Rights. Popular opinion can change, and, although we may (and do) in principle welcome marginalized groups into the American mainstream, there is no guarantee that this process of welcoming will unfold along perfectly just or constitutional lines.

Consider the United Kingdom. The UK Public Order Act of 1986 codified the crimes of riot, violent disorder, and affray, forms of misconduct previously treated under the common law. To trigger each offense, the law required conduct "such as would cause a person of reasonable firmness present at the scene to fear for his personal safety."[15] None of this is terribly objectionable, of course. Threats of violence have been punished by law for centuries.

The act's third section, however, declares that "A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if he intends thereby to stir up racial hatred, or having regard to all the circumstances racial hatred is likely to be stirred up thereby."[16] The words or behavior in question need not lead to, nor even seem likely to lead to, violence; being "likely to stir up hatred" is enough. This is a significant departure from earlier sections of the statute.

Twenty years later, the Racial and Religious Hatred Act 2006 expanded on this, declaring that "A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of

an offence if he intends thereby to stir up religious hatred."[17] Penalties include forfeiture of the offending material and a prison term of up to seven years.[18]

An exemption was made—one could hardly imagine otherwise—for "discussion, criticism, or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions."[19] Yet such an exemption renders the law almost entirely arbitrary. "Hatred" (forbidden) and "antipathy" (allowed) are so close in meaning as to cancel out one another in an almost dialectical fashion. All that separates guilt from innocence is, apparently, the ability of a judge to distinguish between two synonyms, and all that remains of the Act is a free-floating review power over any heated religious controversy.

To make matters worse, Parliament expanded the Act yet again in 2008 to include sexual orientation. And yet again, a supposed legal safeguard opened the door to arbitrary power. The Criminal Justice and Immigration Act exempted those speech acts that "urge persons to refrain from or modify [sexual] conduct or practices." Speech of this type "shall not be taken of itself to be threatening or intended to stir up hatred."[20] It remains unclear, however, how significant this exemption will prove. No speech act of this type is *necessarily* forbidden, but any of them conceivably *could* be.

The story doesn't end there. With a similar rationale—or, arguably, a far more disturbing one—in the first half of 2009, Home Secretary Jacqui Smith announced that her office had begun preemptively banning people from entering the country *for fear that they would* incite hatred. Banned individuals included members of the Westboro Baptist Church, as well as a number of anti-immigrant activists, some radical Muslims, and U.S. talk-radio host Michael Savage. These individuals, whose names were released in May 2009, were chosen pursuant to an even tighter standard than the one in the laws applying to the general public: those wishing to enter the UK faced a "presumption in favour of exclusion," whereby individuals must prove that they will not "stir up tension" in the country.[21]

Now this is an entirely impossible burden to bear. Western legal systems generally support the presumption of innocence for alleged *past* misdeeds. To presume guilt for an indefinitely broad class of *future* misdeeds is to make a presumption that no evidence could possibly rebut.

It is understandable that entry into a country might be considered a privilege, not a right. Nonetheless, if the Home Office were to apply a "presumption in favor of exclusion" literally, one wonders how anyone could enter the UK at all. Yet thousands still do so every day. Obviously only *some* people face this presumption, while the vast majority do not, and this distinction was not subject to independent review.[22]

Fortunately, following an unrelated political scandal which ousted Home Secretary Smith, entering Home Secretary Alan Johnson rescinded the travel bans and termed them a "blunder."[23] One lesson from the incident seems to be that protections from hurt feelings only generate more hurt feelings. Yet this might easily have been apparent from the course of previous UK law. Are conservative Muslims' statements about homosexuality "hateful"? Perhaps. But if a gay person vigorously objects to what he views as religious bigotry, will he incite hatred against Muslims? Or will *both* happen? If both, then what can gays and conservative Muslims legally say about one another? Airing grievances honestly, even at the risk of hard feelings, seems by far the wiser course.

In all, recent developments in UK law offer an object lesson in how prohibitions on purely emotional harm tend to grow over time. They also show how attempts to regulate objectionable speech just open the door to arbitrary power.

Canadian law is similar, but if anything, even broader. Section 13(1) of the Canadian Human Rights Act of 1977 reads as follows:

> It is a discriminatory practice for a person or a group of persons acting in

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Regardless of which cases are punished and which are not, the results are bound to look arbitrary to someone.

> concert to communicate telephonically or to cause to be communicated, repeatedly, in whole or in part by means of the activities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

It has since been amended to unambiguously include Internet communications. Some of the remaining ambiguities are more serious, however. Consider first the case of Stephen Boissoin, a Christian pastor who, in 2002, wrote a letter to the editor of a small newspaper, in which he condemned homosexuality.[24] In response, the Alberta Human Rights and Citizenship Commission forbade Boissoin from "publishing in newspapers, by e-mail, on the radio, in public speeches or on the Internet, in future, [sic] disparaging remarks about gays and homosexuals."[25] In the United States, this would be termed prior-restraint censorship—and would be counted among the most odious forms that censorship can take.

It might console some people, at least, if this new prior-restraint censorship were at least being applied fairly. Sadly, it is not—and probably cannot be. Recently, Canadian fundamentalist Imam Abou Hammad Sulaiman al-Hayiti wrote and published a very clearly hateful tract targeting Jews, Christians, Zoroastrians, homosexuals, *and* non-Muslim women. Al-Hayiti wrote that, "If the Jews, Christians, and [Zoroastrians] refuse to answer the call of Islam, and will not pay the jizyah [tax], then it is obligatory for Muslims to fight them if they are able." He termed Christianity a "religion of lies," calling it responsible for the West's "perversity, corruption, and adultery." He further remarked on "the incredible number of gays and lesbians (may Allah curse and destroy them in this life and the next) who sow disorder upon the Earth and who desire to increase their numbers."[26]

It is difficult to understand these words as anything *except* a call to hatred, and surely this is the very thing that Section 13(1) was designed to punish. To test the objectivity of the law, Canadian blogger Marc Lebuis filed a complaint in April 2008. Incredibly, his complaint was dismissed.[27]

This is not to say that al-Hayiti should have been punished. The real lesson here is that exposing a person to "hatred" or "contempt" is an intrinsically subjective offense. Even things that seem plainly hateful to me will seem anodyne to others. Regardless of which cases are punished and which are not, the results are bound to look arbitrary to someone.

Were al-Hayiti accused of theft or murder, the judges would have relied on physical evidence, testimony about objective facts, and a judgment that, while certainly not infallible, would at least not hinge entirely on measuring a relative emotional state of a hypothetical person. ("Would someone *feel* as though he were "exposed to hatred or contempt"?) Although judgments of the more traditional sort are subject to getting the facts wrong, there is at least a broad agreement, in principle, about what a genuine offense *would* look like, if all exterior facts were to be established. Following this broad agreement, we can progress—in a relatively straightforward fashion—to refining standards of evidence and proof, and to applying them in individual cases. The same can not be done with states of emotion.

The Canadian Human Rights Commission recently published a report defending Section 13. It was entitled "Freedom of Expression and Freedom from Hate in the Internet Age," but this is inaccurate.[28] What Section 13 would actually deliver, if it were somehow to be fairly enforced, is not freedom from hate, because the CHRC does not convince any haters to feel otherwise. What it does is suppress knowledge *about* hate. Canadian law professes perhaps the greatest solicitude for the disadvantaged of any of the

codes examined in this analysis. But it is by no means clear that we help minorities by sheltering them from the views of those who hate them.

Although this sheltering no doubt produces some immediate psychic payoff, ignorance isn't necessarily bliss. Minorities may actually be better off, even strictly in utilitarian terms, if they know who their enemies are and how to avoid them. Their lot may improve still further if these enemies can be rebutted publicly and by name. The purported cost-benefit analyses that back prohibitions on upsetting speech almost never take these values into consideration and focus only on the immediate shock of perceiving hatred in itself. The presumption almost appears to be that the squelched expressions are of such power that any target who happened upon them would crumple into a defenseless heap, and perhaps even that members of the majority will find hate propaganda irresistibly convincing. These presumptions are insulting to majority and minority groups alike.

A fuller analysis would recognize that often the reverse is true for each. Hate messages can galvanize renewed efforts by minorities toward social toleration and respect. And majorities may find that once a form of bigotry is put forward openly and plainly, that bigotry becomes repugnant in all its forms, explicit or implicit. We need not assume that these beneficial effects will *always* appear, but that they *sometimes* appear is undeniable, and this is one consideration that proponents of hate speech laws seemingly never entertain.

Yet we can find the impulse to punish emotionally upsetting speech even in the United States. Here it can be seen in campus speech codes, which often are presented as anti-harassment or civility policies, yet which may contain language every bit as vague and arbitrary as the laws we've just examined from the UK and Canada. Although our Constitution sets up a strong barrier against the spread of hate-speech laws, public college and university administrators across the country have enacted perhaps hundreds of constitutionally doubtful restrictions on student speech.

Perceived offense is once again the key, and the intent of many of these codes is clearly to minimize even momentary feelings of discomfort, regardless of the costs imposed on speakers or the other trade-offs mentioned above. Consider the anti-harassment policy adopted by San Jose State University, which reads in part:

> Any form of activity, whether covert or overt, that creates a significantly uncomfortable, threatening, or harassing environment for any UHS [University Housing Services] resident or guest will be handled judicially and may be grounds for immediate disciplinary action, revocation of the Housing License Agreement, and criminal prosecution. The conduct does not have to be intended to harass. The conduct is evaluated from the complainant's perspective. It is not uncommon for offenders to be completely unaware of how their actions are being perceived. Such activities would include, but are not limited to . . . verbal remarks, ethnic slurs [and] publicly telling offensive jokes.[29]

One wonders why "ethnic slurs" and "offensive jokes" had to be specified, when the category of "verbal remarks" presumably encompasses them already. (Are there *non*verbal "remarks"?) But most disturbingly of all, the evaluation is to be "from the complainant's perspective," a measure that is alien to both the adversarial and the inquisitorial approaches to law. Requiring the authorities to adopt the complainant's perspective effectively unites the judge, the prosecutor, and the victim. The plaintiff's perspective is declared to be *right*, solely because he or she has complained. After that, the law's purpose is purely to make him or her feel better—via a legally dubious "criminal prosecution." With a rule like that, we should not be surprised if we see an increase in the number of complainers.

Ohio State University has also adopted restrictions on free speech in the name of hurt

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feelings. The university's 2007 "Diversity Statement" informed students that "Words, actions, and behaviors that inflict or threaten infliction of bodily or emotional harm, whether done intentionally or with reckless disregard, are not permitted." The statement also told students that they must not "joke about differences related to race, ethnicity, sexual orientation, gender, ability, socioeconomic background, etc."[30]

The university ultimately bowed to pressure, in part from the First Amendment watchdog group Foundation for Individual Rights in Education, and removed these sections from its diversity statement. Yet similar restrictions remain in the Student Housing Handbook. Students are promised "freedom from harassment, including . . . threats of intimidation and physical or emotional harm. This includes acts of ethnic or racial intimidation, hazing, or harassment for reasons of race, religion, gender, gender identity or expression, sexual orientation, age, disability, or veteran status."[31]

These sentiments and approaches are not unusual. Indeed, every month FIRE's website includes a new "speech code of the month"; the organization has compiled an extensive searchable database detailing infringements on the freedoms of speech, religion, and association taking place on college campuses across the country.

There is no doubt that a significant movement exists in the United States, primarily on college campuses, to protect hurt feelings at the expense of core American freedoms. Yet the very impossibility of weighing emotional upset gives college speech codes all of the same problems to be seen in legal prohibitions against hate speech. Although we may wish to minimize the negative externality of hurting others' feelings, the cost-benefit analysis implicit in hate-speech policies never appears to consider either that allowing hate speech has significant benefits, or that perceptions of both costs and benefits are ultimately subjective, conflicting, and impossible to quantify.

Do proponents of speech codes see them as models for future American law? Or do they merely regard college students as less deserving of freedom than other American adults? It may not matter very much what the answers to these questions are, because the net effect may be the same regardless: during the formative years of many educated Americans, the standard has been set that we all have a right not to be made uncomfortable.

As with many pieces of doubtful legislation, the story begins with the desire to protect American children.

Cyberbullies

Although hate-speech laws aren't in play in the United States yet, another proposal with similar aims very definitely is. It comes in an area of law that's not fully settled, and this makes it a significant potential threat to free expression. The Megan Meier Cyberbullying Prevention Act (H.R. 1966) is now under consideration in Congress. It not only penalizes upsetting speech and thus likely falls afoul of the First Amendment—it may even penalize speech simply for being *politically* upsetting.

As with many pieces of doubtful legislation, the story begins with the desire to protect American children. Megan Meier was a 13-year-old girl from Missouri who, like many teens, struggled with social acceptance, body-image problems, and depression. She turned to MySpace, where she befriended a boy named Josh Evans. At first they seemed to bond, but their relationship quickly turned sour. Josh's last message suggested that Megan should kill herself—which she did, on October 17, 2006.[32]

Josh, however, turned out not to be a boy at all. The profile was a fake. It was created in part by Lori Drew, a vengeful mother who believed that Megan had insulted her daughter. Drew worked with her daughter and a coworker to pull off the deception, which Megan never discovered.

In a poetic, though troubling, form of revenge, adult bloggers soon posted photos of Drew's family and published her home phone number, address, and workplace, attempting to provoke counter-harassment. Vandalism and death threats ensued.[33] A jury found Drew guilty of three misdemeanor

charges relating to wire fraud, although she was acquitted on the novel—some would say strained—felony charge that she was, in fact, a computer hacker because she also violated the MySpace terms-of-service agreement. As of this writing, the case remains far from settled; on July 2, 2009, the trial judge set aside the jury's guilty verdicts, which he found to rest problematically on the terms of the MySpace user agreement. Prosecutors are reportedly planning an appeal.[34]

One can easily find Drew's actions reprehensible, and perhaps even criminal, while disagreeing with some of the remedies that have been sought. One such remedy is the Megan Meier Cyberbullying Prevention Act, introduced by Representative Linda Sánchez (D-CA) and currently before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security. The operative clause reads as follows:

> Whoever transmits in interstate or foreign commerce any communication, with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person, using electronic means to support severe, repeated, and hostile behavior, shall be fined under this title or imprisoned not more than two years, or both.[35]

As legal scholar Eugene Volokh has noted, the scope of this measure vastly exceeds existing state-level anti-harassment and anti-stalking laws.[36] It doesn't require, as might be more reasonable, that the victim be a child. It far exceeds both Britain's hate-speech laws and many campus speech codes in that the victim need not be of any minority group, and the upset need not relate to a perceived minority identity.

Indeed, the only thing separating this law from a blanket prohibition on every form of upsetting speech is its "electronic means" stipulation. All of the same difficulties we have observed elsewhere thus apply here as well, and to an even greater degree. "Severe" emotional distress will always be difficult to gauge. "Substantial" emotional distress, although previously found in the law, remains controversial in its own right.[37] And at least for this bill, no threat of violence, whether specific, credible, or otherwise, is needed.

As written, the proposed legislation represents a true carte blanche for would-be censors. After all, no one ever wants to ban *non*-distressing speech. Volokh has called the measure "clearly unconstitutionally overbroad," and has noted that even writings condemning politicians for their policies may cause "severe emotional distress."[38] Although Sánchez has denied that Congress is interested in censorship,[39] the ability to determine just what constitutes "severe emotional distress" under H.R. 1966 would seem to grant that power anyway.

Moderate and Radical Islam

Although it may be contentious to bring up Islam in this context, there are good reasons to do so. One need not, and I do not, imply that radical Islam shares any characteristics with our other examples, apart from the ones we point out here. Yet these shared characteristics are salient, because they suggest the dangers of speech restriction in the name of good feelings. Indeed, "radical" Islam may be a misleading term, because even moderate Islamic jurisprudence often implicates anyone who causes emotional upset to believers. These provisions, although enacted by self-professed moderates, give cover for sweeping attacks on ordinary political, cultural, or religious nonconformity. They can therefore serve as a warning to us.

For example, as an alternative to the UN's Universal Declaration of Human Rights, in 1990 the Organization of the Islamic Conference promulgated the Cairo Declaration on Human Rights in Islam. Although it purports to be a human-rights document, by now readers should realize that not everything appearing under the name "human rights" has been accurately labeled. The Cairo Declaration's Article 22 states that "Everyone

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shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'ah." The principles of Shari'ah, however, make blasphemy a capital crime.

"Information is a vital necessity to society," the Declaration continues. "It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical Values or disintegrate, corrupt or harm society or weaken its faith."[40]

Those tempted to see a moderate path here should consider the case of Abdel Kareem Nabil Soliman, the Egyptian blogger who was arrested for his online writings. Posting pseudonymously as Kareem Amer, he wrote from a secular perspective and criticized the religiously conservative climate at al-Azhar University in Cario, where he was a student. Kareem voiced support for women's rights and criticized the Egyptian government for failure to intervene as Islamic militants ransacked Christian businesses. He is now in prison serving a four-year sentence; among his alleged crimes is incitement to hate Islam.[41]

Although we in the United States (though perhaps not we in the West as a whole) recoil at the thought of locking someone up for expressing an opinion, this outcome is fully consistent with the Cairo Declaration. Information may be "vital" to society, but sometimes, according to the Declaration, it is more vital to protect certain groups from uncomfortable feelings. Those who benefit most from provisions like these are easy to discern.

As Johann Hari has written, "[A] free society cannot be structured to soothe the hardcore faithful. It is based on a deal. You have an absolute right to voice your beliefs—but the price is that I too have a right to respond as I wish. Neither of us can set aside the rules and demand to be protected from offence."[42]

The underlying reason for this deal is that, in many areas of law, a society can craft abstract rules whose full applications are at least theoretically realizable. *All* people have an equal freedom to express their opinions. *All* people enjoy an equal right to seek out employment or to acquire or transfer property. A given piece of property may be mine, or yours, or belong to our mutual friend, and as long as the rules about property holding and acquisition are unambiguous and obeyed, the debate is over. In all of these, it is at least potentially the case that the rules we set up will be *compossible*: they can all be capable of fulfillment at once and in the same respect, without anyone's rights interfering with the rights of another.[43]

Yet when emotional fulfillment becomes a right, no compossible arrangement can be had. Some emotional claims will always conflict with some others, and making some people happy will always involve making some other people sad. The real locus of the law will no longer be in written rules themselves, but ultimately in how various individuals feel, how effectively they can impress that feeling on others, and how well their agents can seize the power of enforcement.

Here there are interminable conflicts, and no set of rules can even conceivably achieve finality. Permitting the sale of Salman Rushdie's *The Satanic Verses* will please lovers of highbrow literature but appall some Muslims; forbidding its sale will appall the bibliophiles, but censorious Muslims will be pleased. Although pleasure and displeasure clearly attach to the application of abstract, impersonal rules, these emotions are not the standards by which the outcome is judged. They are incidental to the process of justice. In hate-speech law, they *are* the process.

Free societies extend the bargain of unrestricted speech because they recognize that offering the same rights of expression to everyone is a compossible set of rights, while restricting certain forms of speech based on the upset they cause invites irresolvable conflict. This is simply in the nature of emotion, and being able to live in a society with others sometimes requires stoicism even in the face of fairly profound emotional upset. Continued civility and sociability are simply more important long-term values, and this is the reason we make the bargain we do. In the next

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section, we will consider some of the practical effects of failing to make this bargain.

Utility Monsters

Philosopher Robert Nozick once noted a paradox of utilitarianism:

> Utilitarian theory is embarrassed by the possibility of utility monsters who get enormously greater gains in utility from any sacrifice of others than these others lose. For, unacceptably, the theory seems to require that we all be sacrificed in the monster's maw, in order to increase total utility.[44]

Because governments are seldom utilitarian in the purely hedonic sense, utility monsters are rarely seen in the wild. Yet hate-speech laws would encourage, or even generate, utility monsters much as Nozick imagined them. Here's how.

As we've seen, it's possible to consider the emotional harm of blasphemy, desecration, or hate speech as a sort of intangible negative externality. Yet quantifying this externality is very difficult or perhaps even impossible. Sooner or later, those who would quantify it must turn to the victim and ask, in effect: "How badly did it hurt?" This question is an invitation to abuse.

Tangible negative externalities may affect property values, morbidity and mortality rates, or even simply sales figures. Once these changes can be quantified, compensation may be subjected to a formula that resolves the question to the best of our scientific knowledge. We may argue about the formula's empirical accuracy, or even about its intrinsic justice—for example, can a death ever be sufficiently compensated?—but it is clear that, at the very least, the justice being done may be done equally for all and in a compossible manner. Even when juries are asked to consider pain and suffering, these emotional states are always incident to a material harm. This limitation allows for a measure of proportionality and tethers the jury's findings to comparable tangible considerations.

But when negative emotional states are considered alone as externalities, those who do not feel the emotion may not even be able to *identify* a putative harm, let alone quantify it. If I were asked, for example, about how harmed I would feel if my *burakumin* ancestors were exposed to the world, it would be extraordinarily difficult for me to come up with an answer that would satisfy myself, let alone one that would satisfy everyone concerned. (Even actual present-day *burakumin* don't agree on this!)

In such situations, it may always be doubted whether a hurt individual or group has received just compensation, regardless of what standard we choose. Dollar-valued remedies will always be a matter of dispute among individuals who feel varying levels of harm, or who feel none at all.

Meanwhile, legal resources are limited, and it is a well-accepted norm that these resources must be allocated to those in the greatest need. For tangible crimes, we can establish a scale: murders are worse than bank robberies; petty vandalism is far below either. With emotional hurts, however, we must rely on the victim's word. The result is a race to the bottom, in which each offended individual must protest ever more loudly about how profoundly he or she has been hurt. Failure to claim a greater harm than one's neighbor may result in no legal help at all, and the most sensitive (or sensitized) party usually wins. And yet, because no outsider can measure the depth of another person's hurt, there is no way to end the progression.

This is why hate-speech restrictions never seem to reduce hate speech. On the contrary, they encourage ever more innocuous things to be *seen* as hate speech—thus producing the famous oversensitivity seen on college campuses today. A similar dynamic is arguably at work in fundamentalist Islam; it is difficult otherwise to explain how a class naming a teddy bear "Mohammed" can result in its teacher being accused of "insulting religion, inciting hatred and showing contempt for

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religious beliefs."[45] Yet protestors demanded the death penalty in the case. "No one lives who insults the Prophet," they declared.[46]

This example illustrates a very general point. Censorship regimes are prone to a peculiar form of regulatory capture. In a typical case of regulatory capture, the friends of railroad executives may get themselves appointed to the railroad oversight board, where they defeat its original purpose of preventing undesired behaviors in the industry. Things work out differently for censorship. Censoring agencies are not captured by the regulated industry—that is, by publishers, who would be lenient. Instead, they are captured by the most censorious individuals or constituencies of the public.

The more severe an individual would be, the more likely he or she is to become intimately acquainted with the censorship regime and to follow its activities approvingly. He or she then becomes a likely candidate for future appointment as a censor and may even campaign actively for the post. People who are radically *dis*inclined to censor, of course, will almost never do such things. The system not only breeds outrage over increasingly petty offenses, it rewards the most outraged by giving them bureaucratic power.

Fighting back is difficult, too. Observing the censorship in Old Regime France, historian John McManners offered a useful insight: "a sort of 'law' of ecclesiastical history begins to work in situations like these: the moral rigorism of a minority becomes a majority interest because of the exigencies of ecclesiastical politics . . . [No one could] afford to allow their adversaries to boast a monopoly of virtuous strictness."[47] It's easy to declare oneself the vindicator of virtue. It's much harder to position oneself as the principled-but-reluctant guardian of vice—especially if you hope one day to run the censorship yourself. The only way forward is to pose as, or perhaps become, another utility monster.

This process is unfolding on college campuses, in liberal and well-meaning countries like Canada, and in the Muslim world. It explains a number of otherwise inexplicably harsh findings against the freedom of expression, both in the West and elsewhere. What we see here is not precisely political correctness according to any one ideology, but the triumph of the utility monsters, whose bottomless suffering *must* be redressed, no matter what the costs, and whose thirst for power is equally bottomless.

In all of this, a certain balance has been lost, and it is curious how some hurt feelings are *never* to be compensated for. I, for example, am not much offended by cartoons of the Prophet. The truth is that I have laughed at them. But I find the mere thought of censorship agonizing. I am not being facetious about this; my sincere upset at the existence of censorship is one of the prime motivations for my writing these words.

Yet I do not ask that my views be adopted by others so that my suffering will be eased. I would prefer that my views be adopted because they are rational and therefore convincing. But I have a reason for my bringing up these personal and decidedly unprofessional feelings anyway. If "feelings of upset" are to be taken into account in shaping our laws, why do my feelings, and the feelings of other libertarians, always count for nothing? What are we to make of those who suffer distress at the thought of censorship? It is curious that in most purportedly utilitarian treatments of this issue, certain pleasures and pains are so little considered.

The Balancing Act

Some say that freedom of speech is a good thing—but that we must balance it with other concerns. Perhaps in years past, we could afford unlimited free speech, the argument goes, but nowadays, the clash of cultures in our changing world has made speech more dangerous than ever. Sometimes, we're told, the freedom of expression needs to yield in the name of diversity. Only "absolutists" would say otherwise.

This is substantially the argument advanced by Jennifer Lynch, Chief Commissioner of the Canadian Human Rights

Commission—and thus one of those responsible for implementing Canada's hate-speech laws. In a recent op-ed, Lynch wrote,

> [Some take] the view that freedom of expression is the paramount right in Canadian society, over and above the right of all citizens to be protected from the harm that can be caused by hate messages.
>
> In fact, there is no hierarchy of rights with some rights having greater importance than others. They work together toward a common purpose.
>
> It is up to legislators and courts to find the appropriate balance that best protects the human rights and freedoms of all citizens.[48]

No one wants to seem "off balance." Yet this particular balancing act is a sham. People who express hate are not the only ones who hold "paramount" the freedom of expression. We all hold it paramount, even Lynch herself, who recently complained that opponents of the CHRC have "chilled" *her own* freedom of expression—by criticizing her and her agency.[49] Even would-be censors fear the loss of freedom of expression.

Of course, Lynch has to some degree brought this problem on herself. When freedom of expression is threatened for anyone, it is threatened for all; when we accept the premise that government agencies should monitor "hateful" speech, we must accept the implication that one day, our own speech could be termed hateful, and the agency we once headed could turn against us. Should a different evaluation arise of the relative pains and pleasures of repressing various forms of expression, there would be nothing to stop this development.

Rather than balance, what Lynch really proposes is that some people's free expression is better than others'—and that the state, not the individual, is best equipped to separate the good from the bad. The proposed remedy is decidedly asymmetrical. On one side, there are words on a computer screen or a newspaper. On the other, there are injunctions, fines, and possibly prison for those who resist. It is hard to see what quantity of the one could justly balance any quantity of the other.

What's missing here is that freedom of speech is its own balance: the remedy for speech that one finds hateful is to speak out against it. The ever more powerful technologies that enable bullies to speak also enable their victims to speak. Often, these communication technologies are among the most powerful resources that marginalized groups have at their disposal. They are powerful in ways that injunctions, fines, and prison are not, because they both encourage associational life and actively work to change the minds of outsiders. Further, they do so in a way that does not simply hand another weapon to the government. Instead, these new technologies extend the social bargain that Johann Hari described as central to a free society—or, in Hillel Steiner's terms, they extend the range of compossible freedoms. In the next section, we will discuss some of the implications of this expansion.

New Resources, New Responsibilities, New Hopes

Technology, we are sometimes told, has made it far easier to embarrass or annoy other people. The Founders never dreamed of YouTube or Twitter. These and other new technologies mean that it's time to consider new restrictions. Skeptics of unlimited online free expression have suggested that the new technologies skew in favor of bullies and coarsen our society. Technology writer Jonathan Zittrain notes that "The summed outrage of many unrelated people viewing a disembodied video may be disproportionate to whatever social norm or law is violated within that video. Lives can be ruined after momentary wrongs, even if merely misdemeanors."[50] He cites a horrifying example:

The famed "Bus Uncle" of Hong Kong

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> upbraided a fellow bus passenger who politely asked him to speak more quietly on his mobile phone. The mobile phone user learned an important lesson in etiquette when a third person captured the argument and then uploaded it to the Internet, where 1.3 million people have viewed one version of the exchange. . . . Weeks after the video was posted, the Bus Uncle was beaten up in a targeted attack at the restaurant where he worked.[51]

Yet there are also times when the outrage is well placed and useful, as when Internet video discloses police brutality to the public. Because police officers are paid public servants, and because they are authorized to use deadly force, they should certainly face closer scrutiny than the Bus Uncle. YouTube videos have shown police beating, tasering, and even shooting suspects who offered little or no resistance. One video showed a man detained for a traffic violation in the parking lot of a hospital. Inside, his mother-in-law lay dying. As the police kept him in the parking lot and threatened him with arrest, she died. After the video reached YouTube, the police chief apologized, and the officer resigned.[52] It's entirely possible that without YouTube, neither would have been held accountable. Nor was this an isolated incident; Internet videos of police misconduct now commonly lead to disciplinary action.[53] A new technology has brought greater government accountability and has undoubtedly had a chilling effect on official misconduct.[54]

None of this will be much comfort to the Bus Uncle, but it does suggest that, on balance, Internet video might do more to inhibit violence than to encourage it, and that it works to the net benefit of the disadvantaged. Further, even the Bus Uncle's own case has become a cautionary tale. Yes, he was beaten, and we can't possibly say that this was a good outcome. Yet the outrage at this unjustified violence has also been magnified, much like the Bus Uncle's original trivial offense. Millions now know both the original story and its awful conclusion. Perhaps they may think more carefully now about how they post, view, and react to Internet video.

It is to be expected that *any* medium, new or old, will sometimes be put to bad ends. When we look at the larger picture, which includes both good and bad, blaming the medium, and regulating it, are not necessarily the best answers. Perhaps we don't need prohibitions, but simply a period of cultural adjustment, in which both we as individuals and our culture as a whole develop norms and values that reflect the power of the new technology.

It's also worth considering, briefly, how oppressed or marginalized groups can directly take advantage of new technologies. The bullies don't always win, and quite often, the Internet has empowered the outcasts, eccentrics, and loners in ways that they have never before experienced. Although the new media certainly can magnify hate speech, they can also magnify the organizing, supporting, and nurturing efforts of communities made entirely of marginalized people and their supporters. Two examples help illustrate this point.

First, consider Autism Blogger (http://www.autism-blog.com). It's just one of literally dozens of autism-related online support, information, and social networking sites. Many individuals on the autistic spectrum experience great difficulty with social interaction; some are even unable to speak comprehensibly. Yet often these same individuals can write and receive online messages with relative ease. These contacts serve both psychological and practical ends. Posters are reassured that they are not alone; their experiences and self-worth are affirmed by members of a community; and they are introduced to new strategies for managing and living successfully with autism.

At Autism Blogger, a teenager discusses dating; a mother talks about toilet training; and therapists, caregivers, and autistic individuals compare notes about products and services that help them manage the condition. Although we don't usually think of autistics as

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a group with a long history of persecution, perhaps we should. Awkward, shy, or seemingly eccentric individuals throughout history may be the very people whom today we would term autistic. They have certainly faced more than the usual share of social ostracism. Online interaction has been an obvious boon to the autistic, and not nearly such an obvious boon to those inclined to mistreat them. Indeed, the Internet has arguably been far more valuable to autistics than to any other marginalized group in society.

Except, perhaps, for our second example: the transgendered. Like autism, the transgender experience comes in many forms and can express itself in many ways, including everything from simple ideation ("In my mind, I know I'm a girl"), to apparel choices, to transsexual hormone therapy and surgery. Without a doubt, transgendered individuals have faced hatred and contempt from mainstream society. They are recognized as a group and commonly persecuted as such, even to the point of violence. Yet they have also been able to find an extraordinary amount of support from online communities of their own making.

The Internet has offered a remarkable "safe space" for transgendered people to express who they are, right down to the ease with which one may construct an online identity with a gender of one's choosing. Outing oneself as transgendered, even online, still can carry an enormous risk, and sites like Transsexual Roadmap list careful (even elaborate) precautions to observe in selecting where and how to participate in online forum discussions.[55] Yet the site also includes links to forums for transgendered people who want to discuss everything from vocal feminization surgery, to faith, to dating—all in relative safety.

This is not to say that the power of hateful messages on the Internet always just happens to be sufficiently offset by the existence of affirming ones. Nor are we opening ourselves to the argument that only the affirming messages should be left online, while the hateful ones should still be taken down. Instead, the experience of marginalized groups on the Internet suggests that this new technology makes it easier than ever before simply to walk away from hateful messages and individuals—while seeking out affirming ones. Far from strengthening hatred, the Internet generally makes it weaker.

Policy scholars should consider the power of these examples when they seek to limit online anonymity in an attempt to prevent emotional upset from hateful online speech. Berin Szoka and Adam Thierer have argued that "It is probably true that the 'veil of anonymity' emboldens some perpetrators who might not otherwise engage in bullying, harassment and stalking . . . and puts bullies at an advantage since it becomes harder to identify, locate, and punish them."[56] They consider this concern to be one of the most serious challenges to any defense of online anonymity. Jonathan Zittrain has expressed concern that "unsheddable identity tokens" may one day be required to access many online venues—tying online and real-world identities permanently together.[57]

Yet it should be obvious from our examples that unsheddable identity tokens wouldn't be good for everyone, and that anonymity can be a tool for the powerless as well as the powerful. Online, we can very often disassociate ourselves from almost anyone, at any time. Anonymity—or, rather, the ability to construct a new identity, and with it, new associations—can be crucial to self-protection. The powerful and unpersecuted don't benefit very much from the ability to break contact, and neither do those who wish to hurt other people. Much of their power, in fact, derives from the inability to break contact. But the powerless and persecuted benefit enormously from the chance to walk away.

Consider that it is obviously and vastly more intimidating to confront someone who hates you in person than online. Even a phone conversation can be more intimidating than the rather impersonal interactions we may choose on the Internet. Online, you can keep your distance. If the hateful messages become too much for you to stand, you need not read them, or you may use software to filter them

Far from strengthening hatred, the Internet generally makes it weaker.

out. Yet if you wish to educate yourselves about people who are hostile to you, it's possible to get that education anonymously and in total safety. At the same time, you can always seek out people who will understand and sympathize with you. It is difficult to see how hate speech, or hateful causes, gain anything at all in this bargain, and therefore it is difficult to see why legislation targeting them is particularly appropriate now.

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Conclusion

Although we may define an economic externality in terms of our willingness to pay another to stop something, and although this definition raises the possibility of purely emotional externalities, we are still a long way off from either crafting legislation based on these considerations or from using them to justify existing legislation. Current hate-speech laws, as we have seen, do not make any attempt to consider all of the emotional costs and benefits of controversial speech, nor could they. Nonetheless, the aggrieved receive a service—or even a government power—for virtually nothing. Naturally, they will demand a great deal of it, and conflicts are inevitable.

Worse, the aggrieved soon engage in a race to the bottom, as the extent of their negative externality is neither readily quantifiable by them nor even potentially quantifiable in an objective manner by anyone else. The result is the appearance in real life of Nozickian utility monsters, and of regulatory capture by the most censorious elements in society. While the idea of protecting individuals from psychic harm is appealing, and while we can make some gestures in the direction of law and economics as we attempt to justify it, considerations arising out of law and economics itself inevitably doom the whole project.

Notes

1. Drake Bennett, "Time For a Muzzle," *Boston Globe*, February 15, 2009, http://www.boston.com/bostonglobe/ideas/articles/2009/02/15/time_for_a_muzzle/.

2. 2008 Republican Platform Values, http://www.gop.com/2008Platform/Values.htm#3.

3. *Texas v. Johnson*, 491 U.S. 397 (1989).

4. "Amendment on Flag Burning Fails by One Vote in Senate," *New York Times*, June 27, 2006, http://www.nytimes.com/2006/06/27/washington/27cnd-flag.html.

5. Senator Chuck Grassley of Iowa, http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=20631.

6. For a prominent example, see Robert Bork, *Slouching Towards Gomorrah: Modern Liberalism and American Decline* (New York: Regan Books, 1997) pp. 99–102

7. Eric Rasmusen, "The Economics of Desecration: Flag Burning and Related Activities," *The Journal of Legal Studies* 27, no. 2. (June 1998): 245–69.

8. Ibid., pp. 247–48. Rasmusen considers, but rejects, bargaining as a solution to this problem, finding that the costs of negotiating with holdouts would be prohibitive: if *each* would-be desecrator must be sufficiently compensated to prevent *all* of the desecration—and all of the suffering—that might otherwise occur, there would be no way to stop desecration by bargaining.

9. Wikipedia, "Flag Desecration Amendment," http://en.wikipedia.org/w/index.php?title=Flag_Desecration_Amendment&oldid=282708252.

10. Or perhaps none at all; the flag in the image does not appear to have sustained any damage yet, and it might even be fireproof, as some flags are nowadays.

11. "Upcoming Picket Schedule," http://www.godhatesfags.com/schedule.html.

12. "About WBC," http://www.godhatesfags.com/written/wbcinfo/aboutwbc.html.

13. Japan Today, "Old Japanese Maps on Google Earth Unveil 'Burakumin' Secrets," May 6, 2009, http://www.japantoday.com/category/technology/view/old-japanese-maps-on-google-earth-unveil-burakumin-secrets.

14. Hate-*crimes* laws, by contrast, examine acts that would have been crimes even without the new law, and they inquire only about criminal motives. Proponents of hate-crimes laws like to point out that inquiries about motives already

happen all the time in our law, and that hate crimes laws should not be dismissed for this reason alone. This is a necessary but not sufficient argument in their favor.

One argument favoring hate-crimes laws is that they are useful to prevent a *lesser* penalty from falling on criminals who target certain social groups. This would of course be perversion of justice. Yet this very consideration would seem to argue not for enhanced penalties to some, but *equal* penalties for all, regardless of the social status of the victim.

Another argument for hate-crimes laws, and perhaps a stronger one, is that certain expressive acts in the context of a crime do not threaten the victim alone, but also those who identify closely with the victim due to shared religion, ethnicity, or sexuality. This common threat is undoubtedly real in many cases. Yet apprehending and imprisoning the criminal would seem to extinguish it, or at least to render it extremely remote. If we cannot subscribe fully to the communal threat argument, we may be forced to conclude that hate-crimes laws are at least in part motivated by a concern for the victims' feelings, as articulated by victim groups, rather than any tangible claim.

15. Public Order Act 1986, c. 64, section 1 and throughout.

16. Ibid., at 18.

17. Racial and Religious Hatred Act 2006, c. 1 at 29B.

18. Ibid., at 29L.

19. Ibid., at 29J.

20. Criminal Justice and Immigration Act 2008, c. 4 at 74.

21. Hélène Mulholland and agencies, "Home Office 'Names and Shames' 16 People Banned from UK." *Guardian* (Manchester), May 5, 2009, http://www.guardian.co.uk/politics/2009/may/05/list-of-people-banned-from-britain.

22. Hélène Mulholland and agencies, "Shock Jock Banned from UK Vows To Sue Jacqui Smith," *Guardian* (Manchester), May 6, 2009, http://www.guardian.co.uk/politics/2009/may/06/michael-savage-sue-jacqui-smith.

23. Simon Walters, "Johnson Ditches Jacqui Smith's Least-wanted List as a 'Blunder,'" *Daily Mail Online*, July 18, 2009, http://www.dailymail.co.uk/news/article-1200636/Alan-Johnson-ditches-Jacqui-Smiths-wanted-list-blunder.html.

24. The full letter, too long to print here, can be read at http://canadianpastor.blogspot.com/2005/09/letter-that-started-it-all.html.

25. "Two-Tiered Thought Police," *National Post*, December 19, 2008, http://www.nationalpost.com/opinion/story.html?id=1095061.

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