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Free Speech and Hate Speech: Language and Rights

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Introduction

I think that insufficient attention has been given to what should be meant by ‘speech’ in the context ‘free speech’. Elsewhere I have argued that when discussion of free speech is grounded in a correct conception of speech, an egalitarian position on free speech becomes available.¹ My project has been to give a distinctive content and a distinctive argumentative foundation to an egalitarian position. In the present paper, I hope to advance this project by considering so-called *hate speech*, or assaultive speech (as it is sometimes called).

For these purposes, we may take the following to provide a sufficient condition of speech’s falling into the category of hate speech:

- (i) it is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, colour, handicap, sexual orientation, etc.; and
- (ii) it is addressed directly to the individuals whom it insults; and
- (iii) it makes use of words which are commonly understood to convey direct and visceral hatred or contempt.

The definition here is got from a code of practice, devised for use in a University in the United States of America.² Of course the issues that arise on American campuses may not arise in Italian ones; and in countries that lack a Constitution like the American one, we may not have the same practical engagement with free speech questions as our American colleagues. But questions about free speech and hate speech can arise outside any legislative context. And a principle of free speech can be endorsed even where it has no state constitutional backing. We might then think of a principle of free speech broadly—as a principle of political morality. This means that we can still have an interest in how hate speech relates to free speech even if we are not concerned with questions of regulation. At any rate my concern is with the theoretical dimension of debates about hate speech—with the claims that underlie the arguments of libertarians.

I think that when it comes to freedom of speech, the possibility of an anti-libertarian, egalitarian position has been lost sight of, because of a misunderstanding on the part of libertarians about what speech is.³ In the context

¹ Principally in Hornsby 1996.

² The clauses occur in a definition of speech which constitutes ‘harassment by vilification’ that was devised by Thomas Grey for use in a Code of Practice at Stanford University: see Grey 1991. I have adapted Grey’s definition slightly.

³ The egalitarian/libertarian distinction here is intended to echo the distinction often made in the same terms in respect of debates about the workings of the free market. (I cannot spell out the various connections here. I think that much of what Cohen says about libertarianism in Cohen 1995 might be adapted to discussion of free speech; though the parallels are not always obvious.)

'free speech', 'speech' must mean whatever it is that a good justification of the protection of speech justifies one in protecting: one's view of what makes free speech defensible determines which conception of speech is relevant to the debates. I claim that even traditional defences of freedom of speech require a different conception of speech from the one which traditionalists nowadays suppose. To put my claim in the terms of J.L. Austin (which I shall explain shortly): I think that justifications of free speech relate to the value of illocutionary acts, not only of locutionary acts.⁴

I shall introduce some background philosophy of language (§1), before I take on libertarians in the matter of hate speech (§2). Since discussion of questions about free speech has to be fitted not only into a correct philosophy of language but also into debate in political philosophy, I shall connect my remarks with questions about the right to free speech (§3).

1. Language

- Speech acts: Austin's classification

Philosophers appreciate how astonishing it is what a language can do: with a few syllables it can express an incalculable number of thoughts. Such is the capacity of any human language that someone who speaks it can express incalculably many thoughts. We have here one understanding of the 'power of speech'. But if we thought of speakers in terms only of their ability to express thoughts, then we should take a very narrow view of language's workings.

Thinking of speakers in terms only of their ability to express thoughts, one thinks that speech is a matter only of what Austin called locution. This is to forget how astonishing it is what speakers can do in and by expressing thoughts. What speech act accounts of language following Austin have been meant to acknowledge is that, as well as languages, which can be more or less abstractly conceived, there is language use, a quotidian, concrete species of human interaction. When Austin introduced illocution, he wanted us to think of speaking not merely as the production of meaningful sounds, but as doing various things with words (things which can be done whatever particular language is used).

A speech act account of the use of some language imposes system on the data of its actual use. It does so by making connections between the very many things that may be done on any of the very many possible occasions when a bit of language may be used. Austin's own top-level classification of speech acts was a three-fold one: into locutionary, illocutionary and perlocutionary. A theory of locution deals with a particular language, telling us in the case of any string of sounds what thought would be expressed if it were produced. 'Illocutionary' and 'perlocutionary' are harder to define. Austin himself spoke of illocutionary acts as done IN doing locutionary acts, and of perlocutionary acts as done BY doing locutionary acts; but on its own, this does not shed much light. Whatever Austin's exact intentions may have been, one underlying idea is clear. Perlocutionary speech acts introduce the idea of extra-linguistic and incidental consequences of speaking—of further things that are done by speaking. By contrast, something is an illocutionary act only if it is located firmly within the domain of language as such. If we know that someone has stated that p to X, or that she has undertaken to do something, then we know something about what happened in speaking—about what constituted an action the speaking that it was. We have examples of

⁴ For further defence of this thought see Langton and Hornsby 1998.

illocution. To home in on the illocutionary is to gain an understanding of what it is, besides a language, which is special to the action that is language use.⁵

- Illocution, communication and reciprocity

To see what is special about illocutionary acts, which makes them peculiarly linguistic acts, take the example of warning. (Warning was one of Austin's favourite examples of an illocutionary act.) Consider the person who, suitably placed, warns someone that a bull is present by producing noises that mean just that. What she relies on to do this is only a certain receptiveness on her audience's part: her audience's taking her to have warned him is the sole effect that her noise making has to have for her to have successfully performed the illocutionary act of warning. When a speaker secures 'uptake' (to use Austin's word), her utterance works as she means it to; her audience's being warned (which is the illocutionary effect) depends on nothing more than speaker and audience being the parties of a normal, linguistic exchange, in which an attempt to communicate is successful. That is why, in an intuitive sense, nothing 'beyond speech' has gone on here. Nor does anything 'beyond speech' go on when someone says something to someone else. A says something to B if the effect of A's attempt to say it is that B takes her to have said it.

This is my reconstruction of Austin's account of illocution.⁶ The crucial thing about illocution, in this account, is that it reveals language as communicative. We miss the point of illocution if we try to characterize illocutionary acts by reference only to the thoughts that speakers express, or by reference only to the intentions of speakers. The idea of speech as a mode of communication is absent until we allude to how an audience's recognition can constitute a speaker's act as of being of some illocutionary kind. There is a successful illocutionary act only in the case (which is the usual case) in which the speaker is taken to be doing whatever illocutionary thing she means to be doing with her words.

One can give a name to the condition which provides for speech actions' being of the illocutionary acts they are of: it is reciprocity. A background of reciprocity is what provides for someone's making of some noises' constituting her performance of an illocutionary act. Only where there is reciprocity are the conditions in place for someone to say something to someone, or to warn someone of something, or whatever. Reciprocity is a feature of the human situation which allows for meetings of minds. The fact that there is reciprocity is just as astonishing, but just as commonplace, as the fact that speakers can be heard, by those who share the language, as doing the things they do when they express thoughts. Of course a hearer does not need to accept the thought that he shares with a speaker when she has said something to him. What reciprocity ensures is only that hearers are such as to recognize speaker's speech as it is meant to be taken. It ensures that in ordinary cases of linguistic communication, there is something a speaker has done which both is overt (not concealed by the speaker) and is transparent (not hidden from hearers).⁷

⁵ Austin 1962. For further defence of the claim that the division between illocutionary and perlocutionary acts is a division between speech acts which are and which aren't of proprietary concern to an account of language, see Hornsby 1998.

⁶ I have defended this account, not as Austin's exactly but as faithful to his intentions, in Hornsby 1994.

⁷ One may distinguish between the audience response that is required for illocution (which works through reciprocity) and the audience response, which is required for a

When reciprocity is seen as the key to illocution, a communicative notion can assume its proper place in an account of language use. Communication is a relation between people, which requires more than common ways of interpreting patterns of sounds: it requires understanding attuned, not only to sounds' conventional significance, but also to speakers' attempted performances. As well as shared knowledge of a language, speakers exploit the existence of reciprocity, which makes it possible for them to do something simply by attempting to do it—and thus being taken to do it.

2. Hate Speech

- The target

I have quite limited goals in discussing hate speech here. My principal claim against the libertarians who are my opponents is that they misconceive the costs of permitting hate speech. The libertarians say that those who would attempt to rule out hate speech put political correctness ahead of a fundamental liberty. They think that the costs of rendering speech unfree always outweigh the value attaching to a regime of free speech. My claim against them is not that we should regulate speech where they say that we should not. My claim relates only to the arguments they give against regulation.⁸ I suggest that these arguments rely on a faulty conception of speech.

If there is hate speech, then those to whom it is directed presumably find it hurtful sometimes. Libertarians may acknowledge this. But libertarians find two sorts of reason for saying that actual serious harm cannot accrue from the presence of hate speech in a community—that no harm will be present where freedom of speech prevails which would be absent if hate speech were not permitted. Firstly, the libertarians take a view about how language works, which is supposed to ensure that any bad effects that speech has on a hearer are not the responsibility of the speaker. And secondly, they say that insofar as speech may cause harm, wherever free speech prevails the harm can be redressed: it can be redressed by further speech—by answering back. Let me now respond to these two libertarian points.

- (i): Mental intermediation and reciprocity

The claim that bad effects of speech are not the responsibility of speakers would certainly help the libertarians' cause, if it were true. For if speakers cannot be held responsible, then it would seem to be inappropriate to attempt to reduce such bad effects as they might cause by placing restrictions on what they could say. If speakers are not to blame for the hurt or harm caused by their speech, the regulation of speech—which is the regulation of speakers—will not seem to be the way to prevent such harm.

speaker 'to be taken seriously'. Once this distinction is in place it becomes plain how little is required of an audience to participate in reciprocity. But there is much more to be said.

⁸ When it is suggested that Universities should have Codes of Practice relating to hate speech, there is no suggestion that any speech should be contrary to the criminal law: the codes are to be enforced on the model of civil law, and they apply only locally. In the U.S.A., the state enters the arena as soon as someone approaches the Courts with the objection that imposing the code is contrary to her rights. In that country, then, there can always be an issue about what kinds of code might be constitutionally admissible. *This* issue obviously is not a local one. A principle of free speech enters the argument.

The libertarian's claim about speakers' responsibility is held in place by a doctrine known in U.S. Constitutional debate as mental intermediation. The doctrine has been invoked in American Court judgements directing that codes of practice on hate speech are unconstitutional.⁹ According to the doctrine, the effects of a speaker's words on a hearer are mediated by the hearer's psychology. If your speech offends me, then the explanation is that your words work in my mind to lead me to feel offended. Between your speaking and my pain is my thought. So, by the lights of this doctrine, my construction of your words is as much a determinant of whether or not I suffer in consequence of your speech as your uttering those words. Offensiveness caused by speech is considered to be under the control of the hearer as much as the speaker. It is said to be 'belief-mediated'.

The doctrine of mental intermediation may remind us of certain philosophical views about language. There is an account of what it is for a speaker to mean something (which originates from the philosopher Grice) which portrays speakers as possessed of very complex hearer-directed intentions. In one version of this account, a speaker who asserts that *p* is said to have a three-part intention, comprising a primary intention to produce a belief in an audience by using an utterance whose content is that *p*, a secondary intention that the utterance should have a feature by means (in part) of which the hearer recognizes the primary intention, and a further intention that recognition of the primary intention should be part of an audience's reason for believing that *p*. When such complex intentions are required of a speaker, complex beliefs must be required of hearers or else speakers' intentions will never be fulfilled. It can then seem that in order for a hearer to be offended by someone's speech, she has to believe at least that the speaker intended that she (the hearer) should believe something which was offensive towards her. If that was correct, then it might appear that someone at the receiving end of hate speech need not be offended—that she would not be offended save for what she believed.

The doctrine of mental intermediation is right about one thing: communicative speech acts cannot be accounted for simply by thinking about how things are with the speaker; a correct conception of such acts brings hearers in. But the particular notion of mental intermediation that the doctrine invokes is utterly unrealistic about the hearer's actual role. In a simple case (where questions about offensiveness do not arise) a hearer surely does not have the task of figuring out what the speaker intended her to believe. Rather a hearer can simply come to know, in virtue of hearing words in a familiar language, that the speaker said what she did. Defining illocutionary speech acts by reference to reciprocity helps one avoid thinking of hearers as confronted with a hermeneutically challenging task. When we have the idea of reciprocity, we can think, realistically, that a hearer's understanding a speaker requires no more than that she take the speaker to be doing what she is doing in uttering words. The hearer is party to the speech act which is not successfully performed unless she takes it to be. But the speaker is nonetheless in control of which speech acts there are.

Hearers share the thoughts of those who speak to them. And insofar as they share a language with those who speak to them, it is well nigh impossible to avoid sharing thoughts they hear expressed. When a speaker uses words which are commonly understood to convey direct and visceral hatred or contempt, there is no act of will on a hearer's part—no piece of mental intermediation—that will change that. The hurtful effect is an illocutionary one—it works through reciprocity—and it is present simply in the communicative use of speech.

⁹ See Brison 1998 for further criticism, and for U.S. legal references.

Insofar as the doctrine of mental intermediation is meant to allow us to shift the blame for the hurt of hate speech from speaker to hearer, it can strike one as bizarre. I have suggested that the doctrine, by presenting a model of language to which reciprocity is not presupposed, uses a picture of language's workings which is simply false.

- (ii) Characteristics of derogatory terms

The second of the two libertarian claims invokes what we might call the *quid pro quo* character of speech: speech can be answered back. If A speaks hatefully to B, then, provided that A and B exist in a regime of free speech, B need not be the loser; for B can do to A what A did to B. It would be wrong to regulate hate speech, then, according to the libertarian because where free speech reigns, there is redress for the hurtfulness of hate speech—in speech itself.

I respond that in the particular case of words commonly used to convey hatred, the *quid pro quo* character of speech is precisely lacking. Notice that pieces of vocabulary in the category we are interested in do not have obverses in a certain sense. There are terms for black people which are commonly understood to convey contempt, but no terms for white people which are. Of course it is possible that groups of blacks might have a contemptuous term for whites; and it is possible that black people should appropriate contemptuous terms, and thereby alter the understanding of them. The claim I make about the asymmetry of the situation concerns only common understandings of terms at a particular time. (And the definition of hate speech refers to such understandings.)

The asymmetry one finds here seems to be no accident. For just as there are terms commonly understood as contemptuous towards blacks but not whites, so it is for women vs. men, gay people vs. straight people, nationals vs. non-nationals. In all of these cases, there is vocabulary which enables a member of the second group to vilify a member of the first, and not conversely. And in all of these cases, those subject to vilification are those who are already at the losing end of political arrangements and discriminatory practices.

The claim that the harm of hate speech can be redressed by more speech now seems plainly wrong. If there is a word that I can use to insult you, but no word that you can use to insult me, then, in one straightforward sense, there is no such thing as answering back. But here the libertarian may make a reply. He may say that in appealing to asymmetries of vocabulary, one mislocates the true *quid pro quo* character of speech. His claim, he wants to say, is only that speech can always be contradicted. And he will insist that this is true even when hateful terms are in use.

When we consider how contradiction works, however, it is evident that this reply is to no avail. Consider the following two contradictory utterances:

'The best niggers are dead niggers'

'It's not the case that the best niggers are dead niggers'

Although the latter, negated sentence is manifestly preferable, equally manifestly a use of it does not counteract that in virtue of which an utterance of the former might constitute hate speech. Certainly one can contradict what is said in a use of hate speech. But to contradict what is said is not to redress the hurt: where there is a term by which A can vilify B but no comparable term for B to use to vilify A, there is no counter to the insult that constitutes A's speech as hate speech.¹⁰

¹⁰ There is nothing to be done with words that vilify by people who lack hateful intentions: derogatory terms have no use for right-minded people. And if we have no use for a term, we don't want to use it even to contradict another. I discuss this further in Hornsby 2001.

I conclude that when libertarians argue against the regulation of hate speech, they introduce incorrect views about the use of language. This leads them to misattribute the source of the hurt that hate speech may do, blaming it on hearers rather than speakers (that was the first point). And it leads them wrongly to assume that everyone equally is a potential victim of hate speech (that was the second point).

3. Rights

Libertarians forget that language as we have it may be suited to express hatred towards some and not towards others: they ignore the fact that a language spoken by a community can reflect existing social inequalities. It is because facts like this have been appreciated that some egalitarian considerations have come to the fore in some academic discussions of language in recent years. In this final section I want to suggest that an egalitarian position on free speech is defensible.

By “an egalitarian position about free speech”, I do not mean one which puts considerations of equality ahead of considerations about freedom. I mean one which upholds a principle of free speech, but which resists libertarian thinking about such a principle. Liberals of all stripes prize free speech highly. The question is whether a good defence of a principle of free speech is on the side of the libertarians or the egalitarians in these debates.

- Justifications of a right to freedom of speech

Why, then, do we care about free speech? Let me briefly rehearse four sorts of arguments to be found in the liberal tradition that might be offered in support of the idea that a regime of free speech should prevail in a social community.

1. There are arguments in which political posits are to be seen as flowing from a characteristic of human beings: Rousseau said ‘Man in his nature is intelligent, the sole animal endowed with reason’.¹¹ And he might have added ‘the sole animal with powers of linguistic communication’.
2. There are various arguments from the nature of liberal democratic societies. These include an argument which says that free speech is an essential ingredient of a society in which the people are sovereign, and an argument which says that tolerance cannot be promoted except where speech is free.¹²
3. There is John Stuart Mill’s argument from truth, which says that where everyone is allowed to say what he thinks, opinions both true and false will be heard, and truth will win out in receptive minds.¹³
4. There is the argument that speech provides a non-violent means of resolving conflict. Here the *quid pro quo* character of speech may be adverted to: language provides for a kind of genuine exchange between two parties which need not be at the expense of either.

If one accepts any of these arguments as providing justification for a principle of free speech, then one thinks that the protection of everyone’s speech is conducive to some good. The good may be (1) human flourishing, or (2) democratic arrangements, or (3) truth, or (4) peaceful circumstances. There can be doubts about whether free speech is really instrumental in promoting any of (1) to (4). But

¹¹ Rousseau 1755.

¹² Meiklejohn 1948; Bollinger 1986.

¹³ In one formulation of his famous argument from truth, Mill said (p.69): ‘[T]ruth has no chance but in proportion as every side of it .. not only finds advocates, but is so advocated as to be listened to’. So Mill was certainly aware of the communicative aspects of speech.

if we call ourselves liberals about free speech, then we are likely to endorse at least one. Our caring about free speech is then a matter of our caring about benefits that accrue from people's capacities to do things with words. The capacities in question include the capacity to do communicative (illocutionary) things: all of these arguments presuppose that—to put it in my own terms—speech works through reciprocity.

Notice now that none of these defences of free speech would be affected if an exception were made of hate speech. Hate speech, we might say, does not possess the characteristics that make free speech valuable. The arguments from democracy and from truth require us to think of speech both as communicative and as having cognitive, propositional contents which make it contradictable. And the argument that speech has a special place in the resolution of conflict requires speech to be thought of as something that can go back and forth. It seems then that the *quid pro quo* character of speech which seems actually to matter to defences of free speech is the one that we saw to be of no avail in the libertarians' defence of his argument against regulating hate speech.

I ought here to say that the fact that in my own view the libertarian loses the argument here could not suffice to show that we should regulate hate speech. All kinds of consideration, which would not be considerations at the high level of the generality of the present discussion, would enter arguments about actual regulation. There are always particular local questions about how hate speech contributes to the political climate, questions about whether regulation could be effective in its goals, and questions about what its side effects might be. My point is only that if the protection of free speech is based in these traditional defences of free speech, then the libertarians' theoretical arguments fail if we are allowed to assess them by reference to a plausible philosophy of language.

- Free speech according to the libertarians

The libertarians will say that there is something crucial missing from the four defences of free speech I have rehearsed. For none of those defences upholds the freedom of individuals as such; and libertarians want to rest the right to free speech in the value of individual moral autonomy. Unless speech is protected, individuals are deprived of the exclusive rights that they have of control and use of their powers, the libertarians say. Libertarians claim that free speech must be defended as a negative liberty—as something that a person has unless she is interfered with.¹⁴

The idea of speech as a negative liberty has been defended in conjunction with the view that speech is locution, rather than illocution.¹⁵ Suppose that to be free to speak meant to be free to move one's mouth and make intelligible noises. Then interference in a quite ordinary sense would be the only thing that curbed it. Thus, on the negative liberty conception of a right to free speech, a person's power of speech has been thought of as limited only by literal obstacles like being gagged, or

¹⁴ The idea of negative liberty is from Isaiah Berlin. For a defence of free speech based upon the idea, see Dworkin, 1991. Dworkin tells us that interfering with someone's speech is an affront to his dignity and respect. (On questions aside from free speech, Dworkin should surely be classified as an egalitarian rather than a libertarian liberal. He is thus a useful example if one wants to suggest—as I should—that discussion of free speech may have become distorted in the hands of American liberals.)

¹⁵ Dworkin, though using a different terminology, rejects an illocutionary conception of speech in Dworkin 1991 and elsewhere. Jacobson 1995 explicitly defends a locutionary conception.

drowned out, or arrested by the police. The capacity to speak is then taken to be something that a speaker in isolation is conceived as having—the ability to voice her thoughts aloud. The idea of speech as communication—and the ability to get her thoughts across to others—is set to one side, on the negative liberty conception.

It is not clear that the kind of freedom that proponents of negative liberties set store by is of special concern when free speech is in question. No doubt any intervention in people's lives which is contrary to their rights is a form of interference. But no-one advocates interference in people's locutionary acts as such. When a principle of free speech relies upon a locutionary conception of speech, the right to free speech can come to seem too much like the right to wiggle one's toes. To uphold someone's right to free speech, in the guise of a negative liberty, would only require ensuring that her production of words was not obstructed. But then the perspective from which free speech is primarily valuable would seem to have vanished. A specifically libertarian defence of free speech specifically can appear to miss the mark.¹⁶

- Free speech and rights

Marx once castigated rights belonging in a certain category when he spoke of 'so-called rights ... not going beyond egoistic man ... an individual withdrawn behind his private interests and whim and separated from the community'.¹⁷ I suggest that those who have thought that we recognize the value of free speech by treating speech as a negative liberty have conceived of free speech in such a way that it would belong in the category of Marxian "so-called rights". They have thought of the value of free speech negatively and individualistically, supposing that unfree speech would be a harm to a would-be speaker. In recognizing that speech is illocution, one introduces a perspective from which a different locus of evaluations is in view. Thinking of speech acts as communicative acts, one takes account of benefits of free speech as well as costs of unfree speech, and one takes account of benefits which only come into view when our sights are not set on the individual speaker. We saw that the traditional defences of free speech allude to the potential benefits to everyone of situations in which speech is generally free. And if we take it seriously that speech works through reciprocity, we must surely set our sights more widely than individual speakers when we defend freedom of speech.

Libertarians are apt to characterize their opponents as placing considerations of equality ahead of considerations about freedom. But the egalitarians' perspective is not one from which anyone's freedom is reckoned unimportant. Until we are told what special value attaches to the freedom that the libertarians specialize in promoting, it is unclear what the force of the criticism that egalitarians promote equality at the expense of freedom is supposed to be. Notice that even if the egalitarian castigates "so-called rights" (the rights of individuals separated from the community), this need not lead to his denying that there is a right to free speech. There is a perfectly natural understanding of rights, on which the point of rights can be that freedom and equality are both promoted by protecting that which people have a right to do. Rights, on this understanding, evidently cannot be equated with negative liberties.

I think that the key to understanding egalitarianism about free speech is to appreciate that the right to free speech can be defended by reference to speech's

¹⁶ My point might be put in the terms of Cohen 1995 by saying that justifications of free speech must have recourse to other values than self-ownership.

¹⁷ Marx, p.91.

peculiar communicative properties. Some analytic philosophers have distorted our view of these properties; my hope is that the distortion may be removed by acknowledging that language works through (as I put it) reciprocity. This helps one to see that language is, among other things, a social resource.

I hope to have made an egalitarian position about free speech more visible than it has been in recent years when the discussion has been dominated by interpretations of the U.S. constitution. By looking at the question of hate speech, I may have done something to reinforce a conclusion I have tried to establish when thinking about other free speech questions—namely that upholding only what libertarians cherish under the head of free speech works to the advantage of those whose speech least needs protecting.

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