

Chapter 8

Free Speech Versus Safe Space

The comedian allowed himself to tell an old joke about “homos.” The audience groaned. He stretched his index finger as far as he could and shouted “First Amendment!” There followed several lame jokes—one about a Rabbi, Minister and Priest who went into a bar. This time the audience responded with an ice silence. The comedian one more time shrieked: “First Amendment!” During the intermission that followed I asked a young couple sitting opposite me, in the cramped night club table, what they thought about his declaration that he was merely exercising his First Amendment rights. “Well, I see that he has right to say all these things; still, I wish...” He trailed off, wondering on what grounds he could object to such loaded, biased commentary about protected groups. His girlfriend had a solution: “We should, like all other civilized nations, ban hate speech.”

All three of them, I mean the comedian and the young couple, like most Americans, seem more infused with popular culture versions of the law—than with elementary communitarian concepts. These suggest a crucial difference between the right to say the most God awful things—use the N word, deny the Holocaust, advocate ISIS—and the rightness of saying these things. A difference between a legal right to speech—and what we consider morally appropriate speech. We are not only citizens, with a whole array of rights; we are also members of various communities (where we reside, work, pray and socialize). These communities, in effect, tell us that if you must engage in offensive speech—granted, which is your right—we in turn may express our dismay, never wish to visit with you again, let alone lend you a cup of sugar in a time of need. In other words, there is nothing in the First Amendment that promises you that free speech will be cost-free.

Better yet: as a society, America has found a way to have our cake and eat it too. We make room for unpopular speech, which is vital for a free society, for dissent, for innovation, for a vigorous civic life. But we also seek to ensure that you do not offend lightly, because there will be consequences. Call it a communitarian balance

This chapter draws on a segment of an article previously published as “Right Does Not Make it Right” in *The American Scholar*, September 29, 2015.

between individual rights and social responsibility. For example, when Larry Summers, serving as president of Harvard, was understood to have stated that that women's underrepresentation in the sciences somehow reflects their shortcomings, a storm of protest ensued (See, e.g., Dooe 2015). It led him to explain that he was misunderstood, tried to make amends, but in the end was one of the reasons he resigned. When then-candidate Donald Trump made several comments women found insulting, including a particularly vulgar comment about a Fox News reporter, he was disinvited from speaking at the Conservative RedState Gathering—a group that had considered him one of its heroes. Journalist Chris Hedges was disinvited from a lecture at the University of Pennsylvania after publishing an article arguing that the “terrorism,” “ethnic cleansing,” and “religious fundamentalism” of the Islamic State “mirrors the quest for a Jewish state eventually carved out of Palestine in 1948.” Beer giant Budweiser apologized after many on social media criticized its advertisement of “The perfect beer for removing ‘no’ from your vocabulary for the night” at a time when women's rights advocates were pushing for a “yes means yes” policy on affirmative sexual consent. U.S. Representative Todd Akin, who led in the election polls for a U.S. Senate seat for Missouri, was roundly criticized and lost the election decisively after stating that women who are victims of “legitimate rape” rarely get pregnant. Several sports commentators and athletes have had to learn to live with the consequences of offensive speech. ESPN refused to rehire commentator Craig James after he said homosexuals “are going to have to answer to the Lord for their actions” during a failed Senate campaign (Bonesteel 2015), and the NFL fined player Riley Cooper for using a racial slur at a concert (Hanzus 2013) and suspended referee Roy Ellison for cursing at a player during a game (ESPN 2013). Moreover, these consequences do not apply only to public figures in the media spotlight. For example, the *New Yorker* reported that after a DJ continued to play “Blurred Lines” against the request of a female patron who felt it promoted “rape culture”—and the bar in question was criticized on social media—the radio station announced it would never invite him back (Sanneh 2015). After Bill Maher used a racial epithet in a live interview on his HBO late-night show, he was widely criticized; the network called Maher's words “completely inexcusable and tasteless” and Senator Al Franken cancelled his upcoming guest appearance on Maher's show because of the offensive remark. Maher apologized for what he said (Itzkoff 2017). An Uber board member resigned after making a sexist comment at a meeting that angered employees (Isaac and Chira 2017). These types of incidents demonstrate that society has ways to contain inappropriate and offensive speech without making it illegal.

As a result, for everyone so chastised, thousands of others say to themselves: I know I have the right to say it, but is it the right thing to say? Which is dandy, because free speech does not presume shooting from the hip, and is best deliberate rather than wanton. I am not arguing that we have found the perfect balance. Those on the left these days seek more limits on speech (more about this soon) and libertarians hold that free speech is endangered. Each has some choice examples of their own. However, if you look at them together, as the examples cited above illustrate, public figures and the mainstream media seem quite well balanced; that is, speaking up without being unduly and wantonly offensive. And when one does offend, they

hear plenty, which is the way society keeps the communitarian balance between the right to speak and keeping the community's sensibilities intact.

8.1 Reflecting a Profound Societal Design

The communitarian setup of free speech, combining a legal right to speak freely with social norms that curb offensive speech, is merely the tip of a much larger iceberg, a reflection of a deep communitarian social structure often overlooked by those who focus on the difference between the private sector and the government, as so much of public discourse does. To outline this structure requires a brief digression into human nature. I first wrote about it in a book that later earned me tenure at Columbia University two years after I got my PhD. I tell you this not to boast about my achievement (well, just a bit) but to suggest that the idea was really well received. I showed, as you recall from Chap. 4, that there are only three ways to motivate people to engage in behavior that they would not engage in otherwise: force them (if you park in the hospital fire lane, you will be towed); pay them (as they are in offices and factories); and convince them of the merit of doing what must be done (e.g. call for volunteers). People who are coerced resent the imposition and tend to do as little as they can get away with it. People who are paid would still rather be doing something else. However, people who are convinced—do their new chores happily; they want to do them! True, they may not be pure altruists. They often simply heed the voice of the community because they are social creatures who crave the approval of others, and try to avoid their disapproval. What most people overlook is the huge amount of social business that is carried out in this third way: the community sets norms of conduct, that define what we are expected to do, and undergirds them by little else than a stream of kudos and appreciation as well as mild digs and snide remarks. Thus most of what people do for their children, their elders, their friends and neighbors, for their community, is not coerced nor paid for but fueled by communal norms and informal social controls.

Prohibition was a prime example: it was largely coercive, failed to achieve its goals, and vastly damaged America's law enforcement system and even its societal fiber; in contrast, the ban on smoking in public, which is based on convictions that this smoking harms others and should be prohibited, is 99.9999% self-enforcing, i.e. based on norms and informal social controls and a smashing success.

This is what observers refer to when they point to peer pressure and informal social controls. True, these can become oppressive, especially in more traditional societies and traditional parts of our society, but increasingly in modern societies they have become quite moderate. When Jonathan Rauch, one of our most seminal authors and a dedicated libertarian, came across this communitarian design, he wrote an enthusiastic oft-cited essay about this design in which he declared himself a soft communitarian, because "soft communitarianism is less oppressive, usually much less so, than the real-world alternatives. Shame is valuable not because it is pleasant or fair or good but because it is the least onerous of all means of social

regulation, and because social regulation is inevitable” (Rauch 2000). All this is behind the social structure that legally allows people to say what they want—but makes them think twice before they use this privilege.

8.1.1 *Not Soft Censorship*

When faced with the community’s voice, in effect a kind of counter speech, free speech advocates complain about it, calling it soft censorship or outright censorship. For example, users of social media site Reddit called on the site to fire its CEO for “censorship” after five forums (out of thousands) were deleted for racial or other harassment (Dewey 2015). Facebook has been criticized and even sued for “censorship” due to its policy of banning those who display pictures of women’s breasts and genitalia (Bouton n.d.) Twitter was criticized for introducing content filters and temporary account suspensions for “abusive messages” and “indirect threats of violence,” (Hern 2015) in what one user said “can only be described as heavy-handed censorship” (Fagioli n.d.) And in response to a Harris poll showing that 71% of Americans want a ratings system for books to protect children from inappropriate content, as exists for movies and games, free speech campaigners likewise argued that such a proposal would “raise serious concerns about censorship” (Flood 2015).

These champions of free speech, unwittingly or deliberately, use the horror the term censorship evokes to object to social reactions to their offensive speech. They would like to be able to say outrageous things—and be appreciated for doing so. But in the process, they are delegitimizing social pressure, which is the foundation of all communities. Censorship occurs when the government exercises its coercive powers to prevent speech, by jailing dissenters, closing newspapers, taking over TV stations, and so on. Social pressures merely ensure that before you speak, you ask yourself whether what you have to say justifies the hurt you will cause, often to people who have already been hurt plenty.

But do not a bookstore that refuses to sell *Mein Kampf*, a symphony orchestra that refuses to play Wagner, a cinema that refuses to show *Gone with the Wind*, a library that bans *Fifty Shades of Grey*, a video hosting site that bans “hateful content,” a comedy club or television channel that bans an offensive comedian, a film studio that refuses to work with Mel Gibson, or an online retailer that refuses to sell Confederate flag merchandise, engage in censorship? Only if they truly prevent speech. *Free speech requires that everyone will have a Hyde Park corner, a place one can freely state whatever the person seeks to state—but not that every corner be a Hyde Park.* If all the bookstores in town, Amazon, and Barnes and Noble and the publishers of e-books refuse to carry a given book, if you could not download it—that would come close to censorship, even if the government was not involved. But this is hardly ever the case, especially since the advent of social media, which provides a large number of alternative platforms such that it is hard to stop any utterance even if we all agree it ought to, like in the case of bullying.

8.1.2 *Ban Hate Speech?*

What about the suggestion of the young lady that we should outlaw hate speech? Most democracies do. And we already ban some speech; libel and child pornography for example. The main difficulty is with defining what hate speech is, without banning much of public discourse and art and literature. For instance, would we have to ban *Huckleberry Finn* because it includes the N word? The book is seen as required reading by some educators, while others argue that the teaching of a book with racist language is unacceptable (Roberts 2003; Holmes 2014). Historically, the list of authors frequently banned or challenged from libraries not only includes purveyors of hate or even dirty language, but also Orwell (for being “pro-communist”), Whitman (for “homoerotic themes”), and Darwin (for promoting the theory of evolution). Moreover, if you ban hate speech, you do very little to eradicate it, you just drive it underground. We would be better off being aware of when, where, and by whom hate speech is made, and respond with counter-speech, than leaving it simmering and unaddressed. In addition, from a communitarian viewpoint, banning hate speech is trying to solve a problem by law, instead by drawing on the community’s informal social controls.

8.1.3 *Microaggressions and “Check Your Privilege”*

Informal social controls can be taken too far, as is the case with the campaign against “microaggressions.” This term was coined in the 1970s and refers to “brief, everyday exchanges that send denigrating messages to certain individuals because of their group membership,” whether as “people of color, women, [or] lesbian, gay, bisexual, or transgender (LGBT)” people (Granger 2012). Microaggressions have also been referred to as “subtle forms of racial bias” that are “so deeply embedded in societal values and practices that they lie outside the consciousness of many well-intentioned White people who may genuinely consider themselves to be nonracist.” Note you cannot be micro-aggressive against white males by this widely followed definition; they are aggressors but cannot be aggrieved.

Those concerned with microaggression frown on statements such as, “There is only one race, the human race;” “America is a melting pot;” and “When I look at you, I don’t see color”—for “denying the significance of a person of color’s racial/ethnic experience” and sending the message that they should “assimilate/acculturate to the dominant culture” (Examples of Racial Microaggressions n.d.). “I believe the most qualified person should get the job” is interpreted to promoting a myth of meritocracy and suggest that people of color and women are lazy (Tool: Recognizing Microaggressions n.d.). Likewise, scrutinizing a thirty-something woman’s hand, looking for a wedding band is interpreted as a microaggression communicating that “women should be married during child-bearing ages because that is their primary purpose.” And the act of asking a non-white person where they are from is interpreted

as micro-aggressively suggesting someone is “exotic” or not a “true American” (Tool: Recognizing Microaggressions n.d.). A guide to “interrupting Microaggressions” in turn recommends that the victim respond to such questions by asking, “I’m wondering what message this is sending [...] Do you think you would have said this to a white male?” Or “How might we examine our implicit bias to ensure that gender plays no part in this?” (Tool: Interrupting Microaggressions n.d.).

I had the following exchange with a microaggression antagonist. I started by noting that I understood concerns about hidden, subtle aggressions, though I was concerned that one is defenseless against being charged with such speech. One is always subject to the argument that “you are unaware of your bias,” that others determine if you are aggressive, and that there is no way to appeal such judgments. The line “check your privilege” seemed to me particularly to cross a line. This expression is increasingly used online and on college campuses to demand that a speaker consider the unearned advantages that result from their race or gender before expressing their opinion on an issue. It basically implies that white males should mince their words, listen rather than talk.

The antagonist suggested that “one should know where one is coming from.” I replied, “That is true for one and all, even those who come with a chip on their shoulder from the inner city, but this is not the way this line is used; it addresses one group and seek to curb one group.”

Antagonist: “Well, if there is a space set aside for, say, Latinos to find their voice, and white males keep occupying the space with their voices...” I agreed that this is indeed an open and shut case of robbery. But when whites speak in a common place, like a class room, and their views are dismissed as biased on the face of it, we are taking social pressures a step or more too far.

I found that concern with microaggressions is held not merely by some far out college kids. Some years back I was asked to address the General Assembly of the Unitarian Universalist Association. I felt I did not know enough about the group and hence spent some days sitting in on meetings and listening. I was surprised to learn that several local chapters resolved that anyone (means white) who did not acknowledge that he or she has racist and homophobic feelings, should be encouraged to dig deeper. That one could not start on a journey of exorcising these feelings unless one first acknowledged that one had them. I had a hard time with such statements; there is no way to clear yourself. Whatever you feel or say—whether you accept the statement that you are profoundly biased—or refused to own up to your alleged feelings—is considered *prima facie* evidence that your view was profoundly warped.

I learned since that one can never be too much on one’s guard. Thus, to reveal and overcome homophobic feelings, for instance, is far from enough. A truly sensitive person would acknowledge that he is “transphobic” and be aware that he maintains different biases not just for gays, lesbians, bisexuals, and transgender people, but also for people of mixed genders or no gender and still others. On his way to curing his phobias, I am told, a person seeking to free himself from hidden biases would avoid the titles of Mr., Mrs., and Ms., and sign Mx.

In short, the movement to overcome microaggressions is part naïve idealism, part slightly disguised anti-elite rhetoric, part theater of the absurd. Above all, it draws reforming energy into micro issues in a world full of macro ones. It leads people to worry about wording in a world where ISIS fighters burn people alive, behead others because they are Christians, and sell young girls as sex slaves. A world in which—still!—hundreds of black men are shot by the police in the US, often without any reason. In which gang warfare turns blocks of cities into war zones—year after year after year. And, in which Citizens United is turning democracy into plutocracy—one dollar, one vote—by claiming that bribery is a form of free speech.

An old children’s rhyme says it very simply but best: “Sticks and stones will break my bones, but words will never hurt me.” If words do hurt you, you have a right to speak up, but see if you cannot find some sticks and stones whose removal commands much greater attention.

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