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ABSTRACT

The First Amendment is an important value in American liberal polity. Under this value, racism, hate speech and offensive speech are protected speech. This article scrutinizes one of the clear representatives of the American liberal polity - Thomas Scanlon. The paper tracks the developments in his theory over the years. It is argued that Scanlon's arguments downplay tangible harm that speech might inflict on its target victim audience. Scanlon's distinction between participant interests, audience interests, and the interests of bystanders is put under close scrutiny. The article criticizes viewpoint neutrality and suggests a balancing approach, further arguing that democracy is required to develop protective mechanisms against harm-facilitating speech as well as profound offences. Both should be taken most seriously.

KEY WORDS: autonomy, contractualism, Freedom of Speech, hate speech, Meiklejohn, JS Mill, offence, Scanlon

Introduction

This article takes issue with the popular liberal stance that the Free Speech Principle should protect even the most harmful and vile expression because such protection would promote individual self-government, enhance individual autonomy and promote critical thinking. Democracy depends on self-determining agents who take part in public deliberation.¹ This article argues for striking a balance between these goods and the impact of the speech in question on its target group. The protection of free speech cannot be offered in isolation from its wider consequences, not only those that affect the speaker but also those that affect those whom the speaker intended to influence. Furthermore, the content of the speech should be evaluated at its face value.

The essay opens with an explanation of the liberal reasoning for freedom of speech and why it is especially forceful in the United States. I proceed by discussing the theory of one protagonist of one strand of American liberalism,² Thomas Scanlon's Contractual theory. The paper traces the developments in Scanlon's free speech theory over the years and focuses on the contractualism argument. Contractualism promotes the "protection of interests" of different stakeholders. Scanlon ascribes strong protection to the speaker, sometimes at the expense of protecting the basic rights of their target group. The paper criticises the American viewpoint neutrality, invoking instead mid-ground position dictated by the principles of respect for others, not harming others, and the Offence to Sensibilities Argument. My position weighs different interests and calls for assigning greater protection to vulnerable populations, especially minorities.

The writing of this article has benefited from exchanges with Thomas Scanlon who generously provided comments on a previous draft and attended to subsequent queries aimed to elucidate specific points.

The Liberal Free Speech Principle

Liberalism was a product of the climate of opinion that emerged at the time of the Renaissance and the Reformation. As the political expression of the new individualism, it was a political declaration of faith in the autonomy of human reason and the essential goodness of man. In Chapter 4 of *On Liberty: The limits to the authority of society over the individual*, John Stuart Mill writes that people may take advice from others but the final decision should be made by them. Individuals should be the final judges of their action: "Considerations to aid his judgment, urgings to strengthen his will, may be offered to him and even pushed at him by others; but he is the final judge. Any errors that he is likely to commit against advice and warning are far outweighed by the evil of allowing others to constrain him to what they think to be his good."³ The belief in human reason and in the essential goodness of humanity reflected the political, social, religious, and economic aspirations of the rising commercial classes. Thus, in *The Rise of European Liberalism*, Laski argues that Liberalism has been, over the last four centuries, "the outstanding doctrine of Western Civilization."⁴

The preservation of individual rights, and the emancipation of the individual from public control mean that all people in liberal democracy enjoy the same equal rights. No group is preferred over others. The majority decides the identity of government but it should not undermine equal rights for all. Liberalism sets the individual on a legal equality in opposition to feudalism and challenges the right of the monarch to govern except in the interests of the citizens.

It is from the concept of a person as an autonomous individual, whose actions are the product of choice and purpose, that the philosophy of a free society is constructed. Liberal society makes the common good available not to a privileged class but to all, so far as the capacity of each permits the individual to share it. The purpose of such a society, according to this view, is to increase the capacities by which the individual can contribute to the common good.

During the past forty years, we have witnessed a significant increase in the number of debates about the boundaries of freedom of expression in the western world. Liberals warn that if we restrict speech, this might lead to an increasing tendency towards law and order legislation;⁵ to the creation of undergrounds;⁶ to outburst of violence, rage, aggression and use of illegal means;⁷ to abuse of power on part of the government;⁸ to more censorship,⁹ or to a less tolerant society.¹⁰ Liberals promote freedom of expression and warn against government's tendency to abuse its powers. We have seen that this warning is well founded. Past experience has shown that different governments were tempted to abuse their powers to promote partisan interests and to undermine their opposition.

In the United States, trust in government used to be high up until the 1950s but a string of events from then on has eroded that trust. As a result of the "Red Scare" and the Cold War between the United States and the Soviet Union, Senator Joseph McCarthy directed investigations towards Hollywood and the intellectual community. During the McCarthyism period (1947-1957) basic civil rights of out-of-favour individuals were harmed by the government.¹¹ In the late 1950s and early 1960s, as the USA was recovering from McCarthyism, public trust in government was relatively high, but the trust in government declined in the late 1960s.¹² The Vietnam War (1959-1975) further eroded public trust, and the Watergate scandal in the early 1970s that

resulted in the resignation of President Richard Nixon in August 1974 (the only resignation of a US president), certainly did not relax the growing suspicions towards government. Mismanagement of the economy did not help, and George W. Bush's "war on terror", including the war waged on Iraq for unclear motives, has further undermined the American public trust in its government. Thus public trust in government has plummeted from 73% in 1958 to 58% in 1973 and continued to drop to 19% in 2013. According to recent Pew Research Reports, just 19%-20% of Americans say they are basically content with the federal government and think the federal government runs its programs well.¹³ Liberals fear that the government might abuse its power to bar speech on partisan, political grounds for good reasons.

The United States is known to hold the most tolerant view in the democratic world on hate speech. The First Amendment instructs that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press".¹⁴ The right of the people peaceably to assemble, and to petition the Government for a redress of grievances" is an enshrined, prominent value in the American political and civic culture. The development of the First Amendment Doctrine occurred against the backdrop of segregation and the Civil Rights movement. This involved southern states deliberately applying speech silencing measures to try and stop the struggle for black equality.¹⁵ In order to prevent state governments restricting political speech, the US Supreme Court adopted strict viewpoint neutrality. Viewpoint neutrality reflects lack of trust in government.¹⁶

The United States pays a price for tolerating hate as some of those speeches translate into hate crimes. According to the Southern Poverty Law Center, during 2009-2014, users of one notorious website, Stormfront.com, were responsible for the

murders of nearly 100 people.¹⁷ But American liberals hold that there is no need to panic or to be afraid of such vile ideas. Instead, we need to expose the falsity of hatred and educate to tolerance and equal liberties for all.

The American Civil Liberties Union (ACLU) among other organizations has supported the rights of racist and anti-Semitic organizations, most notoriously the Ku Klux Klan and the American National Socialist Party, to speak, to demonstrate, to march, and to organize.¹⁸ In their defense of radical political groups, the ACLU and others have not claimed that the words, pictures, and symbols of such groups have no negative consequences.¹⁹ The constitutional protection accorded to the freedom of speech is not based on a naïve belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by allowing reprehensible and even dangerous ideas. Some free speech activists acknowledged that the racist and anti-Semitic images and discourse of these groups might offend and harm the targeted individuals, might corrupt the level and nature of civic discourse, and might increase the probability of hate crimes.²⁰ Yet the admission of speech's causal propensities and harmful consequences has not lessened the strength of the Free Speech Principle. The Nazis and the KKK have free speech rights not because what they say is harmless, but despite their harmful expressions.²¹

Other liberals, such as Dworkin and Nagel, explicitly recommend purely deontological justifications for a libertarian approach to free speech. It is wrong for hate speech and the like to be censored, according to Dworkin and Nagel, even if the overall costs of hate speech (for its targets, or for society as a whole) outweigh any benefits. For Dworkin,²² this conclusion follows from "taking rights seriously", upon recognising free speech as a basic moral right. Nagel defended objectivity in ethics

and explained that “the sovereignty of each person’s reason over his own beliefs and values requires that he be permitted to express them, expose them to the reaction of others, and defend them against objections”.²³ For Nagel,²⁴ freedom of expression is a nonderivative and fundamental element of morality. Indeed, nonconsequentialist justifications for free speech are an important element in defenses of American free speech doctrine. Thus, American liberals who argue for the protection of racist and hateful speech see this kind of speech for both intrinsic or consequentialist reasons as the litmus case for tolerance. After all, tolerance is precisely about challenging expressions, not pleasantries.

Those who challenge this stand and wish to limit the bigot’s speech question why should the racist, who wishes to deny equal status and respect to others due to their race, be entitled to equal status and respect. They argue that the racist is excluding himself from the liberal shield by denying equality for all. But liberals insist on maintaining high standards and on not becoming “like them”.²⁵ Believing that the liberal standards are right, correct, just and true, liberals think that through the battles of words and the free market of opinions the liberal truth will eventually gain the upper hand over the vile speech. This is Ronald Dworkin’s view. Dworkin sees any infringement by the state on the content of speech as denying the equality of citizens.²⁶ Liberals are willing to take risk and pay a price in adhering to their noble principles. The liberal state should respect the rights of racist speakers to “contribute” to the society’s “moral climate” although liberals acknowledge that the racists actually undermine the moral climate. Liberals may even argue that we have an obligation to listen to the racist diatribes and then choose our response. We may choose to ignore them because such diatribes do not deserve our attention, or we may decide to

confront the racist ideas with our benevolent ideas and persuade the racist, or others who listen to the debate, of the truism of the liberal moral ideas.

Thomas Scanlon does acknowledge the harm that might result from the speech in question but he does not evince great concern to explain the circumstances and conditions that constitute exceptions to free speech. It is argued that Scanlon's terminology often obscures and the reasoning is not fully articulated. For instance, in "A Theory of Freedom of Expression", Scanlon offers his own interpretation of the Millian Free Speech Principle. He does acknowledge the harmful effects of certain forms of speech and devotes the last two pages of his essay to the 'near catastrophe' exception to the Free Speech Principle. However, Scanlon fails to explain adequately what exactly he means by this.²⁷ I now turn to discuss his theory in some detail.

Scanlon's Contractualism

Scanlon initially attempted to construct a theory of freedom of speech which would consider the extent to which defenders of such freedom of speech have to rest their case on the claim that the long-term benefits of free expression outweigh obvious and possibly severe short-run costs, and to what extent this calculation of long-term advantages depends upon placing a high value on autonomy and intellectual pursuits as opposed to other values. Scanlon's theory is aimed to limit the powers of a state to those which citizens could recognize while still regarding themselves as equal, autonomous, rational agents.

In 1972, Scanlon published "A Theory of Freedom of Expression".²⁸ He considered a number of ways in which expressions can result in harm, focusing on cases where harms can clearly be counted as reasons for restricting the acts that give rise to them. Scanlon did not argue that the harms in question are always sufficient

justification for restricting free speech, only that they can always be taken into account.²⁹ Scanlon admitted that it is difficult to discern when exactly legal liability in the list of provided cases arises, and he did not offer any thesis as to what constitutes being an accessory, inciting or conspiring to a harmful action. Scanlon maintained that this has to be something more than merely the communication of persuasive reason for harmful action.³⁰ In his obscure fashion, Scanlon did not clarify what this meant. Subsequently Scanlon offered the Millian Principle:³¹

There are certain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a justification for legal restrictions on these acts. These harms are: (a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; (b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing.³²

In other words, justifications for legal restrictions on speech should not include speech that led people to hold false beliefs or that led people to believe (or increased their tendency to believe) that certain harmful acts are worth performing. Scanlon viewed the Millian Principle as the basic principle of freedom of expression and rejected any goal-based or consequentialist reasons that might interfere with this principle.³³ Following the Millian defense of liberty of thought and discussion, Scanlon argued that speech may not be prohibited on the grounds that harms to individuals or society may result due to the individual's acceptance of the validity of the speech; individuals must be

given the freedom to make judgments and decide for themselves. The problem with this theory is that it presents a very limited view of freedom of expression. Following Mill, every expression that is short of incitement to inflicting physical harm to others was protected.³⁴ Later, Scanlon explained that the Millian principle was not intended to provide a complete account of freedom of expression, and that its function was to keep certain considerations “out of the scales” of justification.³⁵ Then Scanlon retracted the Millian principle altogether having realized that the relative value of different forms of expression does make a difference independently from the idea of autonomy.³⁶ I will return to this retraction later on.

In his early writing, Scanlon assumed that autonomy is something that is very valuable (or to be more precise, something that is the source of strong pro tanto reasons for action), irrespective of whether people in fact recognise it or conceive of it as valuable. Scanlon acknowledges that the requirements of autonomy are extremely weak because, according to Scanlon’s perception, an autonomous person may be still subject to coercion.³⁷ For Scanlon, what is important is the acceptance of coercion, not the state of affairs. One may argue that coercion as such undermines autonomy, notwithstanding one’s willingness to be subjected to this state of affairs. Autonomy and coercion are defined by each other's absence: one is autonomous if one is not coerced, and to the extent that one is coerced, one is not autonomous.³⁸ Elsewhere I have argued that people who internalized coercion and accepted limitations on their lives are less autonomous than other people who fight against coercion.³⁹ I agree with Scanlon that it is consistent with a person’s autonomy for the law to restrict her freedom of action for her own good, for instance by dictating certain safety measures on the road. This is also consistent with Mill’s theory on liberty.⁴⁰

Scanlon's article is over 40 years old. It no longer represents Scanlon's official view, and it is not commonly appealed to in actual First Amendment case law. Moreover, Scanlon's general strategy for defending free speech – by identifying free speech as a condition of state legitimacy – has been much more comprehensively developed in recent literature, by Post,⁴¹ Heinze,⁴² and Weinstein.⁴³ These authors argue that liberal democracies should safeguard freedom of expression not just as an individual right but as an essential attribute of democratic citizenship. These authors challenge state regulation of public discourse by promoting a positive view of participatory democracy and arguing that speech restrictions undermine political legitimacy. Robert Post, for instance, wrote that “public discourse consists of the various kinds of communicative action to which citizens must have unrestricted access if this belief is to be sustained”.⁴⁴ It is comprised of “those processes of communication that must remain open to the participation of citizens if democratic legitimacy is to be maintained.” Democratic legitimacy depends upon citizens who believe that their government is responsive to their wishes.⁴⁵

In a later article, Scanlon claimed that his reasoning employed the idea of autonomy as a constraint on justifications of authority.⁴⁶ Interpreted in this way, autonomy which is naturally concerned with the agents (as evidenced by Baker),⁴⁷ in the Scanlonian formulation it reaches conclusions which are far broader in character, with implications to the nature of democracy (this may be called “arguments from democracy”) such as those espoused by Neier,⁴⁸ Bollinger⁴⁹ and Richards⁵⁰ and also implications on the conditions for the discovery of truth (“arguments from truth”) identified first and foremost with John Stuart Mill.⁵¹ In the 1979 article, Scanlon spoke again of the contribution of freedom of expression for enhancing one's autonomy. He stressed the benefits of freedom of expression in helping people crystallize their

conceptions of the good, forming beliefs and desires, and influence social change. But autonomy is not necessarily about bringing social change or forming true beliefs. The notion of autonomy involves the ability to reflect upon beliefs and actions, and the ability to form an idea regarding them, so as to decide the way in which to lead a life. For by deciding among their own conflicting trends, individuals consolidate their opinions more fully and review the ranking of values for themselves with a clear frame of mind. The distinguishing feature of autonomy is, therefore, the forming of our discretion in a way that is supported by our reason, though our rationality might be impaired. Scanlon would agree that choosing the best option or thinking correctly is not a requirement for autonomy so long as the doer exercises deliberation in assessing the alternatives. The emphasis is not on deciding the "best" options, or on holding the "true" opinions, but on the way in which we come to make the decisions and to hold our opinions.

I will not further elaborate on these arguments because Scanlon himself came to reject them. In the "Introduction" to *The Difficulty of Tolerance*, Scanlon explained that he tried to test the Millian Principle on several cases and failed because it placed too tight a constraint on possible justifications for restricting expression.⁵² As he was writing his 1979 article "Freedom of Expression and Categories of Expression", Scanlon came to reject the autonomy based theory of his 1972 article because he realized it was a mistake to treat autonomy as a filter, one reason being that this limited excessively the reasons for restricting expression.⁵³ Thus the 1979 paper rejected the 1972 one. Scanlon then turned to examine the broad issue of rights. Contractualism, which became Scanlon's new overall view, recognizes that the justifiability of actions or policies to others depends on the reasons they have to object to the way these actions or policies would affect them.⁵⁴

Scanlon's general statement of his later view is that freedom of expression is a set of constraints on the powers of governments to regulate expression that are (a) necessary to protect certain important interests and (b) provide this protection at tolerable cost to other interests. The right to freedom of expression is about putting constraints on government interference with expression and acting positively to protect speakers. In both cases, different interests are to be taken into account, including the interest that we all have in the kind of society in which we live. Scanlon emphasizes this in *The Difficulty of Tolerance*.⁵⁵

At the heart of Scanlon's free speech regulation lies his deep suspicion of government. In a recent paper "Moral Rights and Constitutional Rights", Scanlon reflects on a walk he had with his father in the early 1950's when he was denouncing, with pre-teen-age passion, an article in his local newspaper on some pressing political questions, which seemed to him extremely slanted. "How can they be allowed to print such things", Scanlon asked his father, "when they are so false and misleading?" The father replied: "But who's to decide which things can be printed and which cannot?"⁵⁶ Scanlon writes that he was stunned by this Socratic question, and he testifies that he has been thinking about the question ever since. Scanlon essentially answers this question by saying: Everyone may decide for oneself. The government has better things to do.

Interests of Participants, Audiences and Bystanders

In both 1979 and 2003 writings, Scanlon distinguishes between interests of participants, interests of audiences, and interests of bystanders. The most general participant interest is to be able to call something to the attention of a wide audience. Potential speakers and writers have an interest to communicate with others.⁵⁷ The

most general audience interest is to have expression available to them should they wish to attend to it. People wish to be informed, amused, stimulated and even provoked when this leads to self-reflection and growth.⁵⁸ These interests may complete with each other when the speaker addresses issues that are of interest to the audience, or they may come into conflict when the audience is not interested in the speaker's expression. The third interest of bystanders is generally applied to restrict speech as bystanders wish to avoid the undesirable side effects of expressions: traffic jams, noise, litter etc.⁵⁹ Scanlon rightly asserts that protecting bystanders does not require curtailing speech altogether but only to regulate time, place and manner of expression. He speaks of the central interest of the audience in having a good environment for the formation of its beliefs and desires. We all wish, as spectators and as speakers, to promote a framework within which we might pursue our ideas and beliefs. Balance has to be struck between the different interests.

Scanlon moves on to discuss the value of having a fair and effective democratic political institutions.⁶⁰ While we have an interest in having a functional government that would serve our best interests, we should also be aware of the likelihood of government abuse of power. Scanlon warns that giving the government the authority presents a serious threat to participant and audience interests.⁶¹ Governments, Scanlon further warns, have a tendency "to try to silence their critics", and they also tend to be "unsympathetic to ideas, values and points of view that are unpopular in the society at large".⁶² Like many American liberals (Meiklejohn;⁶³ Baker;⁶⁴ Hardin;⁶⁵ Volokh;⁶⁶ Nye, Zelikow and King;⁶⁷ Stone,⁶⁸ Richards),⁶⁹ Scanlon does not trust government to make the right and just decision.⁷⁰ He believes that governments, whether elected or not, have a settled tendency to try to silence their critics. But, I contend, sometimes such a balance needs to be made, and decision needs to follow

as to which interests override others. It is unclear who will make the decisions if it is not the government.⁷¹

Scanlon's reasoning continues a line of reasoning adopted by American liberals, champions of freedom of expression, who chose to shy away from clear prescriptions. Consider Alexander Meiklejohn who asserted that a government of free men can properly be controlled only by itself. Meiklejohn explained: "If We, the People are to be controlled, then We, the People must do the controlling. As a corporate body, we must exercise control over our separate members."⁷² But what does it mean? Meiklejohn suspected that this assertion might need further explanation, thus he elaborated: "What it means is that the body politic, organized as a nation, must recognize its own limitations of wisdom and of temper and of circumstance, and must, therefore, make adequate provision for self-criticism and self-restraint. The government itself must limit the government, must determine what it may and may not do. It must make sure that its attempts to make men free do not result in making them slaves".⁷³

The problems, however, are twofold: first, Meiklejohn and also Scanlon do not trust government to make decision for the people. If the government is suspect when it relates to the people, it is even more suspect when it concerns itself as conflicts of interests are unavoidable. As no specific provision is provided as to how the government should limit itself, which adequate provisions should be made available, and what criteria should guide the decision-making processes (beside the stringent belief in liberty), the road for all kinds of interpretations is opened wide. Furthermore, Meiklejohn's view of broad liberty might be counter-productive. For instance, if manipulators of the system will be granted absolute liberty to pursue their interests, the result might be less freedom to the people, not more.

Scanlon understands 'interests' broadly, as what an individual has reason to want. He develops his theory of individual interests as far as the category of bystanders is concerned and refrains from speaking of the overall societal interests in promoting a good environment. Scanlon seemed to believe that the three categories of participants, audience members and bystanders are exhaustive of the individual points of view. Scanlon also believes that speech-acts are fundamental human interests, and he concedes that additional information is sometimes not worth the cost of getting it; we should not be willing to bear unlimited costs to allow expression to flourish under his principle.⁷⁴ Scanlon also recognizes that speech not related to political issues may legitimately be restricted on paternalistic grounds. However, where political issues are concerned, Scanlon advocates a strong level of protection for expression: "where political issues are involved governments are notoriously partisan and unreliable. Therefore, giving government the authority to make policy by balancing interests in such cases presents a serious threat to particularly important participant and audience interests."⁷⁵ But the participant and the audience might have very different, even contradictory interests, as was the case in Skokie, one of the suburbs of Chicago, inhabited mostly by Jews, some hundreds of them being survivors of Nazi concentration camps, when Nazis attempted to march specifically there.⁷⁶ Scanlon's suspicion of government brought him to protect Nazi free expression while discounting the harm that might be inflicted on the Jews of Skokie.⁷⁷ Other liberals, including Joel Feinberg,⁷⁸ Jeremy Waldron⁷⁹ and the present author⁸⁰ think that protecting the target group's interests was more important than allowing the Nazi march in Skokie. Concurring with them, I think that in this case, the seriousness of the offence, the circumstances and the historical experience are of great significance. It

should also be noted that Mill did not draw a distinction between political and non-political speech.⁸¹

Frank Collin, the leader of the Nazi group, did not attempt to hurt the Jews physically. His group was too small and thus incapable to carry out such an attack. He decided to assert his free speech constitutional right in Skokie because of the large number of Holocaust survivors.⁸² The Nazi assembly in Skokie is not protected under the Free Speech Principle because the survivors were put in an impossible situation. If they were to challenge the Nazis, they would have to face the swastika, the uniform, the hatred, forcing them to relive the horrors they had escaped. And if they were to decide to stay at home, draw the curtains and block their ears, they still would have difficulties to reconcile to the idea that Nazism could pass in their own vicinity. Psychological studies of Holocaust survivors showed that they were extremely vulnerable to profoundly painful reaction were they confronted with situations that triggered memories of their horrific experiences at the hands of the Nazis.⁸³ Profound offence amounts to attack on one's sensibilities. The target group might enter a state of shock. When a Nazi enters a Jewish place with a swastika armband, he need not say anything. His message is loud and clear. No one can mistakenly interpret this message of hate as something positive. Such symbolic speech encapsulates both content and manner of speech.

An irreversible offence to the sensibilities of a person, which brings that person to a state of shock or constant dejection, is arguably more harmful than injury to one's arm or leg, or irreversible damage to one's kidneys. While a person can live without a limb or a kidney, one might lose the taste for life if the offence to sensibilities is devastating and irreversible. In extreme cases, it can cause the victims to lose their human dignity. Thus, we must not avoid discussion of the Offence to Sensibilities

Argument, but rather invest more efforts to set defensible criteria for restriction. Instead of being discouraged from the outset, we must make greater, more rigorous attempts to find sensible solutions. I elaborate below.

Good Environment

In "Freedom of Expression and Categories of Expression," Scanlon speaks of a 'good environment' for expression, explaining that the central interest (especially of the audience) is in having a good environment for the formation of one's beliefs and desires.⁸⁴ Public debate is perceived as the mechanism for the realization of what the truth is, deduced from individuals' conduct and their decision-making processes. People should be free to consider all viewpoints without government interference. In the name of securing 'good environment' for expression, the USA allows the establishment and operation of a Nazi party. Such a party does not openly and explicitly exist today in any other democracy for moral and practical reasons. Nazi parties embracing and spouting racist ideas are perceived as essentially immoral, with immoral ends and with no qualms of using immoral means to achieve them. After WWII and the Holocaust, most democracies (especially those that were victimized by the Nazis) do not think that they should take the risk of allowing such parties to operate.⁸⁵ Because Nazi ideas are vile, the Millian Argument from Truth⁸⁶ is not perceived to be persuasive as the truth of "racism" and "final solutions" to solve the "problem" of inferior races is not only obscene. It is brutally inhuman, dangerous, discriminatory and coercive, against the democratic enshrined values of not harming others, and of respecting others. Yet Scanlon defends the American exceptional view on this issue, saying that governmental power to ban political parties is a threat to important participant and audience interests, and that governments should not possess the

power of banning parties. Scanlon does not address the question of how we should behave if and when society is saturated with constant threats and offensive language that create a poor environment for the democratic forces to work on the psyche of people and generate tolerant behaviour in regard to unpopular views.

Scanlon believes that there are consequences on having or not having restrictions on governmental power. He rather restricts this kind of governmental power. He explains that his view about hate speech laws is very close to the one set out by Joshua Cohen in his paper, "Freedom of Expression".⁸⁷ Because Scanlon accentuates that his views on the question whether we should restrict offensive speech is very similar to Cohen's, let me digress and explain Cohen's stand.

Cohen's Stringent Free Speech Protections

Cohen aimed to present a rationale for stringent free speech protections. He does it by distinguishing three vital interests for free speech: expressive, deliberative and informational. By *expressive interests* Cohen refers to interest in articulating thoughts, attitudes and feelings also in order to influence others.⁸⁸ By *deliberative interests* Cohen means doing the best thing that serves one's interests in the most worthwhile way while pursuing a worthwhile course of conduct based on awareness, on having informed opinions and on understanding the reasons for pursuing each options. Finally, by *informational interests* Cohen assumes a fundamental interest in securing reliable information about the conditions required for pursuing one's aims and aspirations.

Cohen recognizes that speech comes with costs. He distinguishes between direct harmful costs (e.g. defamation), environmental costs (e.g. racism which undermines racial or sexual equality), and straightforwardly indirect costs (e.g.

persuading people to go to war). When it comes to offence, Cohen argues that the costs of avoiding offense are to be borne by those subject to it – “they must, for example, “avert their eyes”.⁸⁹ This sounds very much like Baker’s reasoning.⁹⁰

However, beyond the advice that targeted victims should simply “avert their eyes”, Cohen goes on to suggest a general strategy in deciding whether to protect expression despite its price.⁹¹ The strategy is this: consider the importance of the expression, how direct and serious the harm is, and the vulnerability of the expression to under protection. Precedence is given to protect free speech because broad regulation of hate speech and racism would aim and almost certainly produce an unacceptable suppression of ideas. Cohen objects to general hate speech regulation. Thus he moves to consider specific cases of fighting words that arouse anger, alarm or resentment, conceding that regulation of hateful fighting words is acceptable.⁹²

In such cases of hateful fighting words, the targets are unable to simply “avert their eyes” and thus regulation is permissible. But the discussion does not end here. Cohen adds some cautionary words before we rush to protect the vulnerable by restricting free speech.⁹³ He accentuates that “permissible” does not imply “recommended” because regulation has at least three defects: it might distract energy from other measures; it divides people who are allied in their commitment to equality, and it suggests a “depressingly profound loss of constructive, egalitarian, political and social imagination”. This argument is rather curious because the context is *hate speech*. Generally speaking, people who hate have destructive rather than constructive views. They do not believe in and are not committed to equality. They are not allied with many other segments of society and, more fundamentally, it is not clear why, from a moral standpoint, we should apply egalitarian protections to those who wish to deny them to others. Liberal egalitarianism is based upon the presupposition

that people accept the basic principles upon which society is based. The basic principles of liberal democracy are tolerance, respect for others, and not harming others. These principles are rejected by the bigot thus egalitarianism may not serve as a rationale for protecting the bigot. As Rawls asserts, the political conception of justice is the “framework of basic institutions and the principles, standards, and percepts that apply to it, as well as how those norms are to be expressed in the character and attitudes of the members of society who realize its ideals”.⁹⁴ Cohen thinks that unequal attitude toward the bigot might deprive society of its constructive imagination. He fails to recognize that if we won’t act to protect the target group from the bigot, the target group might pay a far more costly and tangible price, well beyond their constructive imagination.⁹⁵

Like Cohen, Scanlon thinks that offense in general cannot be recognized as justification for restricting expression without restricting expression that it is important to protect. Whether it is possible, and fair, to single out certain kinds of offense as permissible grounds for regulation without these bad effects is a largely empirical question about which Scanlon is uncertain. Scanlon writes that when Canada and the UK have allowed laws against pornography, or “incitement to racial hatred” “the sky has not fallen from the point of view of freedom of expression”.⁹⁶ Scanlon does not think that these laws have done a whole lot of good. In Canada, Scanlon explains, “one of the first effects of anti-pornography laws was to shut down bookstores selling erotic material for gays. This illustrates that when offense can be a basis for restricting expression what one is most likely to get will be laws against what offends those in power”.⁹⁷ This is a cautionary tale that does not clarify whether there is a way of permitting such laws that are valuable and not a threat to important interests. Scanlon is reluctant to pursue Feinberg’s idea of typology of offenses in accordance with the

severity of their effects (annoyance, offense, profound offense) because he suspects that the interests that will in practice be found most profound will be those felt by politically powerful groups.⁹⁸ I agree that the harm of incitement to violent criminal acts is different and more serious than the harm of stirring up emotions.

I posed Scanlon this question: Per Cohen's strategy in deciding whether to protect expression despite its price, you need to consider the importance of the expression, how direct and serious the harm is, and the vulnerability of the expression to the under-protected. Following this, why do you think Skokie was justified? Scanlon replied that "the importance of the expression" has to be taken to mean the importance of the opportunities to engage in expression that would be lost if such restrictions were allowed, not the value of the particular acts of expression in question.⁹⁹ However, even if the United States insists on being the only country in the liberal world that allows the establishment of a Nazi party, this does not entail complete freedom. American law does include time and space regulations to accommodate different interests. Nazis could march in downtown Chicago; why to allow them to march in Skokie with the explicit intention to "hurt the Jews"? Why allow abuse of freedom of expression? Why not balance Nazi free speech against the liberal state obligation to protect its vulnerable minorities? There were testimonies by psychologists on the possible injuries many Jews would suffer as a result of the march. They argued that this speech act might be regarded as the equivalent of a physical assault.¹⁰⁰

Scanlon further stresses that the kinds of regulation that freedom of expression allows have an important empirical element. With respect to hate speech, it depends on what the general consequences would be of allowing governments to make and enforce such laws. The evidence from the cases we have seems to Scanlon inconclusive. On the one hand, giving governments this power has not led to much

over-restriction on speech in Canada or the United Kingdom. However, although it is difficult to assess the relevant counterfactuals, it does not seem to Scanlon that hate speech laws have had a noticeably positive effect on race relations in those countries. This is merely an impression that Scanlon has. He does not back this statement with empirical data. Conversely, Amnesty International experience and research have indicated that prejudicial discourse can fuel discrimination and other human rights abuses.¹⁰¹ The Council of Europe Committee of Ministers recommended that States adopt a range of civil, criminal and administrative law provisions in order “to reconcile in each case respect for freedom of expression with respect for human dignity and the protection of the reputation or the rights of others.”¹⁰²

Viewpoint Neutrality

As mentioned above, Scanlon and other American liberals invoke viewpoint neutrality. According to this view, the liberal state should not justify what it does by appealing to conceptions of the good that are subject to reasonable disagreement. State neutrality is perceived to be vital to ensuring stable and mutually beneficial social cooperation.¹⁰³ Scanlon writes that freedom of expression should not be restricted on the basis of its content, and that any form of regulation should leave ample opportunity for “at least the valued forms” of expression.¹⁰⁴ It is unclear who decides, and upon which criteria, the valued forms of expression. Quoting Laurence Tribe,¹⁰⁵ Scanlon argues that “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content”.¹⁰⁶ Viewpoint neutrality perceives state perfectionism, i.e., the promotion of a specific agenda that provides an aspired objective account of what is the conception of the good, as wrong. Any perfectionist agenda, including a liberal agenda (say personal autonomy or minority rights), would distort free

consideration of different ways of life, would harden the dominant ones, whatever their intrinsic values may be, and would exclude unfairly the values and aspirations of marginalized and disadvantaged groups within the community.¹⁰⁷ Advocates of neutrality are conveying the assumption that the decision regarding the proper policy is crucial because of its grave consequences. Neutrality entails pluralism, diversity, freedom, public consensus, non-interference, vitality etc. If we do not observe viewpoint-neutrality, then we might be left with none of these virtues (Meiklejohn¹⁰⁸; Weinstein¹⁰⁹; Scanlon,¹¹⁰ Baker).¹¹¹ This picture leads to the rejection of subjectivity (or perfectionism), while I suggest a rival view that observes conduct of policies on a continuous scale between strict perfectionism, on the one hand, and complete neutrality on the other. The policy to be adopted does not have to be either the one, or the other. It could well take the Aristotelian Golden Mean, allowing plurality and diversity without resorting to complete neutrality; acknowledging the inner dignity of people; involving some form of perfectionism without resorting to coercion. Perfectionism does not necessarily imply abuse of power or uniformity of ideas, as neutralists fear.

American liberals supplement their endorsement of neutrality with other mechanisms, short of invoking hate speech legislation, to fight hatred and bigotry. They think that education, government programs such as those that deal with bias and diversity, and other initiatives attempting to respond to the problem of discrimination and hate groups without taking the step to silence or suppress those holding the abhorrent beliefs, are sufficient. Defenders of this position argue that preemptive legal approach not only minimizes hate speech, but also minimizes the beliefs that lead to hate speech. Unfortunately, the evidence suggests that these mechanisms, important as they are, are insufficient. White supremacists have killed more people in recent

years than any other type of domestic extremist (54% of all domestic extremist-related murders in the past 10 years).¹¹² In 2015, political extremists killed 70 people in the United States. In 2016, they were responsible for the deaths of 72 people. In 2017, 37 people were killed as a result of extremist violence, while in 2018 the death toll was 50 people. Most of the killings are directly related to right-wing extremists.¹¹³ They are also a troubling source of domestic terror incidents, including 13 plots or attacks within the past five years. Murders and terror plots represent only the tip of the iceberg of white supremacist violence, as there are many more incidents involving less serious crimes, including attempted murders, assaults, and weapons and explosives violations.¹¹⁴ Security experts have discerned worrying intersecting patterns that explain the growing violence of extreme ideologies that are built on hate and fear: people are becoming more disheartened and disconnected from mainstream politics; an administration that is friendlier toward their goals; US hate groups have seen their ideas enter mainstream in the Trump era; a small yet determined movement of activists who want the overthrow of the federal government, the reinstatement of slavery, the genocide of all people of color, and a white homeland. These people are no longer interested in generating a crowd and mass protests of uniformed members, but in the creation of small cells that are committed to violence and terror.¹¹⁵ Education for tolerance and government programs addressing bias and diversity are important but they are unlikely to avert the danger.

In this context, may I mention that in 2008, the twenty-seven-member European Union adopted a resolution declaring that “Racism and xenophobia are direct violations of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles upon which the European Union is founded and which are common to the Member States”.¹¹⁶ Consequently, the

resolution calls upon member states to take the necessary measures to ensure that the following intentional conduct is punishable publicly condoning: “denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes ... directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group”.¹¹⁷

It has been suggested that European countries are less tolerant of racism and hate speech because of their traumatic experience in overcoming Nazism, but this argument is insufficient to explain their restrictive line-drawing. Canada, Australia and New Zealand were not under the Nazi boot or threat, yet all three opted to adopt a policy that is more akin to the European than to the American. Like the United States, Canada, Australia and New Zealand are countries of immigration but unlike the United States their line-drawing weighs more heavily on the side of preserving the mosaic of multiculturalism and protecting vulnerable third-parties than on the side of freedom of expression. Most countries in the free world are not willing to pay the price that the United States is willing to pay for protecting freedom of expression.¹¹⁸

My mid-ground position between neutrality and perfectionism does not underestimate the importance of activities short of legislation. Education is important. Promoting ideas of tolerance, equality, pluralism and multiculturalism is important. Initiatives to fight against bias and bigotry are also important. Yet evidence shows that they are insufficient. Hate crimes, resulting from hate speech, are growing in numbers and scope in the United States. The United States is big and strong and until now it has tolerated the growing violence. But I do not think it should continue doing so. The price that the US has paid is far too significant. A change is needed to protect the

American public and also to set an example. As the leader of the free world, the United States is very influential in many parts of the world. Leading by example means that the government should do its very best to protect its people. Acting responsibly requires change to avert likely violent results. Certainly, many countries in the world are unwilling to pay the price that the US has been paying. They cannot afford it. Change is required in the US now because the price in the near or not too distant future might be too high even for the US.

My mid-ground position is influenced, even dictated, by two principles which Scanlon would accept. Any liberal society is based on the idea of respect for others, in the sense of treating citizens as equals, and on the idea of not harming others. These two principles occupy different normative spaces. The Respect for Others Principle is a moral more, inspired by Kantian ethics, while the Harm Principle is a central tenet of the democratic legal system, derived from Millian ethics. It is the Harm Principle that guides us in prescribing legal boundaries to conduct.

According to Kant, it is only through morality that a rational being can be a law-giving member in the realm of ends, and it is only through morality that a rational being can be an end in itself. Kant distinguished between *relative* value and *intrinsic* value, explaining that people have intrinsic value, i.e. dignity. Kant identified dignity with moral capacity, arguing that human beings are infinitely above any price: “to compare it with, or weigh it against, things that have price would be to violate its holiness, as it were.”¹¹⁹ In other words, “morality, and humanity insofar as it is capable of morality, is that which alone has dignity.”¹²⁰ Kant explained that such beings are not merely “subjective ends” whose existence as a result of our action has value for us, but are “objective ends” whose existence is an end in itself.¹²¹ Each person has dignity and moral worth. People should be respected *qua* being persons and should never be

exploited. Dignity cannot be qualified due to one's gender, race, religion, culture, class or any other characteristics, and it requires us to take responsibility for our conduct. As Dworkin suggests, the concept of dignity needs to be associated with the responsibilities each person must take for her own life vis-à-vis herself and others. Dignity requires owning up to what one has done.¹²²

The argument is formulated in positive terms. It prescribes people to respect those who respect them but we cannot infer from it that, under all circumstances, people should disrespect those who disrespect them. The boundaries of tolerance are determined by the qualification of not harming others that is added to the Respect for Others Principle. Under the Millian Harm Principle, restrictions on liberty may be prescribed when there are clear threats of immediate violence against some individuals or groups.¹²³

The Harm Principle holds that something is eligible for restriction only if it causes harm to others. People may interfere with the other's liberty of action in order to protect themselves and to prevent harm to themselves or to others. Mill wrote in *On Liberty*: "Acts of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled by the unfavourable sentiments, and, when needful, by the active interference of mankind."¹²⁴ Whether an act ought to be restricted remains to be calculated. Hence, in some situations, people are culpable not because of the act that they have performed, though this act might be morally wrong, but because of its circumstances and its consequences. While Kant spoke of unqualified, imperative moral duties, Mill's philosophy is consequentialist in nature. Together the Kantian and Millian arguments make a forceful plea for moral, responsible conduct: Always perceive others as ends in themselves rather than means to something, and avoid harming others.

Accordingly, restrictions on liberty may be prescribed when threats of immediate violence are voiced against some individuals or groups. I agree with Scanlon and First Amendment scholars who argue that incitement and true threats are outside the Free Speech Principle. Elsewhere I added¹²⁵ that liberal government should stand by the basic principles that underline liberal democracy rather than observe neutrality. It is within state interest to adhere to the basic ideas of respect for others and not harming others and to apply judgement in promoting them in their free speech policies. Viewpoint-neutrality on important social issues that concern the safeguarding of democracy might be very risky.

My mid-ground position argues that we should take the harm in hate speech seriously. History has shown, time and again, the risks in hate speech and its direct link to hate crimes. In *Political Liberalism*, Rawls asserts that no society can include within it all forms of life. He explains that intolerant religions will cease to exist in well-ordered societies.¹²⁶ Rawls speaks of *reasonable pluralism*, a just basic structure within which permissible forms of life have a fair opportunity to maintain themselves while securing equal basic liberties and *mutual* toleration. A well-ordered society that is consistent with democratic values cannot be neutral toward hate speech. Hate speech legislation has been invoked in many liberal democracies in order to protect people's dignity against assault. It is there to protect the targets' equal status in the community, their entitlement to basic justice and the fundamentals of their reputation. Waldron maintains that there is a sort of public good of inclusiveness that our society sponsors and that it is committed to. Hate speech undermines this public good, or it makes the task of sustaining it much more difficult than it would otherwise be.¹²⁷ Hate speech creates an environmental threat to social peace, a "sort of slow-acting poison, accumulating here and there, word by word, so that eventually it becomes harder and

less natural for even the good-hearted members of the society to play their part in maintaining this public good".¹²⁸ Waldron argues that hate speech seeks to establish a rival public good as "the wolves call to one another across the peace of a decent society".¹²⁹

Granted that the line-drawing of what constitutes hate is not always simple. On the one hand, statements that assert "Jews are money hungry," "gays are immoral," "Blacks go back to Africa," "A Woman's place is in the Kitchen!", "F*ck The Police", "Israel is an apartheid state" and calls to boycott Israel are all unpleasant yet I think legitimate speech. It is noted that some of these statements might be actionable hate speech in some countries. The problem is that there is no single definition of hate speech and hate speech legislation varies from one country to another.¹³⁰ On the other hand, calls that provoke violence against target groups fall under the definition of incitement; here the context is of harmful speech that is *directly linked* to harmful action. Malicious hate speech that is aimed to victimize and dehumanize its target, often (but not always) vulnerable minorities, and call to act violently against them should not enjoy the protection of the Free Speech Principle.

Adhering to liberal reasoning, my argument places the individual at the center in examining whether the individual needs protection from certain expressions because they might offend one's emotional and spiritual system. Recognizing the dignity of each and every person, it supplements the Harm Principle with the Offence to Sensibilities Argument, arguing that this Argument *in and of itself* can serve as grounds for restricting freedom of expression in extreme cases when the offence is severe; even more so when the target group (individual or individuals) cannot avoid being exposed to the offence, and the consequences of the offence might be destructive. The factors that must be taken into account are:

- The content of the expression.
- The manner of expression.
- The duration and intensity of the offence.
- The frequency of the offence.
- The intentions of the speaker.
- The circumstances which include the avoidability standard and the presence of mitigating factors.
- Consequences of speech.

It is incumbent on those who restrict speech on grounds of profound offence to examine *all* the above factors. Not all of these factors are essential, and we may decide to prohibit certain expressions also when the intentions of the speaker are not explicitly pronounced, and when the target group can avoid exposure to the offence, though members of the target group are still aware of its existence. Speakers should not be callous about expressing profound offence when they have reasons to believe that their speech might result in loss of life. It is emphasized that we are dealing with an especially offensive expression that might damage the sensibilities of the individuals whom the speaker wishes to offend.

Conclusion

Many American liberals, including Scanlon¹³¹ (and also Baker;¹³² Meiklejohn¹³³) endorse viewpoint-neutrality especially where social and political speech is concerned. I think that people, as rational and moral beings, can recognize evil when they see it and argue on moral grounds that certain kinds of speech are beyond tolerance. Anti-Semitic and Islamophobic assertions are, of course, political, aimed to

bring societal changes. I would not defend speakers who hold "Gays should burn in the fires of hell", "Jews are good for gas chambers" or "Good Arabs are dead Arabs." Unfortunately, those assertions are not the fruits of my imagination. Scanlon said in his remarks on this paper that he would not defend such speakers. But he immediately maintained his overriding principle which is suspicion of government. The permissibility of restricting speech depends for Scanlon on the general consequences of giving governments the power to regulate speech on certain grounds.

In a democracy, people must enjoy absolute freedom to advocate and debate ideas, but this is so long as they refrain from abusing this freedom to attack the rights of others or their status in society as human beings and equal members of the community. The freedom of one should be balanced and weighed against the freedom of others. Democracy is founded on two basic principles: respect for others, and not harming others. These principles are the lighthouse according to which democratic morality and policies are formed. There is right and wrong. There is a standard, a moral compass that guides our reasoning. Not all views have equal standing in society, just as not all actions have equal standing.

Limitations on freedom of expression should be crafted with great care. Whenever we come to restrict speech, the onus for limiting free expression is always with the one who wishes to limit expression, and that one should bring concrete evidence to justify restriction. The speech must be dangerous and/or harmful. The danger and/or harm cannot be implicit or implied. If speech would be prohibited only because its danger might be implied from an unclear purpose that is open for interpretations, then the scope for curtailing fundamental democratic rights is too broad, and the slippery-slope syndrome becomes tangible. The implicit way is not the path that liberals should tread on when pondering restricting of freedom of expression. This does not mean that we

should not be vigilant in protecting our democracy. But mere suspicion (“bad tendency”)¹³⁴ will not do to override basic freedoms. Boundaries to freedom of expression should be introduced with caution and due process. But they should be introduced. Freedom of expression needs to be balanced against no less important principles, such as the protection of vulnerable minorities.

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Notes

¹ Post, *Constitutional Domains*.

² American liberalism is comprised of a plethora of opinions over substantive normative questions in the legal context, in the political context, and in philosophical scholarship.

³ J.S. Mill, *Utilitarianism, Liberty, and Representative Government*, 133.

⁴ H.J. Laski, *The Rise of European Liberalism: An Essay in Interpretation*, 5. See also L.T. Hobhouse, *Liberalism*.

⁵ Skillen, "Freedom of Speech".

⁶ Dorsen, "Is There A Right to Stop Offensive Speech? The Case of the Nazis at Skokie"; Neier, *Defending My Enemy*; Baker, "Scope of the First Amendment Freedom of Speech"; idem, "Hate Speech"; Keller, "The Satanic Video".

⁷ Baker, "Autonomy and Hate Speech", 152; idem, "Hate Speech".

⁸ Scanlon, "Freedom of Expression and Categories of Expression"; idem, *The Difficulty of Tolerance*; Schauer, *Free Speech*; Schauer, "The Cost of Communicative Tolerance".

⁹ Dworkin, "Foreword"; Reidy, "Ronald Dworkin: a new map of censorship".

¹⁰ Bollinger, *The Tolerant Society*; Bollinger, *Uninhibited, Robust, and Wide-open*; Bollinger and Stone, *Eternally Vigilant: free speech in the modern era*; Richards, *Toleration and the Constitution*; Richards, "Toleration and Free Speech".

¹¹ Fried, *McCarthyism, The Great American Red Scare*; Schreker, *The Age of McCarthyis*; Oshinsky, *A Conspiracy So Immense*.

¹² Alford, "We're All in This Together. The Decline of Trust in Government, 1958-1996", 30.

¹³ Pew Research Center, Majority Says the Federal Government Threatens Their Personal Rights; Pew Research Center, Beyond Distrust: How Americans View Their Government. For further discussion, see Ashbee, *American Society Today*.

¹⁴ <http://caselaw.lp.findlaw.com/data/constitution/amendment01/> . For further discussion, see Geoffrey R. Stone and Lee C. Bollinger (eds.), *The Free Speech Century*.

¹⁵ See, e.g., *Johnson v. Virginia*; *New York Times v Sullivan*.

¹⁶ I will further discuss the viewpoint neutrality doctrine *infra*.

¹⁷ These incidents include the killing of three Pittsburgh police officers by Richard Poplawski in 2009. Two years later, in 2011, Anders Behring Breivik's murderous journey in which he detonated a truck bomb in front of a government building in Oslo, killing eight, and then went on a shooting spree in Utoya Island, murdering 69 others. In May 2012, Jason Todd Ready killed four people before killing himself. That same month, Eric Clinton Kirk Newman, also known as Luca Rocco Magnotta, was accused of torturing and dismembering a Chinese immigrant; three months later, Wade Michael Page shot and killed six people at a Sikh temple before killing himself during a shootout with police. Dickson, "Where White Supremacists Breed Online".

¹⁸ See *Collin v. Smith*; *Village of Skokie v. National Socialist Party of America*. For further deliberation, see Neier, *Defending My Enemy*.

¹⁹ On the free speech rights of the Ku Klux Klan and other radical organizations, see *Brandenburg v. Ohio*; *Forsyth County v. Nationalist Movement*; *R.A.V. v. City of St. Paul*. See also *United States v. Hayward and Krause* and *United States v. Juveniles J.H.H., L.M.J and R.A.V.* in which the court held that some forms of expression, like cross burning, used to intimidate, are harmful and damaging to others and, as such, do not enjoy the protecting cover of speech in the constitutional sense. On the other hand, see *Virginia v. Black* which declared the Virginia cross-burning statute unconstitutional because it discriminated on the basis of content and viewpoint. For critique of this highly controversial opinion, see Gey, "A Few Questions About Cross Burning, Intimidation, and Free Speech".

²⁰ Schauer, "The Cost of Communicative Tolerance".

²¹ Schauer, *Free Speech*; Schauer, "The Cost of Communicative Tolerance"; Newman, "American and Canadian Perspectives on Hate Speech and the Limits of Free Expression".

²² Dworkin, *Taking Rights Seriously*.

²³ Nagel, "Personal Rights and Public Space," 96.

²⁴ Nagel, *Concealment and Exposure*.

²⁵ Some American Supreme Court justices who defend hardline libertarian views of free speech see themselves as defending a conservative political morality, as opposed to a liberal political morality. See Dworkin, "The Moral Reading of the Constitution".

²⁶ Dworkin, "Why Liberals Should Believe in Equality"; *idem*, *A Matter of Principle*; *idem*, *Sovereign Virtue*; *idem*, "Foreword". See also Cohen, Nagel, and Scanlon, *Equality and Preferential Treatment*; Barker, *Living As Equals*.

²⁷ Scanlon, "A Theory of Freedom of Expression", 171. I asked Scanlon what did he mean by this formulation of 'near catastrophe' exception to the Free Speech Principle, and whether he can provide one or two examples. On October 19, 2015 Scanlon

replied that he is not sure he would endorse this formulation anymore, and that he does not recall exactly what he had in mind.

²⁸ The following references are to the 1977 reprinted edition.

²⁹ Scanlon, "A Theory of Freedom of Expression", 158.

³⁰ Scanlon, "A Theory of Freedom of Expression", 160.

³¹ See Mill, *On Liberty*.

³² Scanlon, "A Theory of Freedom of Expression", 160-161.

³³ Scanlon, "A Theory of Freedom of Expression".

³⁴ Cohen-Almagor, "JS Mill's Boundaries of Freedom of Expression: A Critique".

³⁵ Scanlon, *The Difficulty of Tolerance*, 162.

³⁶ Scanlon, *The Difficulty of Tolerance*, 162.

³⁷ Scanlon, "A Theory of Freedom of Expression", 163.

³⁸ Gaylin and Jennings, *The Perversion of Autonomy*, 154.

³⁹ Cohen-Almagor, *The Scope of Tolerance*.

⁴⁰ Scanlon, "A Theory of Freedom of Expression", 167; Cohen-Almagor, "Between Autonomy and State Regulation".

⁴¹ Post, "The Constitutional Status of Commercial Speech".

⁴² Heinze, *Hate Speech and Democratic Citizenship*.

⁴³ Weinstein, "Hate Speech Bans, Democracy and Political Legitimacy".

⁴⁴ Post, "The Constitutional Status of Commercial Speech".

⁴⁵ For different critiques, see Redish, *The Adversary First Amendment*; Waldron, "The Conditions of Legitimacy: A Response to James Weinstein"; Gardner, "Doubts About 'Democratic Legitimacy'".

⁴⁶ Scanlon, "Freedom of Expression and Categories of Expression", 533.

⁴⁷ Baker, *Human Liberty and Freedom of Speech*; idem, "Autonomy and Hate Speech".

⁴⁸ Neier, *Defending My Enemy*.

⁴⁹ Bollinger, *The Tolerant Society*.

⁵⁰ Richards, *Tolerance and the Constitution*.

⁵¹ Mill, *On Liberty*.

⁵² Scanlon, *The Difficulty of Tolerance*, 2.

⁵³ Scanlon explained this in his comments on a draft of this essay. Personal communication dated July 11, 2015. See also Scanlon, *The Difficulty of Tolerance*, 162.

⁵⁴ See Scanlon, *The Difficulty of Tolerance*, 124-150.

⁵⁵ Scanlon, *The Difficulty of Tolerance*, 157-164.

⁵⁶ See Scanlon, "Moral Rights and Constitutional Rights" (unpublished paper).

⁵⁷ Scanlon, *The Difficulty of Tolerance*, 154.

⁵⁸ *Ibid.*, 155.

⁵⁹ Scanlon, *The Difficulty of Tolerance*, 155; idem, "Freedom of Expression and Categories of Expression", 521-528.

⁶⁰ Scanlon, *The Difficulty of Tolerance*, 155.

⁶¹ Scanlon, "Freedom of Expression and Categories of Expression", 534.

⁶² Scanlon, *The Difficulty of Tolerance*, 156.

⁶³ Meiklejohn, *Political Freedom*; idem, *Free Speech and Its Relation to Self-government*.

⁶⁴ Baker, "Hate Speech".

⁶⁵ Hardin, "Liberal Distrust".

⁶⁶ Volokh, "The Mechanisms of the Slippery Slope".

⁶⁷ Nye, Zelikow and King, *Why People Don't Trust Government*.

⁶⁸ Stone, *Perilous Times*.

⁶⁹ Richards, *Toleration and the Constitution*.

⁷⁰ Scanlon, "Content Regulation Reconsidered", 337.

⁷¹ I asked Scanlon who will make the balancing between competing interests. Will it be the government, the courts, public officials or maybe a special body? Scanlon answered that this is a matter of institutional design. Sometimes courts are less unreliable than electorates, but they are not infallible. Personal communication of July 11, 2015. Insofar as the doctrine that Scanlon is defending, it allows courts to overrule legislatures. His doctrine is not based on the assumption that courts are bound to get it right but at most that they are less likely to make certain kinds of mistakes. For further critique, see Buchanan, "Autonomy and Categories of Expression: A Reply to Professor Scanlon"; Dworkin, "Introduction"; Cohen-Almagor, *The Boundaries of Liberty and Tolerance*.

⁷² Meiklejohn, *Political Freedom*, 16.

⁷³ Meiklejohn, *Political Freedom*, 16-17.

⁷⁴ In his comments on a draft of this paper, Scanlon confirms that these assumptions are correct. Personal communication of October 19, 2015.

⁷⁵ Scanlon, "Freedom of Expression and Categories of Expression", 534.

⁷⁶ *Village of Skokie v. National Socialist Party of America*.

⁷⁷ Scanlon, "Freedom of Expression and Categories of Expression", 519-520.

⁷⁸ Feinberg, *Offense to Others*, 93. Feinberg's argument is somewhat confusing but in a private conversation we had in Oxford Feinberg made it clear to me that he opposed the Skokie decision.

⁷⁹ Waldron, *The Harm in Hate Speech*.

⁸⁰ Cohen-Almagor, "Harm Principle, Offence Principle, and the Skokie Affair"; *Speech, Media, and Ethics*.

⁸¹ In his remarks from July 11, 2015, Scanlon writes that he does care about the interests of the target of hate and that he does not neglect their interests. Insofar as he disagrees with me, it is over (i) how important we take certain of these interests to be (e.g. how bad it is to suffer a certain kind of offense) and (ii) questions of institutional design: is it possible to allow regulation of expression on the grounds that it causes certain kinds of offense without giving governments powers that threaten other important interests? Scanlon acknowledges that we probably disagree about how bad the effects of certain kinds of expression are, and more generally about these questions of institutional design. But to assert that he does not care about harms to vulnerable members of society and that he is excessively sceptical of governmental power in this area exaggerates the disagreement. Reflecting on Skokie, Scanlon writes in his remarks that if he were to change his mind it would be on one of two grounds. (1) Objecting to the Nazi march not on the basis of offense but on the basis of fear, which does not generalize, and has clearer standards of application. (2) Allow regulation on the ground that the Nazis had no legitimate reason to want to march in Skokie as opposed to somewhere else. Their only reason for wanting to march there was a desire to offend and frighten, which Scanlon and I agree that they are not good reasons for wanting that venue.

⁸² Meghan Keneally, "Skokie: The legacy of the would-be Nazi march in a town of Holocaust survivors".

⁸³ D. Goldberger, "Sources of judicial reluctance to use psychic harm as a basis for suppressing racist, sexist and ethnically offensive speech": 1170.

⁸⁴ Scanlon, "Freedom of Expression and Categories of Expression", 527.

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- ⁸⁵ Australia had the Australian National Socialist Party until the 1970s while New Zealand had the National Socialist Party of NZ active until the 1980s.
- ⁸⁶ Mill, *On Liberty*.
- ⁸⁷ Cohen, "Freedom of Expression". Scanlon accentuates these points in our personal exchange. Personal communication dated July 11, 2015.
- ⁸⁸ Cohen, "Freedom of Expression", 223.
- ⁸⁹ *Ibid.*, 241.
- ⁹⁰ Baker, *Human Liberty and Freedom of Speech*; "Autonomy and Hate Speech".
- ⁹¹ Cohen, "Freedom of Expression", 242.
- ⁹² Cohen, "Freedom of Expression", 257. The fighting words doctrine was formulated by Justice Frank Murphy in *Chaplinsky v. New Hampshire* (1942). According to Murphy, there are three characteristics of the fighting words doctrine: that the speech is of low social value (this rationale made it easier for Murphy to exclude it from the protection of the First Amendment); that the speech might lead to immediate breach of the peace; and that it is conducted in a face-to-face encounter.
- ⁹³ Cohen, "Freedom of Expression", 262.
- ⁹⁴ Rawls, *Political Liberalism*, 11-12.
- ⁹⁵ Cohen, "Freedom of Expression".
- ⁹⁶ Scanlon's comments on a draft of this paper. Personal communication dated July 11, 2015.
- ⁹⁷ *Ibid.*
- ⁹⁸ Feinberg, *Offense to Others*.
- ⁹⁹ Personal exchange with Scanlon. His message of October 19, 2015.
- ¹⁰⁰ Cohen-Almagor, *Speech, Media and Ethics*.
- ¹⁰¹ Amnesty International, Choice and Prejudice.
- ¹⁰² Council of Europe Committee of Ministers, Recommendation R(97)20 of the Committee of Ministers of the Council of Europe on "Hate Speech". Stephanos Stavros, Head of the Office of the Council of Europe SG's Special Representative on migration and refugees, advised that ECRI (European Commission against Racism and Intolerance) has collected such empirical evidence. Email communication on April 9, 2017. Paul Giannasi, Head of the Cross-Government Hate Crime Programme in the UK Ministry of Justice, commented: "My sense is that there is more overt hate speech in the USA but also more violence, more prisoners and more division... That said it would presumably be impossible to connect the two factors... I don't think there is any really definitive data given the huge under-reporting of hate crime and the disparity of recording systems". Email communication on April 2, 2017.
- ¹⁰³ Ackerman, *Social Justice and the Liberal State*; Larmore, *Patterns of Moral Complexity*; Dworkin, "Liberalism".
- ¹⁰⁴ Scanlon, *The Difficulty of Tolerance*, 159.
- ¹⁰⁵ Tribe, *American Constitutional Law*, 580.
- ¹⁰⁶ Scanlon, *The Difficulty of Tolerance*, 159.
- ¹⁰⁷ Cohen-Almagor, *The Boundaries of Liberty and Tolerance*.
- ¹⁰⁸ Meiklejohn, *Free Speech and Its Relation to Self-government*.
- ¹⁰⁹ Weinstein, "Hate Speech, Viewpoint Neutrality, and the American Concept of Democracy".
- ¹¹⁰ Scanlon, *The Difficulty of Tolerance*; idem, "Content Regulation Reconsidered".
- ¹¹¹ Baker, "Hate Speech".
- ¹¹² Anti-Defamation League, *New Hate and Old: The Changing Face of American White Supremacy*.
- ¹¹³ Anti-Defamation League, *Murder and Extremism in the United States in 2018*.

¹¹⁴ Anti-Defamation League, *New Hate and Old: The Changing Face of American White Supremacy*.

¹¹⁵ Vegas Tenold, "The neo-Nazi plot against America is much bigger than we realize".

¹¹⁶ Council Framework Decision 16771/07, Brussels, February 26, 2008, <http://register.consilium.europa.eu/pdf/en/07/st16/st16771.en07.pdf>

¹¹⁷ Ibid.

¹¹⁸ R. Cohen-Almagor, "Hate and Racist Speech in the United States - A Critique".

¹¹⁹ Immanuel Kant, *Foundations of the Metaphysics of Morals*, or <http://www.redfuzzyjesus.com/files/kant-groundwork-for-the-metaphysics-of-morals.pdf>. For further discussion, see Graham Bird (ed.), *A Companion to Kant*.

¹²⁰ Immanuel Kant, *Groundwork of the Metaphysics of Morals*, <https://cpb-us-w2.wpmucdn.com/blog.nus.edu.sg/dist/c/1868/files/2012/12/Kant-Groundwork-ng0pby.pdf>

¹²¹ Kant, *Groundwork of the Metaphysic of Morals*. For further discussion, see Ino Augsberg, "'The Moral Feeling Within Me': On Kant's Concept of Human Freedom and Dignity as Auto-Heteronomy", 55-68.

¹²² Dworkin asserts that people who blame others or society at large for their own mistakes, or who absolve themselves of any responsibility for their conduct by blaming genetic determinism lack dignity. Ronald Dworkin, *Justice for Hedgehogs*, chapter 8.

¹²³ To quote Mill, the end for which "mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection." Power can be rightfully exercised over any member of society, against her will, is to prevent harm to others. Cf. J.S. Mill, *On Liberty*, in *Utilitarianism, Liberty and Representative Government*, 72-73. See also pp. 114, 138.

¹²⁴ John Stuart Mill, *Utilitarianism, Liberty, and Representative Government*, chapter 3 of *On Liberty*, in *Utilitarianism, Liberty and Representative Government*, at 72-73, 114. See also p. 138, or <http://www.bartleby.com/130/3.html>.

¹²⁵ Cohen-Almagor, "Hate and Racist Speech in the United States - A Critique".

¹²⁶ Rawls, *Political Liberalism*, 196-198.

¹²⁷ Waldron, *The Harm in Hate Speech*.

¹²⁸ Waldron, *The Harm in Hate Speech*, 4.

¹²⁹ Ibid., 94. For further discussion as to why hate speech deserve special consideration and should not be perceived neutrally, see Heyman, *Controversies in Constitutional Law*; idem, *Free Speech and Human Dignity*; Cohen-Almagor, *Speech, Media, and Ethics*, Cohen-Almagor, "Is Law Appropriate to Regulate Hateful and Racist Speech"; Cohen-Almagor, "Freedom of Expression v. Social Responsibility: Holocaust Denial in Canada"; Cohen-Almagor, *Confronting the Internet's Dark Side*; Waldron, "The Conditions of Legitimacy: A Response to James Weinstein".

¹³⁰ Bleich, *The Freedom to Be Racist?*

¹³¹ Scanlon, *The Difficulty of Tolerance*; idem, "Content Regulation Reconsidered".

¹³² Baker, "Scope of the First Amendment Freedom of Speech"; idem, *Human Liberty and Freedom of Speech*; idem, "Harm, Liberty and Free Speech"; idem, "Autonomy and Hate Speech"; idem, "Hate Speech".

¹³³ Meiklejohn, *Political Freedom*; idem, "Freedom of Speech"; idem, *Free Speech and Its Relation to Self-government*.

¹³⁴ For discussion on bad tendency, see Rabban, *Free Speech in Its Forgotten Years*.

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