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Tort Actions for Hate Speech and the First Amendment: Reconceptualizing the Competing Interests

Jean C. Love*

In an effort to avoid pitting one of us against another, I take Bill Rubenstein's words to heart. I'm not going to make sharp, critical comments about the three speeches that you've just heard. All three speeches were very thoughtful and I learned a great deal from each speaker. Instead, I'm going to use these three speeches as a springboard for asking some basic questions about hate speech and about the First Amendment. I want to plant a few seeds for thought in your mind that I hope will create an environment in which we can have a very good question and answer session.

The first question I want to ask is the most basic question: does speech really cause harm? I imagine that many of you grew up in a household or a neighborhood where somebody said to you at some point in time: "Sticks and stones may break my bones but words can never hurt me." It is an old saying that many of us grew up with. But is it true? If it is, then we should forget about regulating hate speech, because there is no point in regulating something that does not harm us. And so this is the question I want you to focus on first: Is it really true that sticks and stones may break my bones, but words can never hurt me?

I suspect that each one of us can look back over our lives and come up with some personal experience in which words have hurt us. The types of harm may be different. For example, if you're a white heterosexual male, you may not have experienced the harm that results from what I call "discriminatory speech." Yet we have all, at some time or another, felt some pain caused by words. Thus, at some level, we all know that words can indeed wound, even if the specific wounds are different. Of course it, may be that the differences in the pain or harm that we have experienced contribute to our differing positions on whether hate speech should be regulated. For now, I ask you to keep this thought in mind. Focus on the harms you have experienced from words as you try to formulate your

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thoughts about whether or not we should regulate hate speech in any way, and think about whether your harm is like the harm others have suffered.

Let me give you some concrete examples of ways in which words can wound. First of all, words can cause physical harm to persons or property. For example, a speaker's words might incite a crowd to riot, causing property damage or physical injury to the target of the crowd's hatred. Consider the harm that could result if someone ran into this room at this moment and said, "Kill all the queers!" A lot of us in this room would have reason to fear serious harm. Whenever a speaker uses the rhetoric of hatred to convince others to join in an attack, actual physical injury is likely to ensue.

Second, words can cause various types of nonphysical harm. A speaker's words may damage the plaintiff's reputation. The speaker might defame a "straight" woman by calling her a lesbian, or defame a "straight" man by calling him a "faggot." When speech is used to say something untrue and harmful about a person, we call the speech defamatory. Defamatory speech causes harm to reputation. These are words that wound.

Words can also be used to invade a person's privacy. For example, a speaker might announce that a totally closeted gay man is a homosexual. These are words that wound, that harm that individual's right to privacy.

Finally, a speaker's words might inflict severe emotional distress. For example, a shopkeeper, who is on the phone with a gay man might quip to a coworker, "This guy is as queer as a three dollar bill."¹ Or a lesbian police officer might be the victim of verbal sexual orientation harassment by her coworkers. These are words that wound.

At this point, we can probably all agree that the answer to my first question is: "Yes, speech, along with sticks and stones, really can cause harm." I've given you some examples in which words can (and do) wound. And no doubt each of you has conjured up some personal memory to supplement my examples.

But, even if we agree that words can and do cause harm, that does not mean that we necessarily ought to regulate harmful speech. One could take the position that we should only regulate physical conduct which causes physical harm. A person who takes this position would want to enact laws that prohibit murder or battery, and perhaps also would want to prohibit speech that leads directly to murder or battery. One could alternatively take the position that we should protect more than an individual's physical well-being. A person who takes this position would want to enact laws against the "murder of the spirit,"² which surely would re-

1. See *Logan v. Sears, Roebuck & Co.*, 466 So. 2d 121, 122 (Ala. 1985) (holding that the speech did not constitute extreme and outrageous conduct).

2. See Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 129 (1987).

quire regulating some forms of speech, namely words that wound the spirit.

In point of fact, for centuries our lawmakers have taken the position that we as a society do want to regulate words that wound. To protect the physical well-being of individuals, early legislatures passed laws making it a crime to incite a riot. To protect the nonphysical parts of our personhood (e.g., "the spirit"), common law courts have created tort actions for defamation, for invasion of privacy, and for intentional infliction of emotional distress. We have, in fact, lived all of our lives here in the United States in a society that subjects us to regulation of our speech.

Given this long history of laws that regulate speech, the question becomes: What does the First Amendment mean when applied to these laws? Yes, we know that state laws must not abridge the guarantee of free speech found in the First Amendment to the Constitution, but what can that guarantee mean in light of our legislative and common law history of regulating words that wound?

We might answer this question in two different ways. We might say that adoption of the First Amendment effectively repealed all laws that attempt to regulate speech. This would constitute an extreme absolutist approach to First Amendment jurisprudence. Or, we might say that the First Amendment was intended to protect speech without repealing laws that protect the person and the spirit. This alternative approach would require us to balance the First Amendment interest in free speech against other interests we want to protect.

As I read Supreme Court cases on the First Amendment, it appears to me that we have adopted the latter approach, one that balances the competing interests in any given case. For example, courts still enforce criminal laws that prohibit incitement to riot, provided there is an immediate causal connection between the speech and the riotous activity. The role of the First Amendment is to require a tight causal connection, to make sure that it really is the spoken words that incited the riot and not something else. Courts continue to allow plaintiffs to recover damages for defamation, provided the defendant spoke with the requisite state of mind regarding the falsity of the defamatory statement. We haven't prohibited people from suing for defamation, but in deference to First Amendment concerns, we make it more difficult for certain people, such as public officials and public figures, to establish liability.³ Also, courts continue to allow plaintiffs to recover damages for invasion of privacy, provided the defendant's words were truly about matters of private concern. Because the purpose of the First Amendment is primarily to protect speech dealing with matters

3. See generally *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967).

of public interest, it does not preclude a lawmaker from protecting the competing values of privacy.

The Jerry Falwell case is a good example of current Supreme Court jurisprudence in which the values protected by private tort actions are balanced against the values protected by the First Amendment.⁴ The Falwell Court left the cause of action for intentional infliction of emotional distress intact, although it put important restrictions on the cause of action for public figures who seek damages against publishers. One way to look at this case is to say that the Court thought public officials and persons ought to assume the risk that someone might say nasty things about them. After all, public debate can sometimes become mean-spirited, and, even though we may not like the nastiness, we must tolerate it in the interest of preserving our free democracy.

Thus far we have concluded that speech can in fact cause harm. We have also concluded that we have a long history of enacting and enforcing laws that regulate harmful speech. And we have concluded that the First Amendment does not prevent the enforcement of these laws. Why, then, are we suddenly confronted with such an intense barrage of First Amendment attacks on the concept of regulating hate speech? Has something changed? Are First Amendment values more at risk today than when the amendment was first enacted?

I do not intend to answer this question in any detail, but I do want to make the following suggestion: I think one reason we are revisiting this conflict between private speech and First Amendment values is because most of the people currently advocating the regulation of hate speech are members of minority groups, who have only recently become empowered as the result of the enactment of nondiscrimination legislation. They are advocating the protection of dignitary interests that were not recognized at the time of the adoption of the First Amendment.

Defamation was the most commonly litigated tort action for dignitary harm at the time the First Amendment was adopted. In those days, the typical plaintiff in a defamation action was likely to be a member of the upper class, a person with a good reputation to protect. The typical defendant was also likely to be a member of the upper class, a person who had enough money to pay the judgment. Thus, the typical plaintiff and defendant came from the same segment of society. In the context of a defamation action, then, the balancing of interests approach served, as a practical matter, to balance the reputational interests of those in the upper class against the free speech interests of those in the upper class. Because members of the upper class could have imagined themselves as either plaintiffs or defendants in a defamation action, they would have wanted

4. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

the courts to recognize both their reputational interests and their free speech interests.

Consider, by contrast, a contemporary tort action for hate speech.⁵ The typical plaintiff in such a cause of action is a person who is a member of a nondominant group, such as a gay man, a lesbian, an African-American male, or a Mexican-American female. The typical defendant in a hate speech cause of action is a person of a dominant group, usually a white, heterosexual male or female. Because the typical plaintiff and defendant do not come from the same segments of society, the balancing of interests approach serves to balance the "personhood" interests of those in nondominant groups against the free speech interests of those in dominant groups. Because members of the dominant group are less apt to imagine themselves as plaintiffs in a tort action for hate speech, they have a greater interest in the protection of their free speech rights and a lesser interest in their right to be free from the dignitary harm caused by hate speech.

Hate speech is not the only context in which we have seen the dominant group claim an absolute right to speak words that wound. We have witnessed this same phenomenon in the pornography debate. Historically, we as a society have been willing to balance free speech rights in order to protect ourselves from pornographic material that is obscene. We have defined "obscene" in a gender-neutral way as something that appeals to our prurient interest.⁶ All of us, male and female, white and black, gay and straight, can share the concern about obscenity. If speech is regarded as truly obscene by diverse groups, then we have a joint interest in regulating it, in protecting ourselves against the harm it can cause. But when Catharine MacKinnon and Andrea Dworkin began to propose the regulation of pornographic material that subordinated women (as opposed to pornographic material that was obscene), the dominant group, representing male interests, began to assert absolute free speech rights.

Does it really matter that the debate over free speech appears to become more heated when it is the free speech interests of those in a dominant group that are at stake? I think it is a phenomenon to which we should pay close attention. We pride ourselves in living under a Constitution that guarantees both liberty and equality to every citizen of the United States. But, in a pluralistic society, when the free speech rights of one group are

5. Under current tort law, the cause of action for hate speech is intentional infliction of emotional distress. See Jean C. Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123 (1990).

6. Feminists have pointed out the obvious fact that, even though obscenity might appear to be defined in a gender-neutral way, in practice the definition is interpreted from the masculine perspective. Charles Nero's paper gives a new gloss to this point by suggesting that the Sears catalogue can be viewed as obscene—a view probably not shared by many women. See Charles I. Nero, *Free Speech or Hate Speech: Pornography and Its Means of Production*, 2 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 1 (1992).

pitted against the "personhood" rights of another group, it becomes more difficult to ensure both liberty and equality for all.

I do not want to suggest that a homogenous society can balance First Amendment and personhood values, whereas a diverse society cannot. But I do think that we can learn something from the historical fact that it has been easier to balance First Amendment interests against reputational interests in actions for defamation than to balance First Amendment interests against personhood interests in actions for hate speech. Perhaps we need to reconceptualize the cause of action for hate speech. Perhaps we need to redefine it in a way that makes it easier for the typical plaintiff and the typical defendant to imagine being a participant in a cause of action in which their roles are reversed.

Here are my suggestions. First, I think we need to define the harm caused by hate speech in such a way that it is a universally experienced harm. We might, for example, characterize the harm as a harm to "personhood" or to "basic human dignity." We will have to go through an agonizing case-by-case process to develop what we mean by "personhood" or "basic human dignity," but that process is exactly what the common law tradition is all about. It is a process by which a universal principle that we can all understand is applied to the very specific facts of a case involving real people and real harms.

We all are born into this world as human beings, and we all can imagine what it means to say that we want legal protection against harm to our personhood or to basic human dignity. Just as all members of the upper class shared a common interest in protecting their reputations, we all share an interest in protecting our personhood or basic human dignity. Once we recognize that this is the larger interest protected by remedies for hate speech, we need to recognize that each member of society should be entitled to bring such a cause of action. Specifically, I mean blacks must be able to sue whites; women must be able to sue men; and gay men and lesbians must be able to sue heterosexuals. Conversely, whites must be able to sue blacks; men must be able to sue women; and heterosexuals must be able to sue homosexuals. This is a very controversial statement amongst those who support the regulation of hate speech. I acknowledge that. But I am not keying my concept of hate speech into the concept of substantive equality. I am keying my concept of hate speech into the concept of personhood. Every one of us in this society is entitled to basic human dignity, and I think it is dangerous to capture the concept of personhood for members of nondominant groups only.

Finally, I think we must balance our interest in protecting our free speech rights against our interest in regulating words that undermine basic human dignity. That means, for example, that we might decide that hate speech is not a cause of action that we would want to grant to a public official or a public figure because we do not want to regulate politi-

cal speech. That also means, for example, that we ought to define our interest in personhood sufficiently narrowly and precisely to leave breathing space for the exercise of our First Amendment freedom of speech.

What guidelines should we adopt in balancing our free speech rights against our interest in protecting each individual's personhood? I think that we should begin by acknowledging existing First Amendment precedents and applying them case by case to causes of action for hate speech in the same way that we apply them to causes of action for defamation and privacy. Beyond that, we should develop a balancing test that is uniquely tailored to actions for hate speech. We should understand that the regulation of hate speech in order to protect personhood is completely consistent with the goals of the First Amendment, because one objective of the First Amendment is to preserve the democratic process. In a pluralistic society, the democratic process will function more effectively if members of diverse groups feel safe enough to speak out, in their own voices, about their own issues.

Finally, I want to conclude by mentioning briefly that the role of gay men and lesbians in the debate over hate speech is a special one. As every one on this panel has said, hate speech does silence its victims. Lesbians and gay men, as a group, know what it means to be silenced. We are regarded, at the present moment in time, as the country's most silent minority. Regulating hate speech is surely one means of helping us to break the silence. Yet, at the same time, securing our First Amendment freedom of speech is critical to ending the silence. Because of our precipitous position in the continuing fight for equality and our overwhelming need for the right to speak freely, I think we have a responsibility to serve as a catalyst for other members of our pluralist society to band together in rethinking the question of whether and how we should regulate hate speech.

