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Counterspeech in Response to Changing Notions of Free Speech

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by Nadine Strossen

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In addressing this issue's theme—"the changing notions of free speech in our society"—I will explore whether and how notions of free speech actually have been changing. To start, a couple of important such notions have not notably changed for many decades.

Unchanging Support for Two Important, Inconsistent Notions of Free Speech

Notwithstanding recent alarmist headlines on the subject, public opinion surveys and other data, going back to the mid-twentieth century, consistently demonstrate that most people simultaneously hold two inconsistent notions of free speech. On the one hand, when asked about freedom of speech in the abstract, most people are supportive. After all, freedom of speech is a cherished national value "as American as apple pie." On the other hand, when asked about freedom of speech for particular controversial views, many of the very same people favor censorship.

Many members of the public, as well as officials, from across the political spectrum have supported suppressing a range of controversial expression at particular points in the recent past—from flag burning to media violence. Furthermore, as far back as the data extends, there has been one particular unpopular message that solid majorities have steadfastly supported stifling: "hate speech," or speech conveying hateful, discriminatory views on bases such as race, religion, gender, and sexual orientation. Hence, we should not be shocked by the recent Gallup/Knight Foundation poll reporting that 64 percent of college students oppose constitutional protection for such speech. Their responses mirror those of all adults throughout recent history.

There is abounding evidence of the unchanging notions of free speech in our society as excluding controversial messages, in particular, hateful speech. One piece of evidence is a trend analysis of the First Amendment Center's annual surveys about free speech attitudes, between 1997 and 2004, by Princeton University's Center for Arts and Cultural Policy Studies. It found that in each of

these years, while respondents overwhelmingly expressed support for free speech, “a substantial number of respondents (sometimes even a majority) did not support the right to express *specific* types of potentially offensive opinions.”

Surveys further show that majorities of respondents consistently oppose free speech rights for hateful speech in particular. For example, let me cite a historic survey conducted by the very organization that publishes this magazine: the American Bar Association (ABA). In 1991, to mark the 200th anniversary of the Bill of Rights, the ABA released a survey revealing that 51 percent of adult Americans believed that government should ban hate speech. Also pertinent are the First Amendment Center’s annual free speech surveys, noted above. In every such survey from 1997 to 2008, majorities of respondents either strongly disagreed or mildly disagreed with the proposition that “people should be allowed to use words in public that might be offensive to racial groups.” Throughout that period, the lowest percentage of respondents who either strongly or mildly disagreed with this core free speech principle was 53 percent (in 2005), while the highest such percentage was 78 percent (in 1999).

These polling results are bolstered by other evidence. One potent example involves the iconic “Skokie case”: the 1977–1978 litigation arising from the attempts to bar a proposed demonstration by neo-Nazis in Skokie, Illinois, a Chicago suburb that had a large Jewish population, including many Holocaust survivors. When the American Civil Liberties Union (ACLU) defended the fundamental free speech principles at stake, it resoundingly won in the courts of law. In contrast, though, the ACLU did not fare so well in the court of public opinion. In fact, even many ACLU members—who were generally diehard free speech champions—supported censoring the Nazis; remarkably, a full 15 percent of the ACLU’s members resigned from the organization in protest.

Likewise, when the ACLU (successfully) defended free speech rights for alt-right demonstrators in Charlottesville, Virginia, in 2017, about 200 ACLU staff members (out of 1,300) objected. In sum, even many ACLU insiders, who are surely among the staunchest supporters of free speech in general, nonetheless object to freedom for racist views. This underscores the prevalent, longstanding disconnect between our society’s support for free speech in general, while not supporting freedom for hateful speech in particular.

The Supreme Court’s Changing Notions of Free Speech

Although the public’s notions of free speech have not been changing, insofar as many people have consistently sought to suppress hateful speech, fortunately, the Supreme Court’s pertinent notions

have been changing—in a speech-protective direction. From the mid-twentieth century onward, with support from justices across a broad ideological spectrum, the Court has been evolving toward more and more protection of more and more speech purveying controversial views, including hate speech.

The Viewpoint Neutrality Principle

The Court has increasingly strongly enforced the “viewpoint neutrality” principle, which it has hailed as “the bedrock principle” securing our free speech rights: that government may not punish speech solely because its viewpoint or content is deemed hateful by the majority of the community—even if it is deeply loathed by the vast majority of the community. Ideologically diverse justices long have been united in supporting that fundamental notion of free speech, including when the hated viewpoint is a racist or other hateful one. For example, just last year, the Court unanimously reaffirmed this principle when it upheld freedom of speech for a term (“slants”) that traditionally has been used as an ethnic slur against Asian Americans. As the majority opinion declared, quoting a famous phrase that Justice Oliver Wendell Holmes had penned in a 1929 dissent:

Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’

Similarly, in a 1964 case, the Court explained that even when people “speak out of hatred,” their “utterances . . . contribute to the free interchange of ideas and the ascertainment of truth.”

The Emergency Principle

To be sure, if a hateful message (or any other message) is conveyed in a specific context that poses “a clear and present danger” of directly causing certain specific, imminent, serious harm—such as violence—which cannot be averted through any other means, then government may suppress the speech. Short of such an emergency situation, though, the Court has insisted that the answer to hateful, hated ideas is “more speech,” not suppression.

The Court has acknowledged that even hateful speech that does not satisfy the emergency test may potentially have other adverse impacts. For example, it might indirectly contribute to a more speculative potential harm—including violence—at some indefinite future time. Or it might

contribute to emotional or psychic harm, which the Court has held cannot justify punishing any speech about matters of public concern—including hateful speech—because that would silence too much speech that is crucial in our democracy.

Before the Court's changing notions of free speech embraced the viewpoint neutrality and emergency principles, it had permitted government to silence speech based on the speech's potential emotional harm, and also based on a more speculative feared connection between the speech and potential violence. Predictably, this broad power was used disproportionately to silence views that were critical of government officials or policies, or that advocated reforms, including racial justice and other human rights causes. For this reason, many human rights activists, including leaders of the twentieth century civil rights movement, have opposed hate speech laws.

Let me quote a 2011 Supreme Court decision on point. Upholding the right of individuals to picket outside the funerals of military veterans with signs conveying hateful views about military personnel, Catholics, the pope, and gay men and lesbians, the Court explained (over only one dissenting vote):

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. [W]e cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.

Extending Protection to New Media

The Court not only has enforced the speech-protective viewpoint neutrality principle to protect a growing array of hateful and hated messages; it also has enforced that principle to protect expression in an expanded array of media. This constitutes another noteworthy respect in which free speech notions have been changing.

For example, in the 1978 case of *FCC v. Pacifica*, the Court stated: “We have long recognized that each medium of expression presents special First Amendment problems.” Accordingly, the *Pacific* decision permitted the federal government to bar certain words from radio and television broadcasts solely because the government deemed the words to be “indecent” or “patently offensive.” Under this dramatic departure from the viewpoint neutrality principle, the Court upheld a ban on comedian George Carlin's famous, satirical “Seven Dirty Words” monologue.

In contrast, in subsequent cases that reviewed the “special First Amendment problems” presented by other, newer media, the Court’s free speech notions evolved toward strict enforcement of the viewpoint neutrality principle. Accordingly, it struck down restrictions on “indecent” and “patently offensive” expression in those new media. This was true, for instance, of the Court’s opinions concerning such expression conveyed by telephones (in 1989), cable TV (in 1996), and the Internet (in 1997). Most recently, in its 2017 opinion that focused on yet another new “medium of expression”—online social media—the Roberts Court unanimously extended strong First Amendment protection to such expression.

Changing Notions of Counterspeech in Our Society

In short, the Court’s foregoing decisions reflect its changing notions of free speech, which have expanded protection for both the messages that speech conveys and the media by which the speech is transmitted. In these lines of cases, the Court has consistently held that the constitutionally permissible response to speech conveying controversial, disfavored views is “counterspeech,” not censorship—more speech, not silence. And here is where some “changing notions of free speech in our society” *can* clearly be discerned: in the increasingly vigorous and widespread counterspeech that is being undertaken by so many members of our society. In recent years, we have witnessed a remarkable and bipartisan outpouring of speech and peaceful demonstrations that have denounced hateful ideologies while celebrating our nation’s renewed commitments to equality, inclusivity, and intergroup harmony.

Recent dramatic examples of such potent counterspeech have prompted the cancelling of comedian Roseanne Barr’s rebooted television show following her racist tweet about Obama aide Valerie Jarrett, and Samantha Bee’s apology for using a vulgar, disparaging, sexist term to describe Ivanka Trump. Consider also the concerted social media and on-the-ground public shaming of New York City lawyer Aaron Schlossberg, who was caught on video making anti-immigrant and discriminatory remarks to and about Spanish-speaking restaurant workers. Such condemnation increasingly has been leveled not only against intentional, explicitly hateful expression, but also against unwittingly insensitive expression.

As one commentator has observed: “For a politician or a journalist . . . to be labeled racist is usually equivalent to the end of their public career.” Indeed, in 2017, a (white) Florida state senator was forced to resign after he used a racist slur in a private conversation with several other state legislators, for which he abjectly apologized. In another 2017 example, after HBO host Bill Maher’s

use of the N-word for attempted comic purposes, for which he also promptly apologized, HBO was pressured to fire him.

Vigorous counterspeech also has been flourishing in the especially important campus context, which has been the site of so many free speech debates and so many attempts by right-wing and even alt-right speakers to gain platforms and recruits. This was the conclusion of a report by *Buzzfeed News* in September 2017, which it described as “the first comprehensive survey of hate speech at higher education institutions since the 2016 election.” To be sure, that survey confirmed 154 hate speech incidents at more than 120 campuses across the country. But *Buzzfeed* concluded that “colleges typically responded to [these] bias incidents quickly and to the satisfaction of their students. . . . In nearly every case, university presidents sent off mass emails condemning the hate speech.”

All of this is hardly to say “mission accomplished” when it comes to endemic societal and individual biases. But it is proof positive that human rights activism has been flourishing despite—or even because of—well-publicized incidents of hateful, discriminatory speech and conduct. Just think of Charlottesville and its aftermath last year, with the overwhelming outpouring of opposition to the hatemongers and support for minority groups they disparaged, including from top officials in both major parties, military leaders, and business leaders. Or think of this year’s anniversary gatherings, in which tiny bands of white supremacists were vastly outnumbered by counter-demonstrators.

As the daughter of a Holocaust survivor, with many relatives who were slaughtered by the Nazis, I will never forget the horror of hearing the torch- and gun-bearing demonstrators in Charlottesville last year, chanting: “You will not replace us. Jews will not replace us.” But the net result of that horrific incident was to underscore that such views will never replace Americans’ core commitments to liberty and justice for all. For all of the partisan and tribal divisions we face, we remain united in our repudiation of those views.

Among other things, even CEOs of major business corporations who had been serving on two advisory councils to President Donald Trump were so critical of the president’s failure to forcefully condemn the neo-Nazis in Charlottesville that they resigned and both councils were disbanded. Let me quote just one such CEO: Jamie Dimon of JP Morgan Chase. He had been a member of the president’s Strategy & Policy Forum. Although he and other members of that forum supported the president’s economic and regulatory policies, they nonetheless chose to disband in light of the larger issues at stake. As Dimon explained: “Constructive economic and

regulatory policies . . . will not matter if we do not address the divisions in our country. It is a leader's role in business or government, to bring people together, not tear them apart." In a nutshell, this was strong counterspeech against Trump's tepid (at best) counterspeech against the Charlottesville Nazis.



In a speech at the University of Illinois on September 7, 2018, former President Barack Obama underscored the same point:

It shouldn't be Democratic or Republican to say we don't target certain groups of people based on what they look like or how they pray. We are Americans. We are supposed to stand up to bullies, not follow them. We are supposed to stand up to discrimination. And we sure as heck are supposed to stand up clearly and unequivocally to Nazi sympathizers. How hard can that be, saying that Nazis are bad?

We also have seen increasingly sophisticated social media campaigns for countering hateful speech in many ways, including by persuading even leaders of hater mongering groups, as well as members of such groups, to abandon the groups and repudiate their ideas. Online media have

facilitated not only counterspeech (as well as hateful speech), but also studies as to which counterspeech strategies are most effective, thus promising that future counterspeech campaigns can be ever more successful.

Amid all the positive changing notions of counterspeech in our society, the one I find most encouraging has been burgeoning in the much-discussed campus context: Marginalized students have increasingly been raising their voices and taken seriously. Shaun Harper, director of the University of Southern California's Race and Equity Center, describes this development as "an unmuting of black collegians," who are now "speaking more loudly" than ever "about the . . . racism they experience in classrooms and elsewhere." (Likewise, we recently have been witnessing the extraordinary "unmuting" of even much younger students to protest the gun violence that terrorizes their classrooms and lives.)

Harper's center has conducted dozens of investigations of the racial climates on campuses across the country, and he reports that, when minority students are asked what corrective actions they're calling for, they say nothing about "speech codes":

They tell us they want to be heard, understood and taken seriously. They want white people to recognize the harmful effects of their words and actions. . . . They want educators on their campuses to be more highly skilled at teaching diverse student populations and fostering inclusive learning environments where every student feels respected. They want names of slave owners removed from buildings and statues of white supremacists taken down.

Hoped-for Future Changing Notions of Counterspeech and Censorship

Throughout U.S. history, human rights champions have hailed counterspeech as more effective than censorship for advancing their goals. One important example is Barack Obama. He speaks with special expertise and experience concerning these issues; not only has he taught constitutional law, but he also has been subjected to virulently hateful speech. While he was president, Obama declared that "the strongest weapon against hateful speech is not repression; it is more speech—the voices of tolerance that rally against bigotry . . . and lift up . . . mutual respect." In the same vein, then-First Lady Michelle Obama famously recounted how she and her husband taught their daughters to respond to "hateful language," including "when someone is cruel or acts like a bully": "[Y]ou don't stoop to their level. No, our motto is, when they go low, we go high."

Based on the changing notions of free speech that have produced increasingly vigorous and sophisticated counterspeech, I am hopeful that we can look forward to yet another changing notion of free speech in our society. Specifically, I hope that, as diverse members of our society continue to experience power and agency by engaging in counterspeech, their support for censorship will diminish. When it comes to changing notions of free speech in our society, that is one that I would heartily welcome.

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