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Harm Principle, Offence Principle, and Hate Speech[1]

Introduction

The aim of this chapter is to confront the ethical question of the constraints of speech. Focus is put on the harm or the offence caused by the speech in question: can we say that sometimes the harm or the offence brought about by a certain speech constitutes such an injury that it cannot be tolerated? More specifically, under what conditions can preventing offence provide adequate reason for limiting freedom of expression?

The plan for confronting these issues is the following. The discussion is divided into two major parts: theoretical and practical. In the first part, I shall try to formulate the restrictions on freedom of expression in the clearest and most precise fashion possible. Too vague and overly broad a definition might lead to administrative abuse on the part of the government in its attempt to silence 'inconvenient' views. An imprecise definition might have a snowballing effect, paving the way for a syndrome whereby freedom of speech might become the exception rather than the rule. Moreover, the restrictions cannot be occasional. We have to seek a criterion that could serve both as an evaluative guideline and be suitable for a range of cases, covering different types of speech (racist, ethnic, religious, and so on). In this quest I shall avail myself of the Millian theory on liberty, which continues to inspire the free speech literature, discussing in brief the well-known Harm Principle, and then proceed by formulating the Offence Principle.

In the practical part of the essay I shall attend to a hate speech case, which arouses much controversy, the Skokie affair, evaluating the court decision in the light of the two principles. My suggestion will be that

there are grounds for abridging expression not only when the speech is intended to bring about physical harm, but also when it is designed to inflict psychological offence, which is morally on a par with physical harm, provided that the circumstances are such that the target group cannot avoid being exposed to it. The term 'morally on a par with physical harm' is intended to mean that just as we view the infliction of physical pain as a wrongful deed, seeing it as the right and the duty of the state to prohibit such an infliction, so should we set boundaries to expressions designed to cause psychological offence to some target group. It will be argued that in either case, when physical harm or psychological offence is inflicted upon others, four considerations are pertinent:

– the content of the speech.[2]
– the manner in which the speech is expressed.
– the intentions and the motives of the speaker.
– the circumstances in which the speech takes place.

I further assert that when no consideration is paid to these aspects, then freedom of speech might be abused in a way that contradicts, to use Dworkin's phraseology, fundamental background rights to human dignity and equality of concern and respect, which underlie a free democratic society.[3] The view enunciated in this study is similar, in various respects, to that of German law. Article 5 of the Basic Law limits the right to freedom of expression by the right to inviolability of personal honour[4] and the German Penal Code (section 130) makes it an offence to attack the dignity of other people (*inter alia*, by inciting racial hatred) and thus prevents the possibility of exploiting democratic principles.[5]

Before contemplating the Millian theory, one preliminary methodological note has to be made concerning the Offence Principle. The common liberal interpretation of Mill is that any speech that falls under the category of 'advocacy' is immune to restrictions. Only forms of instigation which bring about instant harm are punishable, and these cases constitute the exception to the Free Speech Principle. My view is different. I shall argue that Mill introduced an exception to advocacy, holding that there is a category of cases of advocacy that has to be restricted. These are concerned with offensive conduct that is performed in public. Thus I will show that there are certain offensive expressions which may be considered advocacy but which nevertheless should be prohibited. However, it seems that my view and the common liberal view differ only in terminology, not in essence. That is,

there are certain utterances which do not induce anyone to take a harmful action but which should still be excluded from the protection of the Free Speech Principle because of their imminent offensive effects on those who are exposed to them. Some liberals would probably not agree with my vocabulary, and would not consider what I call advocacy to be such. They would rather put the case under the rubric of instigative speech. But I think that they would agree with my conclusions.

The Millian theory and freedom of expression

Mill proffered two main qualifications for the immunity which freedom of expression should, as a general rule, enjoy, and in an earlier article concerning freedom of the press he formulated two other qualifications.[6] He did not introduce them systematically, but in an *ad hoc* way, allowing for interference in what he conceived to be special cases. The first qualification proposed in *On Liberty* is concerned with the case of instigative speech. The second qualification considers the case of indecent conduct that is performed in public. Let us first examine the case of instigation.

As a consequentialist, Mill acknowledged that speech loses its immunity when it constitutes instigation to some harmful action. In his corn-dealer example, Mill asserted that opinions lose their absolute immunity when the circumstances in which they are expressed are such as to constitute by their expression a positive instigation to some mischievous act. Thus, the opinion that corn dealers are starvers of the poor may be prevented from being delivered orally to 'an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard'.[7] But, that same opinion ought to go unmolested when simply circulated through the press. Accordingly we may deduce that Mill considered as instigation a speech that aims to lead to some mischievous action in circumstances which are conducive to the taking of that action. It seems that in instances such as that of the corn dealer, Mill would regard certain speeches as instigation irrespective of whether overt harmful action follows. Though he did not explicitly say this, Mill implied that the intention to lead people to take a harmful action constitutes an instigation.[8] However, advocacy that does not induce someone to take an action, but which is voiced as a matter of ethical conviction, is protected under Mill's theory. This is one of his major contributions to the free speech literature. Mill was the first to distinguish between speech (or discussion) as a matter of ethical conviction and instigation.

The essential distinction between 'instigation' and 'advocacy' or 'teaching' is that those to whom the instigation is addressed must be urged to do something now or in the immediate future, rather than merely to believe in something. In other words, instigation is speech closely linked to action. Mill in the corn dealer explicitly opined that when an audience has no time for careful and rational reflection before it pursues the course of action urged on it, this speech falls outside the protection of the Free Speech Principle since the people are too excited to be responsible for their acts.[9] Mill did not restrict the advocating of certain opinions *per se*. Rather, it is the combination of the content of the opinion, its manner, the intentions of the speaker, and the circumstances that necessitates the restriction. In the corn-dealer example the harmful results of a breach of the peace, disorder, and harm to others are imminent and likely, and therefore they outweigh the importance of free expression.

In parenthesis, two clarifications have to be made. One relates to the factor of 'intention', the other to 'manner'. As to 'intention', one may question the relevance of intention to Mill's argument about instigation. One may argue that the relevant consideration is whether circumstances are such that a speech will cause a riot; that would seem sufficient reason for intervention even when the speaker does not intended to cause a riot. I am not convinced. The very usage of the word 'instigation' implies that the intention exists to provoke a riot. I agree that there might be unintended riots. But it seems to me odd to use the term 'instigation' in that context.

As for 'manner'; this factor characterises the way expressions are made, be it an oral or a symbolic speech. We can think of situations in which the manner is not so important, yet the three other factors are sufficient to constitute instigation. Consider, for example, a leader of a fundamentalist religious sect who urges his followers to some mischievous act in a very cool and quiet tone. In this case it seems that Mill would have had no qualms about classifying such a speech under the heading of 'instigation'. I shall discuss this issue further *infra*.

The implications of the instigation reasoning are that it will be incorrect to say that all opinions bring the same results. It seems, then, that Justice Holmes's assertion '[E]very idea is an incitement' is too hasty.[10] Rather, we may concede that words, which express an opinion in one context, can become incendiary when addressed to an inflammable audience. The peculiarity of cases of instigation is that the likelihood of an immediate danger is high, and there is little or no opportunity to

conduct a discussion in the open, and to bring contrasting considerations into play that may reduce the effects of the speech. Justice Holmes himself agreed that in certain circumstances, when speech is closely related to action and might induce harmful consequences, it should be curtailed. In a similar way to the Millian corn dealer example, Justice Holmes asserted in a renowned opinion that we cannot allow falsely shouting 'Fire!' in a crowded theatre.[11] Here too a restriction on speech is justified on the grounds that the content of the speech (that is, its effects, not its intrinsic value), the manner of the speech, and the intentions of the agent are aimed to bring about harm, and the audience is under conditions which diminish its ability to deliberate in a rational manner, and therefore such a shout might lead it to act in a harmful manner (harmful to themselves as well as to others).[12] Hence, to the extent that speech entails an immediate effect, the arguments that assign special status to freedom of speech are less compelling. Boundaries have to be introduced in accordance with the context of the speech, otherwise the results could be too risky. As Chafee asserted: 'Smoking is all right, but not in a powder magazine.'[13]

Thus, incorporating the four conditions of content, manner, intention, and circumstances to the Millian and the Holmesian examples, the following argument may be deduced:

Argument number one: any speech, which instigates (in the sense of meeting the four criteria of content, manner, intention, and circumstances) to cause physical harm to certain individuals or groups, ought to be curtailed. Note that this argument is a much more decisive version of the Millian Harm Principle.[14]

Let us now move on to examine Mill's second exception which qualifies, in my opinion, the immunity Mill generally granted to advocacy. This exception considers the case of indecent conduct done in public. Although Mill spoke of 'conduct' and did not explicitly mention speech, it is plausible to argue that he included utterances, as well as acts, when he set out this qualification.[15] Mill implied that there are certain cases which fall within the scope of social regulation, and people not only have the right but the duty to put a stop to those activities by individuals. In a brief paragraph he discussed a category of actions which being directly injurious only to the agents themselves, ought not to be legally interdicted, but which, 'if done publicly, are a violation of good manners, and coming thus within the category of offences against others, may rightly be prohibited'.[16] This argument is in accordance

with Mill's position on the importance of autonomy. There are intimate matters, which do not concern anyone but the individual so long as they are done in private. But when they are done publicly, they might cause offence to others, and the state may legitimately control them.[17] Of this kind, Mill said, are offences against decency.

Hence, in certain situations, one is culpable not because of the act that one has done, though this act might be morally wrong, but because of its circumstances and its consequences. Mill assumed that one can evaluate the rightness and wrongness of an action by considering its consequences, believing that the morality of an action depends on the consequences which it is likely to produce.[18] Since one is to judge before acting, one must weigh the probable results of one's doing, given the specific conditions of the situation.

From these arguments we may infer that it is usually not the act itself that is crucial for taking a stand on this subject, but the forum in which it is done. In other words, a certain conduct in itself does not necessarily provide sufficient grounds for interference. But if that same conduct is performed in public it might be counted as morally wrong, and consequently constitutes an offence, so it is legitimate to curtail it. Enforcement of sanctions may be justified when a conduct causes offence to others.[19]

To sum up: the two exceptions brought forward by Mill touch upon the time factor, which distinguishes speech from action. Thus, action – if it endangers the public, or part of it – might have immediate consequences; whereas speech, if it has any endangering effect, will have it in most cases sometime in the future, whether near or more remote, and thus will allow us a much wider range of manoeuvres.[20] Even if a specific view might cause harm, or risk of harm to others, but the danger is not immediate, then free speech has to be allowed. However, in some circumstances the time factor might lose its distinctiveness, with the result that the effects of the expression in question are immediate. Indeed, both in the case of instigation as well as in cases of moral offence (say when one vulgarly praises in public the sexual qualities of one's next door neighbour or one's performances in bed, knowing the anguish that the neighbour might suffer as a result), the effects of the expression are instantaneous, and thus might bring about hurtful consequences now, rather than at some remote point in the future. That is, when we discuss the issue of obscene speech or defamation,[21] the line between conduct and speech, according to the criterion of time, becomes blurred and consequently these utterances are not protected under the principle of freedom of speech.

The preliminary argument (number one) included the term 'physical.' I formulated the argument, using this term, in order to avoid at that stage the question of whether the formula ought to include other sorts of harm. I have now argued that in the cases both of instigation and of indecent conduct done in public, the effects of the communication are immediate. Yet such conduct does not necessarily fall under the first argument, for offences against decency may not be physical. There seem to be other notions of injury that Mill articulated when he introduced this qualification. The expression in question may fall under the rubric of 'advocacy', in the sense that it does not induce anyone to take a harmful action. Nevertheless, the expression may still be excluded from the protection of the Free Speech Principle because of its offensive effects on those who are exposed to it. This is the only exception that is implied in Mill's theory with regard to advocacy. It is the combination of the content of the advocacy, its manner, the intentions of the speaker, and the fact that it is done publicly which gives grounds for restriction. Certain types of advocacy constitute a violation of good manners thus coming within the category of offences and, consequently, may rightly be prohibited. In order to understand what notions of injury may be included under this qualification, which may be put under the heading of the Offence Principle, it is necessary to explain the distinction between 'harm' and 'offence'. Here Joel Feinberg supplies some useful guidelines.

Feinberg: the offence principle

Feinberg explains that like the word 'harm', the word 'offence' has both a general and a specifically normative sense, the former including in its reference any or all of a miscellany of disliked mental states (disgust, shame, hurt, anxiety, and so on), while the latter refers to those states only when caused by the wrongful (right violating) conduct of others. He postulates that offence takes place when three criteria are present: one is offended when (a) one suffers a disliked state, and (b) one attributes that state to the wrongful conduct of another, and (c) one resents the other for his role in causing one to be in that state.[22] Feinberg maintains that the seriousness of the offensiveness will be determined by three standards: (1) 'the extent of offensive standard' – meaning the intensity and durability of the repugnance produced, and the extent to which repugnance could be anticipated to be the general reaction of strangers to the conduct displayed; (2) 'the reasonable avoidability standard' – which refers to the ease with which unwilling

witnesses can avoid the offensive displays; and (3) 'the Volenti standard' – which considers whether or not the witnesses have willingly assumed the risk of being offended either through curiosity or the anticipation of pleasure.[23] Standards (2) and (3) are of relevance when we examine the circumstances in which an offensive speech is expressed.

Feinberg categorically asserts that offence is a less serious thing than harm, and thus ignores the possibility that psychological offences might amount to physical harm, with the same serious implications. The next section specifically reflects on this subject through consideration of Feinberg's standards. Here, however, if we return to Mill's second qualification, we may say that morally wrong actions which concern others cause one to suffer a disliked state, which one attributes to the doer's conduct. Consequently one resents the doer for his acts. Nevertheless, offences against decency are problematic, since what is offensive to one may not be regarded as offensive at all by another. If we want to make the Offence Principle an intelligible principle, the offence has to be explicit, and it has to be more than emotional distress, inconvenience, embarrassment, or annoyance. We cannot outlaw everything that causes some sort of offence to others. If the Offence Principle is broadened to include annoyance, it becomes too weak to serve as a guideline in political theory, for almost every action can be said to cause some nuisance to others. Cultural norms and prejudices, for instance, might irritate some people. Liberal views may cause some discomfort to conservatives; and conservative opinions might distress liberals. Some, for instance, might be offended when hearing a woman shouting commands, or just by the sight of black and white people holding hands. This is not to say that these sorts of behaviour should be curbed because of some people who are 'over sensitive' to gender or interracial relations. Similarly, if someone is easily offended by pornographic material, one can easily avoid the pain by not buying magazines marked by the warning: 'The content may be offensive to some.' Under Feinberg's 'reasonable avoidability' and 'Volenti' standards the offence cannot be considered serious. Injuries, to be restricted under the Offence Principle, must involve serious offence to be infringed. By 'serious offence' it is meant that consideration has to be given to the 'reasonable avoidability', and the 'Volenti' as well as the 'extent of offensive' standards. The repugnance produced has to be severe so as to cause an irremediable offence, which might affect the ability of the listeners to function in their lives.

Let me consider in some more detail Feinberg's 'reasonable avoidability standard'. Under this standard and Mill's argument regarding public

immoral actions, the offence has to be committed in such circumstances that those offended by it cannot possibly escape for there to be grounds for restriction. For example, if a person takes a stool to Hyde Park Corner, advocating the abolition of Parliament, throwing out all Indians, expressing his desire to become the new Stalin of tomorrow, and claiming that yesterday he was Napoleon, the offence cannot be considered anything more than annoying, or anything more than an inconvenience to the listeners, for they can simply leave the place and free themselves of the speaker's presence, as well as of his speech. We cannot say that the audience's interest in 'having a good environment' is more important than the speaker's interest in conveying his thoughts.[24] Also, the argument that this communication does not carry substantive content cannot serve as sufficient reason for abridging it, for then we might supply grounds for curtailing many other speeches that just repeat familiar stands. In addition, 'the extent of offence standard', determined by the content and manner of the speech, and 'the Volenti standard', do not provide reasons for restriction.

The situation is different, however, when the avoidance of offensive conduct in itself constitutes severe pain. Then we may say that the matter is open to dispute. That is, if those who are offended by a certain speech feel an obligation to stay because they think that they will suffer more by leaving and avoiding it, then there are grounds for placing restrictions on speech, provided that the extent of the offence is considerable. In any event, it is the combination of the content and manner of the speech, the evil intention of the speaker, and unavoidable circumstances that warrants the introduction of sanctions.

In the next section I shall discuss the Nazis' decision to march in Skokie as an illustration of this argument. In this case the conflict over freedom of expression involves the freedom to march and demonstrate. I shall attempt to assess the preliminary court decisions to ban the march, as well as the Illinois Supreme Court ruling which allowed the demonstration of hatred, and explore whether the Offence Principle supplies us with grounds for supporting one over the other. Before embarking on this endeavour, however, one clarification is needed. In applying the Offence Principle to Skokie I do not claim that racist and hateful speech should be considered a distinct case, as some philosophers and commentators urge, thus excluding it from the protection usually accorded to expression.[25] It may be suggested that if we are to speak of matters of principle, racist speech is incompatible with liberal democracy, so it should be outlawed. I am in favour of regulation of racist speech rather than outright prohibition.[26] My reluctance

to accept the principled line of reasoning evolves from two basic considerations. First, I do not see why verbal attacks on race, colour, religion, and so on, should be regarded as a unique type of speech that does not deserve protection. I find it difficult to see why racist expressions should be thought different from verbal attacks on one's most fundamental ethical and moral convictions – as, for instance, in the abortion or the euthanasia cases. I do not see why dignity or equal respect and concern is so much at stake in the former than in the latter.

Second, there is lack of agreement on the meaning of the term 'racism'. Different countries and forums put different types of speech under the heading of 'racism'. By excluding racist expressions we might open the way to curtail expressions that we may want to defend. For instance, Zionism was condemned as a form of racism, so accordingly anyone who expresses his desire to live in Zion (Israel) might be considered a racist by some. This claim is less strong than the preceding, for we can define exactly what sorts of speech should be put under 'racism'. However, the argument is in place because in applying common terms from one place to another, definition might be lost on the way.

Consequently, my intention is to formulate general criteria to be applied consistently not only in cases of racial hatred, but also in other categories of offensive speech. Any speech, be it on religious, ethnic, cultural, national, social, or moral grounds, should be placed within the confines of the two principles that are suggested.[27] Speech that instigates causing immediate harm to the target group, and speech that is designed to offend the sensibilities of the target group – in circumstances that are bound to expose the target group to a serious offence (which is morally on a par with physical pain) – should be restricted.

Applying the offence principle: the Skokie controversy

Background

What came to be known as 'the Skokie case' began in April 1977, when Frank Collin, the leader of the National Socialist Party of America (NSPA) announced that a march would be held in Skokie, one of the suburbs of Chicago, inhabited mostly by Jews, some hundreds of them being survivors of Nazi concentration camps.[28] The Skokie residents obtained an injunction in court that banned the march. Referring to the *Brandenburg* case, they contended that the display of the Nazi uniform and the swastika were the symbolic equivalents of a public call to kill all Jews, and consequently that it constituted a 'direct incitement to immediate mass murder'.[29] After a long legal struggle, which lasted

until January 1978, the Illinois Supreme Court, in a seven to one decision, ruled in favour of Collin.[30] The main argument was the 'content neutrality rule' according to which political speech shall not be abridged because of its content, even if that content is verbally abusive. Speech can be restricted only when it interferes in a physical way with other legitimate activities; when it is thrust upon a 'captive' audience, or when it directly incites immediate harmful conduct. Otherwise, no matter what the content of the speech, the intention of the speaker, and the impact of the speech on noncaptive listeners, the speech is protected under the First Amendment to the Constitution.[31]

The Court dismissed the main arguments of the residents of Skokie, declaring that the display of the swastika was symbolic political speech, which was intended to convey the ideas of the NSPA, even if these ideas were offensive. Similarly it was argued that the plaintiffs' wearing uniforms need not meet standards of acceptability. The judges further concluded that anticipation of a hostile audience could not justify prior restraint or restrict speech, when that audience was not 'captive'. Freedom of speech cannot be abridged because the listeners are intolerant of its content.[32]

The 'avoidability standard'

Two basic things concerning this case are plain and generally agreed upon. First, Skokie was not a case of a captive audience, because there was advance notification of the Nazis' intentions. Second, the argument that the Nazi march or speech was designed to convince some members of the audience to embrace all, or part of the Nazi ideology, was not an issue. It was obvious that Collin's aim was not to convince his audience but to offend the Jewish population in Skokie. Nevertheless, the Illinois Supreme Court ruled that it was not a case of 'fighting words',[33] because the display of the swastika did not fall within the confines of that doctrine,[34] and because it was no longer the prevailing thought that it was up to the court to assess the value of utterances. The Court ruled that the wearing of Nazi uniforms and the display of the swastika constituted political speech that was protected under the Free Speech clause.[35]

In his examination of the Skokie decision, Feinberg lays emphasis on the contention that given the relative ease by which the Nazis' malicious and spiteful insults could be avoided, there was not an exceptionally weighty case for legal interference. Since the Nazis announced the demonstration well in advance, it could easily be avoided by all those

who wished to avoid it, in most cases with minimal inconvenience:[36] 'Despite the intense aversion felt by the offended parties, there was not an exceptionally weighty case for legal interference with the Nazis, given the relative ease by which their malicious and spiteful insults could be avoided.'

In other words, Feinberg reiterates the reasoning of the Illinois Supreme Court in favour of the NSPA, in accordance with his 'reasonable avoidability standard'. He maintains that 'the scales would tip the other way' if their behaviour were to become more frequent, for the constant need to avoid public places at certain times can soon become a major nuisance.[37] Since the issue concerned only one demonstration, the solution was easy enough: those likely to be offended simply had to be elsewhere when it was held. These assertions are in accordance with Feinberg's emphasis on the intensity and the durability of the repugnance produced.[38]

From this analysis we can deduce that the crux of the matter lies in the 'avoidability standard': the Jews can ignore the offence, as others ignore the giving of 'the finger'. For Feinberg, as for the court, the Jews did not have to attend the rally. However, not attending the march was no solution at all for these Jews, because it took them back to the days when they had to hide from the Nazis. The survivors of the Holocaust learned the lesson not to keep silent, not to wait until another 'wave of hatred' was over. The lesson of 1933 was enlightening enough. Hiding and running away had been their solution in Europe, when they could not do anything else. That solution, they thought, was over and done with when they came, after the war, to live in the United States. For them as Jews, when the Nazi phenomenon was at issue, there was no other way but to stand against it with all their power, especially when the Nazis decided to come to their own neighbourhood with the intention of hurting, and awakening fear. Therefore, the suggestion that the Nazis would march in their own front yard without their being present was inconceivable. It was not a matter of a 'nuisance' to avoid 'public places' as Feinberg suggests; it is neither a matter of a nuisance, nor of a public place.

If the Nazis were to march elsewhere in Chicago (say in the city centre), their right to be heard would be granted protection under the Free Speech Principle. Then one could say that this march was equally offensive to the Jews of Chicago, New York, or Tel Aviv.[39] But this is not the case when Nazis come to a populated Jewish neighbourhood, when the clear and deliberate intention is to offend and excite the inhabitants, especially when they know that many of them are survivors of the

Holocaust. Intentions and motives do matter because they may lead to a wrong interpretation being given to the real and true motives of the agent. True, the same conduct may be interpreted in different ways, according to the motives of the doer.[40] But here there is no fear of such possible confusion. Here it is not a case of interpretation at all for the Nazis voiced their reasons for coming to Skokie. It has to be emphasized that the intentions and motives were manifested by Collin himself, who said that he had decided to march in Skokie in order to spite and offend the Jews. Under such circumstances, refraining from attending the march was not a solution for the Jews, as Feinberg suggests, for it would not make them evade the injury. It might even increase it.

Clearly Collin did not mean to persuade the Jews that he was right, or that his ideas were justified.[41] He chose Skokie not only because there was a big community which he could offend but also because he wanted to gain public attention. As Dworkin suggested to me,[42] it was the grotesqueness of the venue that gained attention. This, of course, is true. The choosing of a venue is cardinal to the success of the demonstration. Protests are made where they can convey their message best. For example, we would not seriously consider a demonstration against sending troops to Saudi Arabia, say, in a zoo. We would expect such a demonstration to take place outside the draft offices, or opposite 10 Downing Street. By the same logic, we would expect a Nazi to propagate his ideas in a Jewish neighbourhood. The question is, however, whether or not our understanding of Collin's motives in choosing Skokie to attract public attention and media coverage should convince us to allow the march. My conclusive answer is 'No'. I repeat: when the offence is serious; the intentions of the offender are clear; and the target group is not in a position to avoid the offence, then democracy should draw the line and constrain freedom of expression.

Furthermore, these arguments do not intend to suggest that only demonstrations that are meant to persuade should be allowed, whereas those that mean to protest or to offend should be prohibited. As stated, the intentions of the demonstrators is only one of the considerations that we should bear in mind when deciding on boundaries of freedom of expression. No less important are the seriousness of the offence and the circumstances in which the protest is being made; that is, whether or not the target group can avoid the demonstration without being hurt by the very act of going away. In this context, historical experience is of relevance.

Thus, the Skokie Jews were put in such a position that in either case they would have been offended: if attending the demonstration, they

would have to see the swastika, the Nazi uniform, and so on; and if not attending, it would have been as if to allow Nazism to pass, and pass in their own vicinity. Skokie exemplifies the democratic 'catch' in a vivid manner: the same liberty that is granted to Nazis to exercise their belief that espouses hatred and malicious speech might endanger their target group that wishes to maintain their peaceful life and protect what they conceive as a fundamental right not to be harassed by hate mongers.

Acceptance of the 'avoidability standard' only criticizes the main argument of the Illinois Supreme Court. It does not in itself constitute sufficient grounds to imply that the Nazi right to freedom of expression had to be curtailed in that instance. What I have tried to establish until now is that the seriousness of the offence was severe according to 'the Volenti standard' and 'the reasonable avoidability standard'. Now there is still a need to clarify the scope of 'the extent of the offence standard', and explain how serious the offence has to be for it to be liable to restriction. The fact that Skokie was not a case of instigation might have been a sufficient reason to protect the expression and allow the march, unless we can say that the expression in itself constitutes pain that could be considered morally on a par with physical harm. In other words, while it is true that Skokie could not fall within the confines of the Harm Principle, nevertheless, if strong argument were provided that the very utterance of the Nazi speech constitutes psychological damage that could be equated with physical pain, then a strong case might be provided against tolerance under the Offence Principle, and in accordance with 'the extent of offence standard'. Then we may hold, contrary to Feinberg's presupposition, that an offence might be as serious as harm.[43]

Psychological offence, morally on a par with physical harm

The issue of psychological damage is problematic for two reasons. First there is the general claim that the law is an inappropriate instrument for dealing with expression which produces mental distress or whose targets are the beliefs and values of an audience.[44] Second, speaking of psychological damage necessarily involves drawing a distinction between annoyance or some emotional distress, and a significant offence to the mental framework of people.

As for the first claim, Haiman postulates that individuals in a free society 'are not objects which can be triggered into action by symbolic stimuli but human beings who decide how they will respond to the communication they see and hear'.[45] He conceives people as rational human beings, who carefully weigh arguments and decide according to

them. He does not acknowledge that people also have feelings, drives, and emotions, which are sometimes so powerful as to dominate their view regarding a certain object, or a phenomenon, or other people. He is not willing to concede that a personal trauma, for example, might prevent an autonomous person, who is usually capable of reason and making choices, from developing a rational line of thought about the causes of his or her trauma. As far as Haiman is concerned, the anguish experienced by those exposed to scenes that remind people of their trauma is a price that must be paid for freedom of speech. He admits that it is difficult not to seem callous in holding this position, but he 'must take that risk and so argue'.[46] Otherwise, those who display Nazi symbols would have to be prohibited from appearing not only in front of the Skokie Village Hall but in any other public place where it might be expected that they would be seen by survivors of the Holocaust. Furthermore, a television documentary examining and vividly portraying neo-Nazi activity might have to be censored because of its impact on Holocaust survivors.[47]

Both arguments, however, are not sufficient to explain why the law should not deal with expressions which produce mental distress, for the 'avoidability standard' takes the sting out of them. The Offence Principle, as postulated, does not supply grounds to restrict either of Haiman's examples. One can switch one's television off, or intentionally avoid an encounter with an offensive phenomenon in the city centre. Either of these acts may be deemed necessary to keep one's peace of mind. However, an intentional going away from facing an offensive phenomenon occurring in one's own neighbourhood entails more than mere avoidance. It may be seen by some as surrender. This Haiman, like Feinberg and others, fails to understand.

With regard to the second issue, the distinction between annoyance or some emotional distress and a severe offence to one's psyche is not clear-cut and it is bound to awaken controversy. For the task obviously requires professional judgements, which further complicates this issue. These reasons, among others, have influenced the literature to the effect that it lacks sufficient consideration regarding the potential psychological injury that certain speech acts might cause. But these difficulties should not make us overlook the issue. Rather, because we are aware of the complexities that are involved, we must make the qualifications as conclusive as possible and the requirements equally stringent, in order not to open avenues to further suppression of freedom of expression. As previously stated, we must insist that restrictions on freedom of expression be as clear as possible, for otherwise they might become

counter productive in the sense that instead of protecting our liberties, they will assist in their denial. Hence, there can be no doubt that when we speak of a psychological offence, we refer to one that is well beyond inconvenience, irritation, or some other marginal form of emotional distress. Only considerable pain, one which is not speculative, and which is preferably backed by material evidence, may provide us with a reason to restrict freedom of expression under the Offence Principle, in that the circumstances make the offence inescapable. With regard to Skokie, therefore, our task is to establish that the offence was such as to constitute an injury that outweighed the special status reserved for freedom of expression.

There was testimony by psychologists on the possible injuries many Jews would suffer as a result of the march. They argued that this speech act might be regarded as the equivalent of a physical assault.[48] This entails that the speech act was properly subject to regulation (if we recall Scanlon's theory of free speech), as was any physical attack.[49] Thus, in opposition to the *Brandenburg* and *Skokie* decisions, the argument here is that the content of speech is of significance. In emphasizing the importance of content, the focus is put not on the truth of the speech, but rather on its effects. When the content and the purpose of expression are overlooked, freedom of speech may be exploited in a way that rebuts fundamental principles that underlie a democratic society. Indeed, the United States Supreme Court recognized in a series of cases several classes of speech as having 'low' value, and thus deserving only limited constitutional protection.[50] The Court held that otherwise speech could be exercised wilfully to inflict injury upon the target persons and groups, thus transforming freedom of speech into a means for curtailing freedoms of others. Therefore, we should bear in mind the content of speeches, and when they are designed to inflict psychological damage upon their target group, then there is a basis to consider their constraint. Here it is worth mentioning the Illinois Appellate Court ruling, later to be overruled by the Illinois Supreme Court, which justified the restriction of the Nazi march because of the likelihood of such injury. The court said that: 'the tens of thousands of Skokie's Jewish residents must feel gross revulsion for the swastika and would immediately respond to the personally abusive epithets slung their way in the form of the defendants' chosen symbol, the swastika … '.[51]

It maintained that the swastika was a personal affront to every member of the Jewish faith, especially to Holocaust survivors. These beliefs were powerful enough for a ruling in favour of Skokie's residents and against Collin. However, this ruling supplies a weaker standard than the one that

was just declared to restrict free speech. 'Gross revulsion' and 'personally abusive epithets' make a more general standard for constraining freedom of speech. As said, one person might be offended simply at the sight of black and white people holding hands. Another may feel gross revulsion when watching a commercial featuring a woman in a bathing suit. We cannot extend the scope of the Offence Principle so as to include any potential reaction of disgust on the part of some people. Therefore, we ought to insist on the more stringent requirement, that which holds that restriction on freedom of speech under the Offence Principle is permissible only if we can show that the speech in question causes psychological offence, which may be equated with physical pain.

Now, however, we face the problem of making this distinction between an offence which causes 'emotional distress', or is a 'personal affront', and an offence which causes 'psychological injury' amounting to physical pain, an intelligible distinction. It has been argued that offensive acts in general cause unpleasant distressful psychological states to one degree or another. To be offended is, by definition, to suffer distress or anguish.[52] It is, therefore, reiterated that the Offence Principle allows infringement of freedom of speech only in specific cases, when the damage is deemed irreversible. Skokie is a relevant case because racist utterances, as stated before, have a damaging psychological impact on the target group, which is difficult to overcome or to reverse. Concentration camp survivors carry psychological scars with them for the rest of their lives. Often they have sustained residual organic and psychological damage, and find it difficult to cope with any kind of stress, especially when it is imposed on them by malicious, invidious Nazis who provoke them and wish to disturb their peace and undermine their lives.[53] Consequently it would appear that 'the extent of offence standard' is satisfied to an extent that Feinberg himself does not acknowledge when formulating his standards. In some instances the seriousness of the offence is such that it can be viewed as morally on a par with physical harm. A Nazi march in a Jewish neighbourhood populated by Holocaust survivors is a case in point.

A further clarification is called for in order to make the argument under the Offence Principle more precise. The Principle does not provide grounds to restrict racial hatred as such. It insists that we should take into consideration the circumstances in which the speech is made. In this respect my view is somewhat different from criminal codes of some European countries, such as Great Britain or Sweden.[54] With regard to the British stance, sections 5 and 18 of the Public Order Act 1986 are of specific relevance.[55] Section 5 prohibits threatening, abusive,

or insulting speech likely to cause harassment, alarm, or distress.[56] There need be no intention to insult: it is sufficient that an ordinary person might feel so insulted.[57] In turn, section 18 of the 1986 Act reads:

> 1) A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if (a) he intends thereby to stir up racial hatred, or (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.[58]

By the British reasoning, grounds might be provided to prohibit a Hyde Park Corner speaker from conveying racist opinions; while this essay postulates that a Hyde Park Corner speaker wishing to preach racial hatred should not be denied expression because the listeners are free to leave the place at will, thereby avoiding the offence. Relying on the Millian formulation of the Offence Principle, which speaks of a combination of consequences and circumstances, and also on Feinberg's standards, which determine the seriousness of the offensiveness, it is emphasized that the fact that some types of speech (such as racial and discriminatory advocacy) create great psychological distress is not in itself a sufficiently compelling reason to override free speech. The Home Affairs Committee of the House of Commons in its fifth report (1979–80) recommended not to create power to ban marches where there was a likelihood of racial incitement. Barendt, concurring, writes: '… however distasteful the views of these [racist] organisations may be, they are entitled to the same freedom of speech as those with more orthodox opinions, and the suppression of such views may be the first slide down the "slippery slope" towards total government control of political discourse.'[59]

There is no disagreement that the prescribing of boundaries to freedom of expression has to be a painstaking effort, involving careful consideration and lucid articulation, so as to avoid sliding down the slippery slope. I must express reservations in regard to the traditional British position, which solely emphasizes the fear of provoking a breach of the peace. This reasoning comes close to *argument number one*. Indeed, looking at the way the British authorities have dealt with fascist and racist demonstrations over the years, one can assume that this reasoning would have been invoked in order to ban a Skokie-like demonstration.[60] It seems that the British approach is at variance with that adopted in the United States.[61]

In Britain, unlike the United States, there is no guaranteed right to demonstrate. The view is that public processions are *prima facie* lawful; that is, *peaceful* demonstrations are lawful.[62] Accordingly, a procession may only be banned on the ground that it is likely to cause 'serious public disorder.'[63] Here lies my disagreement with the British stance. My view is that the apprehension of serious public disorder should not be the sole ground for the prohibition of processions and assemblies.[64] Thus I have offered the Offence Principle as another reason for abridging expressions. The British authorities considered this reason in the Green Paper of 1980 and the White Paper of 1985, and rejected it on both occasions.[65]

One additional comment has to be made before formulating the argument under the Offence Principle. Among the justifications voiced for the *Skokie* decision was the contention that if the Nazis were denied free expression, this would jeopardise the entire structure of free speech rights that has been erected. According to this argument, to permit Skokie to ban this speech because of its offensiveness would mean that southern American whites could ban civil rights marches, especially those that are held by blacks.[66] Let us assume that it is plausible to argue that the degree of the irritation resulting in this case amounted to psychological offence. Then these southern whites could claim that these demonstrators acted in a manner which they found seriously offensive; that they maliciously, recklessly, or negligently disregarded their interest in not being harmed by seriously offensive actions, such as marching in 'their' territory; that the corollary of these marches was severe injury, conducive to further impairment of those whites who were offended, and difficult to reverse.

The Offence Principle, however, is intended to defend against the abuse of freedom by those who deny respect for others. It is not to assist those, whose motivation is to cause harm to others, whose aim is either to intimidate or to discriminate and to deny rights to others.[67] There is a set of values that underlie a liberal society and we judge in accordance with it. The fact that some individuals are offended by a speech that advocates equal rights cannot supply sufficient reason for its restriction. The Principle bears on freedom of expression when the speech in question contradicts fundamental background rights to human dignity and to equality of concern and respect.[68] Otherwise, every speech which some might find psychologically offensive may be curtailed. Members of the civil rights movement who come to demonstrate in the southern United States do not deny the rights of any group of people. In contrast to the Nazis in Skokie, they are not deliberately setting out to upset

southern whites. The intentions of the civil rights marchers are not to offend but to *protect* the rights of those who are discriminated against by those who now claim that they are being offended. The right to freedom of speech is here exercised out of respect for others, aiming to preach values that are in accordance with the moral codes of a liberal society, not values which deny these accepted moral codes. Those who are offended by the values adopted by the entire society implicitly argue when wishing to prevent the demonstration that their problem is not with the march as such. Rather, their problem is a matter of principle, which concerns their own place within a liberal society.

Hence, four major elements should be taken into account when we come to restrict expression on the grounds of psychological offence: the content of the expression; the tenor and the manner of the expression; the intentions and the motive of the speaker; and the objective circumstances in which the advocacy is to take place. Accordingly we can now lay down our second qualification of free speech. This restriction is made under the Offence Principle. The argument is:

Argument number two: under the Offence Principle, when the content and/or manner of a certain speech is/are designed to cause a psychological offence to a certain target group, and the objective circumstances are such that make the target group inescapably exposed to that offence, then the speech in question has to be restricted.

Note that this argument differs from my reconstruction of the Millian Harm Principle in two crucial respects: it covers damages that are not physical, and it restricts certain types of speeches that fall within the category of 'advocacy', as distinct from 'instigation'.

One last point: it might be argued that the Offence Principle as construed might be applicable to Skokie but the Skokie circumstances are special, hence the applicability of the Principle is very limited. I agree that the applicability of the Offence Principle should be limited. I have made every effort to formulate it in the most decisive way. Any principle designed to restrain freedom of speech should be narrowly defined in order to prevent the possibility of opening a window for further restrictions.

However, the Skokie case is not unique. We could think of other cases in which the conditions of the Offence Principle are fulfilled, hence there is scope to set boundaries to liberty and tolerance. For instance, it is one thing to allow marches of the quasi-fascist and anti-Arab 'Kach' movement in Tel Aviv, and quite another to allow such

marches in Shfaram, an Arab town.[69] Similarly, we should not see in the same light the burning of a cross by the Ku Klux Klan in an isolated farm in the southern United States, and the same act in Harlem, New York.[70] In a similar vein, it would be legitimate to forbid promoting pornographic literature and the selling of pork in Bnei Brak, an ultra-orthodox religious town in Israel. And it is one thing to permit the publication of Salman Rushdie's *Satanic Verses* in Britain and other democracies, and quite another to allow Mr Rushdie to promote his book outside the central mosque in Bradford, a town with a large Muslim minority.[71] In all instances there are valid arguments to prohibit expressions that are highly offensive, designed to offend a designated group of people who could not avoid being exposed to the offensive speech.

Conclusion

To sum up, we ought not to tolerate every speech, whatever it might be, for then we elevate the value of freedom of expression, and indeed, of tolerance, over other values which we deem to be of no less importance, such as human dignity and equality of concern and respect. Tolerance, which conceives the right to freedom of expression as a *carte blanche* allowing any speech, in any circumstances, might prove counter productive, assisting the flourishing of anti-tolerant opinions and hate movements.[72] Therefore, we have to be aware of the dangers of words, and restrict certain forms of expression when designated as levers to harmful, discriminatory actions; for words, to a great extent, are prescriptions for actions.

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