Freedom of Speech and the Function of Public Discourse

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I. Introduction

Hate speech poses a particular dilemma in and for democratic societies. The liberal notion of free speech is characterized by belief in a “free marketplace of ideas,” in which all points of view have or should have an opportunity to be heard; by the logic of liberal capitalism—in which better products and services emerge through competition—it follows that better ideas will triumph over worse ideas. In this context, hate speech is not only tolerated but justified and valorized as a necessary, if unpleasant, part of democratic processes. As the oft-cited Oliver Wendell Holmes put it, “if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate” (*United States v. Schwimmer* 654-55). This leads to the quasi-logical conclusion that the only appropriate response to hate speech is simply “more speech.”

In order to interrogate this cluster of ideas, I use a rhetorical and cultural lens to examine the case of Westboro Baptist Church. Specifically, I marry a historical perspective on free speech with an understanding of models of the public sphere. The former links Mill’s ideas on free expression with later U.S. Supreme Court opinions, including the Westboro case, which illustrate the major tenets of liberal free speech theory that remain prominent in both academic and popular works on freedom of speech. I then apply Patricia Roberts-Miller’s taxonomy of models of the public sphere to explicate assumptions about public discourse that undergird the bourgeois (liberal) version of the public sphere. What this analysis reveals is not merely that the bourgeois public sphere is a flawed ideal, but that its endurance as an ideal has depended on a specious link between free expression and capitalism which, by defining the public good in terms of individual liberty, erases socio-political imbalances of power, privileges the position of the (already) privileged, and normalizes the expressive function of public discourse, to the exclusion of other (potentially more democratic) models. In such a context, meaningful debate is increasingly reduced to just another kind of competition, a show, a spectacle.

II. *Snyder v. Phelps*

Westboro Baptist Church has gained national and international notoriety for protests at military funerals. According to its own web site (godhatesfags.com), “WBC engages in daily peaceful sidewalk demonstrations opposing the homosexual lifestyle of soul-damning, nation-destroying filth.” The group reasons that “the modern militant homosexual movement […] pose[s] a clear and present danger to the survival of America,” and that U.S. soldiers perishing in Iraq and Afghanistan
God’s “righteous judgment against an evil nation.” Although Westboro began demonstrating in 1991, the United States officially “crossed the line,” they say, “on June 26, 2003, when the Supreme Court (the conscience of the nation) ruled that we must respect sodomy” (Westboro).

In 2011, the “conscience of the nation” ruled 8-1 in favor of Westboro’s right to “free speech.” Albert Snyder had sued following a 2006 WBC demonstration near the funeral of his son, Matthew, a Marine Lance Corporal killed in the line of duty in Iraq. A jury awarded Snyder a total of $10.9 million (later reduced to $5 million) for defamation, invasion of privacy, and intentional infliction of emotional distress (Dominguez; Liptak). A federal appeals court, however, reversed the decision—calling the WBC demonstration “protected speech” because it involves “matters of public concern, including the issue of homosexuals in the military, the sex-abuse scandal within the Catholic Church, and the political and moral conduct of the United States and its citizens” (Snyder, Ct. of A. 223)—and ordered Albert Snyder to pay the church’s court costs of over $16,000 (CBS/AP).

In upholding the ruling, the Supreme Court argued that the WBC demonstration falls under the protection of the First Amendment, since Westboro “addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials” (Snyder, S. Ct. 15). Chief Justice Roberts went on to write, “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. On the facts before us, we 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” (Snyder, S. Ct. 15). The Supreme Court’s decision, then, sustains a particular notion of freedom of speech that has been dominant in the United States for the better part of the last century, one which invokes a questionable notion of “publicness”—i.e., public debate on matters of public concern—as a way of protecting speech that may be harmful to others.

III. The Liberal Notion of Free Speech

This notion of freedom of speech, which has been broadly understood as the sine qua non of “democracy,” is typically rooted in the philosophy of John Stuart Mill, who argued that because opinions—including (even especially) one’s own—were fallible, “the collision of different opinions” was necessary “to establish truth” (Roberts 71). The apparently self-justifying notion of a marketplace of ideas therefore resonated with an emerging bourgeois class, reflecting Mill’s own belief that “free trade and free expression were two sides of the same coin” (Peters 10). Even so, Mill himself did not advocate widely inclusive public debate. In fact, Mill worried that the masses of people then organizing and agitating were (or would be) easily and uncritically swayed by a handful of charismatic and eloquent leaders. He therefore described an ideal kind of public discussion that generally excluded the majority of the population, though he had some hope of properly educating the working classes: “The prospect of the future depends on the degree in which they can be made rational beings” (123; qtd. in Roberts 81). Thus, as John Michael Roberts concludes, “Mill constructs not so much a rationale for free speech as a defence [sic] of the liberal form of the bourgeois public sphere” and “legitimates an ideological form of the capitalist state” (67).
Mill’s rationale emerges in its officially codified form in Supreme Court opinions issued by Oliver Wendell Holmes  and Louis Brandeis, and in a string of later Court decisions culminating in *Brandenburg v. Ohio* (1969). This judicial history, despite its many irregularities and even contradictions, has been oft-invoked in recent decades to defend the very broad, liberal notion of free speech, even in ostensibly “neutral” or “objective” discussions. Anthony Lewis’s widely cited (and Pulitzer Prize winning) “biography” of the First Amendment, for example, is titled (quoting Holmes) *Freedom for the Thought That We Hate.* Likewise, in Oxford’s *Free Speech: A Very Short Introduction*, Nigel Warburton can write in the preface that his “aim in this book is [...] to provide a critical overview of the main arguments about what free speech is and why we should care about it” (n. pag.), and then go on to begin chapter one by saying:

> Freedom of speech is worth defending vigorously even when you hate what is being spoken. Commitment to free speech involves protecting the speech that you don’t want to hear as well as the speech that you do. This principle is at the heart of democracy, a basic human right, and its protection is a mark of a civilized and tolerant society. (1)

The notion that freedom of speech is the principle at the heart of democracy is carefully and subtly, if unconsciously, structured to avoid debate about what “free speech” and even “democracy” actually mean; instead, these definitions are assumed to be self-evident.

As Warburton points out, Article 19 of the United Nations’ Universal Declaration of Human Rights (1948) explicitly recognizes the need to protect free expression. Even so, Warburton (like Lewis) conveniently overlooks the fact that there are also laws or codes against hate speech in every liberal democracy in the world, except the United States (Waldron). Instead, Warburton simply asserts that “the best answer to bad speech is good speech” (34), normalizing the “marketplace of ideas” and ignoring the ways in which power functions. Even Stanley Fish acknowledged that this notion assumes that “the effects of speech [can] be canceled out by additional speech,” as if “the pain and humiliation caused by racial or religious epithets could be ameliorated by saying something like ‘So’s your old man’” (109). Thus the characterization of hate speech, by Warburton, Lewis, and others, as simply “speech that you hate” or “speech that you don’t want to hear” grossly distorts and minimizes the issue, and privileges a particular notion of “harm” that, in turn, privileges the position of the privileged—i.e., those who are least likely to suffer harm from “offensive” speech.” In *The Harm in Hate Speech*, Jeremy Waldron makes the case that each person, each member of each group, should be able to go about his or her business, with the assurance that there will be no need to face hostility, violence, discrimination, or exclusion by others [...] This sense of security in the space we all inhabit is a public good [...] [and] hate speech undermines this public good. (4, emphasis added)

In this, Waldron has chosen to elevate a different kind of public good, over and against the generalized “public good” of individual liberty assumed by hate speech apologists. These competing notions of public good are characteristic of different models of the public sphere. An explication of such models, then, can
help unearth some of the differing assumptions about the function of public discourse in society.

IV. Models of the Public Sphere

Habermas’s account of the emergence of a bourgeois (liberal) public sphere in the late-18th and early 19th centuries has been widely critiqued, yet remains central as a description of a particular, conceptual ideal, one which emphasizes rational-critical debate among diverse peoples who, although they occupy unequal positions in society, are able to function as relative equals (Habermas; Fraser; Roberts-Miller). The public good depends on participants who have the intellectual and moral aptitude to set aside both imbalances of power and individual interests while exercising rational judgment. Whether or not this particular model ever actually existed, it continues to dominate public legal and political discussion (Roberts-Miller 18; Weintraub and Kumar 7). There are, however, some alternatives. Patricia Roberts-Miller lists an additional five models, of which I should like to focus on three: the interest-based, deliberative, and agonistic. These provide a useful means of talking about characteristics of public discourse and its relationship to different versions of democracy.

The interest-based model “assumes that individuals can and should pursue their own self-interest” in a “marketplace of ideas” (Roberts-Miller 98), and that the public good is served inasmuch as better ideas are assumed to flourish. The deliberative model places a high value on listening, seriously and carefully, to a wide range of perspectives in order to think through, and possibly even change, one’s own (Roberts-Miller 183). It therefore tends to assume that there is a common good that supersedes the interests of the autonomous individual. An agonistic model of the public sphere heightens the deliberative model’s emphasis on listening and revising one’s own position, though it also tends to resist the impulse toward consensus that is characteristic of the deliberative and other models (Roberts-Miller 126, 132). Both models reflect Mill’s belief in the fallibility of opinions and the necessity of a “collision of different opinions” (Roberts 71), but have been largely overshadowed and undermined—despite regular justificatory references to them—by the bourgeois (liberal) and interest-based models.

The bourgeois and interest-based models, in fact, complement one another: by defining the public good in terms of individual liberty, they craft a justificatory link between free expression and liberal capitalism. Taken together, they ultimately normalize the expressive function of public discourse. The privileging of such expression is not merely not deliberative, it is anti-deliberative, and stifles public debate rather than encouraging it. Mill’s notion of the fallibility of opinions works, then, to justify the expression of any opinion; but the idea of a collision of opinions, in which one’s own opinions are called into question, is lost.

In other words, the Westboro Baptist Church decision illustrates the reliance on a model of the public sphere that privileges autonomous, individual expression at the expense of any actual deliberation. Viewed from a deliberative or agonistic perspective, such speech should not be protected merely because it involves “matters of public import” (Snyder, S. Ct. 15), but should force us to ask instead, What does the Church’s opinion contribute to discussion about matters of public concern? What sort of public debate is engaged or enriched as a result of the
expression(s) in question? And in what ways does this advance the creation of a (more) democratic society? In fact, the issue of hate speech itself is actually erased from the discussion early on—public outrage as well as the Supreme Court’s decision emerge from the Church’s protests at military funerals, and the harm in question is that suffered by Albert Snyder; the question of hate speech targeting the gay community isn’t even part of the discussion.

This is not (as hate speech apologists have framed it) simply “speech that you don’t want to hear” (Warburton 1). This is the expression of opinions with intent to harm, but also with the intent to deny the need or usefulness of democratic deliberation. Westboro Baptist Church has made clear that they have no real interest in any form of discussion, debate, or deliberation; moreover, they appear fundamentally opposed to the very democracy they’ve appealed to for protection. After all, they also insist the Supreme Court has failed its role as “the conscience of the nation” by ruling “that we must respect sodomy” (Westboro).

Thus, I think, the terms of the free speech debate must change. The liberal defense of hate speech relies on a broader cultural context in which the function of rhetoric is always already understood to be primarily expressive and self-interested. We need to re-think the entire concept of “free speech” in terms of a truly democratic public sphere, one in which the “public good” is reconceived—not to erase or exclude the autonomous individual, but to situate her in relation to and as a member of the body politic, which is to say, as a participant in and contributor to the governance of a community, and not merely the expresser of an “opinion.”
Endnotes

1. Justice John Hessin Clarke in Abrams v. United States (1919): “the best test of truth is the power of the thought to get itself accepted in the competition of the market” (630).

2. “As a threshold matter, as utterly distasteful as [their] signs are, they involve matters of public concern, including the issue of homosexuals in the military, the sex-abuse scandal within the Catholic Church, and the political and moral conduct of the United States and its citizens.” (Judge Robert Bruce King, Snyder v. Phelps 580 F. 3d 206. Court of Appeals, 4th Circuit. 2009. 223.)

3. “In 1948, Alexander Meiklejohn wrote: ‘The principle of the freedom of speech springs from the necessities of the program of self-government . . . . It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.’ Ever since, a steady stream of jurists, constitutional scholars, and political theorists have repeated the maxim: free expression is a precondition for democracy. The people must be able to discuss political issues openly, without fear of governmental punishment, or democracy cannot exist” (Feldman 1).

4. See also Roberts.

5. See also Warburton: “[Mill] was also clear that his arguments for freedom only applied to ‘human beings in the maturity of their faculties.’ Paternalism—that is, coercing someone for their own good—was in his opinion appropriate towards children, and, more controversially, towards ‘those backward states of society in which the race itself may be considered in its nonage’” (9).

6. The first four “free speech” opinions of the Supreme Court were issued in 1919; all four affirmed the restriction of speech under the Espionage/Sedition Acts of 1917 and 1918. Holmes authored unanimous opinions in Schenck, Frohwerk, and Debs, and (joined by Brandeis) a dissenting opinion in Abrams.


8. Importantly, however, Brandenburg blurred the distinction between imminent lawless action (the KKK’s threat to the State), on one hand, and hate speech (derogatory references to Blacks and Jews), on the other. The Klan had actually been prosecuted under Ohio’s Syndicalism statute, which criminalized “advocat[ing] [ . . . ] the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform” and “voluntarily assemble[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.” The Court’s opinion specifically noted, in the film of the Klan rally in question, the presence of firearms (on multiple occasions), derogatory references to Blacks and Jews (including, “Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel”), and a speaker who said, “We’re not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance [sic] taken. We are marching on Congress July the Fourth, four hundred thousand strong” (Brandenburg v. Ohio 444-445).

9. See also, for example, Smolla, Free Speech in an Open Society (1992); Parker, Free Speech on Trial (2003); Dautrich, Yalof, and Lopez, The Future of the First Amendment (2008).
10. See also Whitney: “the fitting remedy for evil counsels is good ones” (375).

11. According to John Durham Peters, there are good reasons to believe that “ideas of unhampered public debate are held most intensely by those in positions of power [...] The rich and the educated consistently support free expression rights most vigorously” (176). According to Andsager, Wyatt, and Martin, “people who are most secure within society are most likely to support expressive rights” (265; qtd. in Peters 176-77). (Julie L. Andsager, Robert O. Wyatt, and Ernest Martin. Free Expression and Five Democratic Publics: Support for Individual and Media Rights. Creskill, N.J.: Hampton, 2004.).

12. What Habermas called “bourgeois,” Roberts-Miller and others refer to as the “liberal” model. In order to avoid confusing “liberal model” with what is currently referred to as “liberal politics,” which is “only historically related” (Roberts-Miller 4), I prefer to retain the designation “bourgeois” when possible.

13. The other two models described by Roberts-Miller are the technocratic and the communitarian. Importantly, Roberts-Miller acknowledges that the list is not exhaustive, and the categories are not mutually exclusive.

14. See, for example, Synder 6, 15; Whitney 377; Warburton 3; Dautrich, Yalof, and López 1.

Works Cited


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