“Hate Speech’ and Incitement to Violence”
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TO: Participants in the ‘Hate Speech’ and Incitement to Violence Workshop

FR: Arthur Jacobson

I’ve attached a draft of “Hate Speech and Self-Restraint,” a paper that Bernhard Schlink and I are in the process of writing.

Professor Schlink hasn’t seen this draft, so please chalk up errors and infelicities to me alone. A section on speech codes in colleges and universities has only been sketched, not written.

Professor Schlink and I are extremely grateful to Kendall Thomas and Peter Molnar for the opportunity of test driving the paper before their workshop. We’re also grateful, in advance, for what we expect to learn from the discussion.
Hate Speech and Self-Restraint

by:

Arthur Jacobson and Bernhard Schlink

It is a truism of comparative constitutional law that the United States takes an absolutist position against the criminalization of hate speech, and that the United States is alone amongst the constitutional democracies in taking this position. The First Amendment as interpreted by the courts bars states and the federal government from banning hate speech, just because it is hate speech and for no other reason. Other constitutional democracies do ban hate speech just as hate speech, and for that reason alone. They may justify the ban differently; they may differ on its extent and consequence. But one way or the other, to one degree or another, they ban hate speech and the United States does not.

The truism recognizes, of course, that the United States does, in fact, ban hate speech. What the United States does not do – and constitutionally cannot do – is ban hate speech as such. But if hate speech falls within one of the well-known exceptions to free speech, then the First Amendment does not stop the government from banning it. The exceptions include “fighting words,”¹ and words that create a “clear and present danger” of imminent lawlessness.² Yet the

² See Schenck v. United States, 249 U.S. 47, 49 (1919), as limited by Brandenburg v. Ohio, 395 U.S. 444 (1969). Those who know their First Amendment doubtless note that we have left off group libel from the list of exceptions, even though the Supreme Court put it on the list in Beauharnais v. Illinois, 343 U.S. 250 (1952). The reason we left it off is that Beauharnais assumed that statutes criminalizing libel enjoy absolute immunity from First Amendment
exceptions are limited. They permit little more than the criminalization of words that are tantamount to an incipient assault, and neither of them permits the naked and unadorned criminalization of hate speech.

This striking difference in constitutional doctrine raises a difficult, and, for constitutional democracies other than the United States, awkward series of questions. At the heart of democracy is free expression. Every constitutional democracy acknowledges that. And so, constitutional democracies limit free expression only in the name of defending democracy, thus only in the interest of protecting free expression. Constitutional democracy, they say, cannot survive when hate speech flourishes. Democracy requires a minimum, yet durable, measure of mutual respect amongst its citizens and between every group making its public presence felt. Hate speech corrodes the very core of mutual respect and threatens democracy itself.

So how is it that the United States can disable itself from banning hate speech, yet remain a constitutional democracy? Is it wrong that democracy requires a minimum measure of mutual respect? Do the constitutional democracies that ban hate speech do so gratuitously? Does the ban reflect a taste, an historical obsession, rather than considered judgment about the requisites of democratic society? Or does the United States in fact restrain hate speech just like everyone

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restrictions. This assumption, which is crucial to its reasoning, was destroyed in *New York Times v. Sullivan*, 376 U.S. 254 (1964). The Sullivan case was effectively brought home to *Beauharnais* by the Seventh Circuit’s decision in *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978) (permitting The National Socialist Party of America to march in the Village of Skokie while displaying the Swastika, despite an ordinance making it a misdemeanor to disseminate any material that promotes or incites racial or religious hatred; Skokie had a sizeable population of Holocaust survivors). Were the Supreme Court to revisit the issue of criminal libel, *Collins* would bode ill for *Beauharnais*. See, *e.g.*, Keegstra, p. 904.
else, but in a different way? Is the limited and back-handed way the United States restrains hate speech in fact adequate to the task of protecting mutual respect?

We want to agree with the constitutional democracies that restraining hate speech is essential to the maintenance of democracy. Yet we also want to agree with the United States that law, specifically criminal law, is not the only method of restraint. To achieve these aims, we consider three prominent mechanisms for restraining hate speech in the United States, none of which follows the model proposed by other constitutional democracies. These mechanisms are: workplace harassment claims, speech codes on college and university campuses, and standards and practices codes in the broadcast and cable media. There are doubtless more. But the three we study adequately reflect the variety of approaches to restraining hate speech in the United States. None of the three makes use of criminal sanctions. Two do not even draw directly upon the resources of law. How effective they are in restraining hate speech, especially by comparison with criminalization, we cannot say. That is an empirical question, and a tricky one at that. We do know this, however. It is simply impossible to assess the quantum of restraint by focusing narrowly on constitutional doctrine, or on criminal law, or even on law altogether. One must consider self-restraint in civil society as well as restraint. Only then is one ready to compare systems.

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Workplace harassment claims

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer “to … discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin…” In 1986 in *Meritor Savings Bank v. Vinson* the Supreme Court held the sexual harassment of an employee by a supervisor to be actionable under Title VII. The Court required the harassment to be “sufficiently severe or pervasive ‘to alter the conditions of the [victim’s] employment and create an abusive working environment.’” Before *Meritor* circuit courts had held “hostile environment” harassment actionable in race, religion, and national origin as well as in sex, and after *Meritor* everyone assumed that the Supreme Court meant to do so as well.

The premise of hostile environment harassment claims is a discriminatory difference in working conditions. It is not enough that the behavior is offensive; it must actually change the employee’s working conditions: “Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII’s purview.” And it is not enough that the behavior actually changes the employee’s working conditions. It must also constitute unequal

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5 We consider workplace harassment claims at the federal level only, and equate the law at the federal level with the “American” model. States have their own, often different, antidiscrimination laws.
7 477 U.S. 57 (1986).
8 477 U.S. at 67.
9 See, e.g.,
treatment “because of” a category protected by Title VII: “The critical issue, Title VII’s text
indicates, is whether members of one sex [or race, or religion, etc.] are exposed to
disadvantageous terms or conditions of employment to which members of the other sex [or race,
or religion, etc.] are not exposed.”

It should go without saying that hostile environment harassment includes behavior that
would be classified as hate speech in a jurisdiction where hate speech is the operative legal
category. Of course, one must adjust for cultural, social and political differences, yet it remains
tolerably true that hate speech may be comprised and controlled by hostile environment
harassment claims. The only requirement is that the hate speech differentially affect the
workplace conditions of a member or members of a protected category.

At the same time, actionable harassment may and often does include behavior that
doesn’t come close to hate speech. This is especially true of sex discrimination, where the
change in workplace conditions may be the result of behavior that runs the gamut from the
merely offensive – unwelcome sexual advances,\footnote{Meritor, 477 U.S. at 68 (“[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome’”).} distasteful or degrading remarks or behavior\footnote{510 U.S. at 25. And so the courts of appeal have concluded, at least after \textit{Oncale v. Sundowner Offshore Services, Inc.}, 523 U.S.75 (1998), repeated and elaborated \textit{Harris’s} insistence on a finding of unequal treatment. Where, for example, a supervisor abuses members of both sexes equally, lower courts have found no disparate treatment of either sex. See, \textit{e.g.}, \textit{Holman v. Indiana}, 211 F.3d 399 (7\textsuperscript{th} Cir. 2000), overruling \textit{McDonnell v. Cisneros} 84 F.3d 256 (7\textsuperscript{th} Cir. 1996). However, courts have sometimes found that the same abuse may impact women more harshly, and thus be remediable under what is in effect a disparate impact theory. See, \textit{e.g.}, \textit{Kampmier v. Emeritus Corp.}, 472 F.3d 930 (7\textsuperscript{th} Cir. 2007); \textit{EEOC v. National Educ. Ass’n, Alaska}, 422 F3d 840 (9\textsuperscript{th} Cir. 2005); \textit{Steiner v. Showboat Operating Co.}, 25 F.3d 1459 (9\textsuperscript{th} Cir. 1994).} – to the hatefully violent.\footnote{12 Meritor, 477 U.S. at 68 (“[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome’”).} But none of it is hate speech.
It is of decisive importance to the structure and operation of this mechanism of restraining hate speech that the harassment claim lies against the employer, not against the harasser. The harasser may be liable in tort under state law – intentional infliction of emotional distress, assault, outrage, even in some states the tort of harassment – but not under Title VII. Only the employer is liable. And the employer must answer to the victim of the harassment, not to a prosecutor wielding the power of the state, with its own interests, its own agenda, its own inertia. All the differences between hate crime and workplace harassment claims flow from these two facts.

Restraining hate speech through criminal law has three salient features:

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13 See, e.g., McLaughlin v. New York, 739 F.Supp. 97 (N.D.N.Y. 1990) (prima facie case of sexual harassment supported by distasteful and degrading comments);
14 See, e.g., Little v. Windermere Relocation, Inc., 301 F.3d 958 (9th Cir. 2002) (rape).
15 See, e.g., Stevenson v. Precision Standard, Inc., 762 So.2d 820 (Ala. 1999) (an independent cause of action for sexual harassment does not exist; instead, claims of sexual harassment are maintained under common law tort theories, such as assault and battery, invasion of privacy, negligent training and supervision, and outrage.
16 The standard for employer liability depends on the role of the employee who is doing the harassing. If the harasser is a co-employee of the victim, then the employer’s liability is judged by a negligence standard; the employer is liable for a co-worker’s harassment if it “knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.” 29 C.F.R. 1604.11(d), from the EEOC’s Guidelines on Discrimination Because of Sex, quoted approvingly in Faragher v. City of Boca Raton, 524 U.S. 775, 799 (1998). If, on the other hand, the harasser is “a supervisor with immediate (or successively higher) authority” over the victim, then the employer’s liability depends on whether the supervisor’s harassment “culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.” 524 U.S. at 807, 808. If the harassment does culminate in a tangible employment action, then the employer is liable as if the supervisor were his agent. 524 U.S. at 790. If the harassment does not culminate in a tangible employment action – if all the supervisor has done is differentially alter the terms or conditions of the victim’s employment – then the employer can avoid liability by proving an affirmative defense. The affirmative defense requires the employer to show: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” 524 U.S. at 807.
1. Hate crime statutes express and impose the will of the state, without the participation or contribution of any individual or of any institution mediating between individual and state.

2. The statutes address individuals primarily; they address institutions and organizations only secondarily, as aggregates of individuals.

3. The statutes threaten punishment as the state defines punishment, either imprisonment or fines; they do not seek compensation for victims or marshal methods of control other than punishment.

Restraining hate speech through workplace harassment claims differs in all three features:

1. Workplace harassment claims resemble criminal prosecution in that they express and impose the will of the state. However, unlike prosecution, a harassment claim may be initiated and prosecuted by an individual. The individual decides whether to press the claim, controls its timing, the remedies to pursue, and whether, when and how to settle. The harassment claimant can also press the court to adopt new theories for claims or defenses or to drop old ones. The harassment claimant shares with the state the enforcement and creation of the law. The victim of a hate crime is utterly dependent upon the whim – or the discretion, to be kind – of the prosecutor. How the law goes has nothing to do with him. When hate speech comes to the attention of the prosecutor because the speech is public someway – in a newspaper, on the television, at a rally – then the victim needn’t even play the role of reporting the crime to the

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17 The Equal Employment Opportunities Commission may initiate claims or intervene in claims initiated by individuals. 42 U.S.C. § 2000e-5(f). Typically, however, the EEOC leaves enforcement to individual claimants. Its only contribution in that case is to attempt to conciliate disputes between employer and employee prior to filing in federal district court. In some cases, the EEOC will also participate in fact investigation. 42 U.S.C. § 2000e-5(b).
authorities, needn’t even testify at the trial being prosecuted in the name of his benefit. The caption of the report of the trial – and captions are no small thing – reads “People v. Hate Speaker” rather than “Victim v. Hate Speaker.”

2. Federal harassment claims do not address the harasser; they address the employer of the harasser. The source of federal harassment claims – Title VII of the Civil Rights Act of 1964 – addresses employers, not harassers. It is the employer, not the harasser, who has the immediate interest in making sure that the workplace is free of harassment. The employer may or may not discipline the harasser, may or may not give the harasser an incentive to change his ways. Or, instead, the employer may plead with the harasser, warn the harasser, transfer the harasser to another office or another part of the factory floor where trouble doesn’t lie his way. Only some employers, in some cases, will fire the harasser, make the harasser take a leave, dock his pay. The employer’s job isn’t justice; it’s managing the harasser, and management serves interests alien to the law.

Moreover, Title VII doesn’t cover small employers, only large ones. So far as federal law is concerned, mom-and-pop enterprises can engage in as much discrimination as they please without legal consequence. Employers large enough to be covered by the act are, therefore, likely to be organizations or institutions, not individuals, since sole proprietors tend to seek the

18 Where the employer is a sole proprietor or an incorporated sole proprietor, the Court has elided the distinction between harasser and employer. See, e.g., Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).

19 Title VII defines “employer” (and therefore the persons it covers) as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person….” 42 U.S.C. § 2000e. Of course, “agent” is more likely to include individuals than “employer” since “agent” isn’t limited by the 15-person/20-week requirement, yet the fact of the matter is that one rarely if ever sees a claim against an individual.
protection of limited liability when the number of employees to manage, and therefore lose track of, gets too large. The immediate, on the ground enforcers of federal anti-harassment law, the ones whom Title VII seeks to mobilize for the suppression of workplace harassment, are thus organizations or institutions, not the state and not individuals. The organizational or institutional employer becomes a private police force working gratis on behalf of the state to forestall and, if necessary, sanction behavior that the state wishes would go away. The employee experiences the employer, not the government, as the normative and practical source of the policy; the law virtually requires the employer to feign, if it does not have, an authentic desire to banish harassment. (When an employer circulates its anti-harassment policy, it doesn’t say, “Government mandate requires Wonka Widgets to circulate this policy. Harassment violates Title VII and therefore, etc.” It says, “Wonka Widgets strongly believes that harassment is wrong and will do everything in its power to stop it.” Only by showing vigorous and credible efforts to stamp out harassment can the employer be sure of avoiding liability should harassment occur.  

Federal anti-harassment law thus breaks the direct relationship between state and individual that criminalization nurtures and requires.

3. Because the relationship between state and individual in federal anti-harassment law is no longer direct, because Title VII interposes the employer between them, the sanction that the state wields in direct relationships with individuals, the criminal sanction, ceases to be appropriate. A hate crime statute addresses the perpetrator of the wrong. Title VII does not; it addresses the perpetrator’s employer. A hate crime statute tells the perpetrator, “If you say hateful things, you are a criminal, and we will prosecute you and convict you for committing a

20 See note 16, supra.
crime.” Can the state say anything like that to a harasser’s employer? Can the state make the case that the harasser’s employer is a criminal? The only wrong the employer has done is employing and then perhaps tolerating a harasser. Is it wrong to employ people who commit wrongs? Is it wrong to tolerate their wrongful behavior? These are fair questions. They have no obvious or simple or universally correct answer. Far easier for the state to say to the employer: “We want to cut down on the amount of harassment in the workplace. We would like to enlist your help. Who better than you to give it? All we ask is that you make a decent effort to put a stop to harassment. We would like you to do what an employer can do to persuade employees not to harass each other. We know you don’t have available to you the sanctions of criminal law. But you can educate, and you can impose your own sorts of sanctions. If all that fails, as it will upon occasion, we won’t hold you responsible. But if you won’t make the effort, then we will hold you responsible, but only for putting the victim of harassment in as good a position as he or she would have been in had the harasser behaved properly.”

This is the deal that Title VII thrusts upon employers. It is a far more palatable deal than saddling employers with criminal liability for the behavior of persons over whom they have only partial control. But note the consequence. Title VII replaces the single regime of criminal liability with two different remedial regimes operating at two different levels. The first is a regime in which the state forces the employer to compensate the harasser’s victim, unless the

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21 To be more precise, this is the deal Title VII imposes upon employers when the harassment is not connected with a tangible employment action against the victim. If the harassment is connected with a tangible employment action, then the employer can’t avoid liability by exercising reasonable care to eliminate harassment. See note 16, supra.
employer can show that it tried to stop harassment and the victim didn’t try to avoid it. The harasser himself is exempt from making compensation. Nor does this first level regime punish the harasser. It leaves dealing with him to the second level, in which the employer tries to shield itself from liability for a harasser’s behavior by installing internal mechanisms designed to stop harassment, or alleviate its consequences once it has occurred.

An employer has an entirely different toolbox at its disposal for dealing with harassment than the government’s in controlling hate speech. Though American jurisdictions are getting more creative these days in sentencing (specialized drug courts can order therapy, for example), the prevailing currency of criminal courts is still punishment. Employers always have “punishment” as an option (as employers punish). But scouring harassment from the employer’s ranks is fundamentally a problem of management – of balancing costs and benefits, of seeing what works and what doesn’t. It is also, therefore, in the end a problem of education, of training

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22 See note 16, supra, on the affirmative defense to a harassment claim outlined in Faragher. We use the term “compensation” to indicate a remedial scheme whose complexities would take much patient exposition to thread. A stark and simplistic summary: Since 1991 Title VII complaining parties have been able to seek compensatory and punitive damages. 42 U.S.C. § 1981A(a). Prior to 1991 complainants could seek only equitable remedies, such as back-pay, reinstatement, and an injunction. Congress had initially envisioned the remedial powers of the court under Title VII to be those of a chancellor. But compensatory and punitive damages are available only if the employer engaged in unlawful intentional discrimination (and only if the complaining party can’t recover under 42 U.S.C. § 1981). Thus an employer that is liable under Title VII only for the discriminatory impact of a facially neutral employment practice but has not intentionally discriminated is subject to neither compensatory nor punitive damages, but may seek one of the equitable remedies provided in Title VII, as appropriate.

“Punitive damages” is a technical term peculiar to Title VII. The Civil Rights Act of 1991 provides that a Title VII complaining party may recover punitive damages “if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.” 42 U.S.C. § 1981A(b)(1). The Supreme Court has rejected the equation of “punitive damages” under Title VII with “punitive damages” in ordinary tort law. See Kolstad v. American Dental Association, 527 U.S. 526 (malice or reckless disregard are not identical with egregious misconduct).
(or making sure that someone else has trained) the employee not to harass just as one trains him to do his job or to know his skill. Management demands tradeoff. Rights do not. (Often they do, but we hide that fact.) At the level of management anti-harassment becomes an interest to be served; it loses its character as a right. We pursue rights in the shadow of the law – of court processes, of predictions what courts will do, and so forth. We pursue interests in the shadow of management – of ordinary business acumen and needs. In the first level regime, the contact of state with employer, anti-harassment presents itself as a right to be pursued. In the second, the contact of employer with harasser, it presents itself as an interest to be served. The right to be free from harassment necessarily encounters and intertwines with practices and structures and goals that from the law’s perspective compromise the right. This, we suppose, is true of any legal phenomenon. But here the law intends for this to happen, for enforcement to become management and for liability to be deflected from where it comes to ground.

Comparing the administration of hate crime sanctions with the broader remedial palette available in Title VII’s split-level enforcement regime, one is struck by what amounts to a quid pro quo. In the passage from hate crime to Title VII the state gives up absolute control over the sanction and abandons recognition of its own interest as paramount. What civil society gets, in return, is transmutation and adaptation of the state’s interest to suit the interests, ways and means, of civil society. What Title VII accomplishes, in effect, is mobilization of the energy and effectiveness of civil society behind a hybrid of the state’s and the victim’s and the employer’s objectives.

23 Even here one must notice a caveat (there is always a caveat in law): Title VII orders the EEOC to attempt to “conciliate” disputes between employers and aggrieved employees. 42 U.S.C. § 2000e-(5)(b). Conciliation is an aggressive form of mediation. [cite] Here too interest makes its presence felt.
We do not claim that mobilization of the resources of civil society in the interest of law is an innovation of Title VII. Certainly Title VII is a prominent example. But other examples are common. Nor do we claim that legal scholarship has neglected this mobilization. It surely has not. All we claim is that it is vitally important when comparing legal systems to look at the resources law mobilizes as well as the doctrines it propounds. Only then can one know what the law seeks to control.

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In the regulatory regime sponsored by Title VII law plays a direct, yet non-exclusive role. It takes on an ally in management. The regulation of hate speech in Title VII is thus janus-faced. On the one side it uses instruments of law – claims, regulations, corporate controls and corporate equal employment opportunity officers designed to fend off liability. On the other side it hosts a grab bag of motives and methods. Management may indeed just be responding to the law, regulating hate speech just to reduce exposure to workplace harassment claims. But it may also be responding to ideal motives. It may be banning hate speech because it has a certain vision of corporate responsibility, not because, or not just because, it wants to reduce exposure. It may be banning hate speech because its shareholders want it banned. It may be banning it because of a fear of publicity, or because its customers won’t patronize an enterprise that tolerates hate speech. Or it may have other motives, articulate or inarticulate.

The point is that one side of Title VII’s face is management, and management, precisely because it is not the government and not subject to the constraints of the First Amendment, may,
if it wishes, ban hate speech as such. Private actors in the United States may accomplish what is forbidden to the state. The typical anti-harassment statement that an employer publicizes to its employees does not say, “You may harass any other employee you wish because of race, sex, etc., so long as the harassment doesn’t change the employee’s working conditions.” Or, “You may harass any other employee you wish because of race, sex, etc., so long as you harass everyone equally.” No, it says: “Don’t harass any other employee because of race, sex, etc., and if you do all hell will break loose, whether you change their working conditions or not, whether you are an equal opportunity harasser or not.” The employer doesn’t care a whit for the jurisdictional premise that makes government action in the form of Title VII constitutionally tolerable. It’s an employer, not the government, and because of the generality of the typical anti-harassment statement the typical employer always winds up exceeding the government’s constitutional powers. The government can honestly say, “We stand by our constitutional premise and when a workplace harassment claim comes to court we require a discriminatory change in working conditions. What the employer does in the course of partnering with us to regulate hate speech is not our business.” But the fact is, the government’s partner is banning hate speech.

Once one recalls – for that is the correct word here – that civil society has instruments at its disposal for banning hate speech even if the government does not, then the puzzle with which this paper began – how is it that United States can refrain from criminalizing hate speech and remain a constitutional democracy? – becomes solvable. The government’s refusal to ban hate speech does not stop civil society from banning it, as effectively as if it were a crime.
We have chosen two institutions in civil society to consider, each of which covers a large and important tract of American life. These are the broadcast and cable industry, and higher education. Both institutions commonly, even universally, ban hate speech. The first does this quietly, without drawing attention to the fact that it does. The second does so openly and noisily. The first constitutes what has long been the public square of American life. (Now it must share that role with the Internet.) The second conducts the education into public consciousness of half of America’s youth, from which the governing classes will in large measure be drawn. (Union leadership has historically represented the other half, but their presence is today sorely diminished.) Unlike the workplace, which vexes classification as either public or private, both these institutions play the role of the public reaching into and forming or educating the private. One of them comes into your home; the other becomes your home, at least for many, at least for a time. Neither, however, forms an arm or agent of the government. Even though they represent the public, they are unabashedly private and aggressively lay claim to all the freedoms that privacy in America entails. Hence regulating hate speech for them is entirely an expression of freedom. It is what they wish or think they need to do. It is civil society regulating itself, restraining itself in its own way for its own reasons, as distant as can be from the model of regulation offered by criminal law.

Standards and practices

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24 We had the invaluable assistance in the preparation of this section of an attorney experienced in standards and practices in the broadcast and cable media. We shall refer to the conversation with this attorney as “private conversation.”
Every broadcast and cable network in the United States has a censor. Every one pays it to do its job. The censor is a division within the network. The network hires the censor and fires the censor. The censor is not just one person. It is a division, typically known by the name “standards and practices.” Actually it is three separate divisions. One of them is devoted to regulating the content of commercials, another to monitoring news shows, and a third, entertainment. All of them ban hate speech.

It is hard to come by information about standards and practices. Networks guard the secrecy of their codes as proprietary information. The fact that they have them is public; what is in them is not. What little information there is often becomes public during a controversy, for example when a network is forced to defend a controversial news broadcast. The codes are

26 Bruce Linton, supra note 25, 487, note 29 (“All of the manuals given to this writer by station managers … [were] provided in confidence and cannot be cited specifically as to the station.”).

In testimony before Congress about a report she co-authored, “Television’s Performance on Election Night 2000: A Report to CNN,” Joan Konner, Professor and Dean Emerita of the Columbia University Graduate School of Journalism, said: “Public affairs journalism is the pursuit of truth in the public interest, and its major values are accuracy, fairness, balance, responsibility, accountability, independence, integrity and timeliness. Those are the standards that informed our judgment. And they are the standards that define professionalism, according to the written codes of most mainstream organizations and the journalists that work for them.” House Energy and Commerce Committee hearing regarding Election Night Coverage, Feb. 14, 2001.
secret for a variety of reasons. First and foremost, code content is a target of special interest groups. Networks can avoid negotiating with these groups over language if the groups don’t know the language. Also, networks want to maintain maximum flexibility; they don’t disclose restrictions explicitly so they can adapt as situations require. They believe that it is hard to be flexible if you are getting pressure to stick to language that you have already approved in writing saying what is acceptable and what isn’t.

The broadcast industry is clear about the motives for its codes. Prior to 1982 the National Association of Broadcasters published a code, the purpose of which was to fend off government regulation and to minimize audience and advertiser dissatisfaction. The NAB withdrew the code in 1982, when the Department of Justice won a summary judgment motion in its suit against the NAB, alleging that some of the advertising restrictions in the code violated the antitrust laws. The reason the industry withdrew the entire code rather than just the affected

Bruce Linton’s article was written in the wake of the National Associations of Broadcasters abandoning its code in 1982, when the Department of Justice won summary judgment in a suit against the NAB alleging that some of the advertising restrictions in its code violated the antitrust laws. Bruce Linton, supra note 25.

28 In the words of one industry participant, standards and practices are a “flashpoint for advocacy interest groups,” and these groups “are not always reasonable.” “Pressure groups … are … organized and vocal.” Bruce Linton, supra note 25, at 484. Alice Henderson and Helaine Doktori have written about their work in standards and practices: “We also meet with representatives of various recognized special interest groups who frequently offer insights to their specific areas of concern. Input from these organizations, our affiliated stations, and our viewing audience is given careful consideration in the formulation and application of CBS broadcast acceptance policy.” Alice M. Henderson, Helaine Doktori, “How the Networks Monitor Content,” in Stuart Oskamp, Television as a Social Issue, Applied Social Psychology Annual Eight (Thousand Oaks, CA: Sage Publications, Inc., 1988), 130. See also Kathryn C. Montgomery, Target: Prime Time: Advocacy Groups and the Struggle Over Entertainment Television (New York: Oxford University Press, 1989).

provisions is that the political environment in 1982 was anti-regulation. The NAB withdrew the code because it felt that politically it didn’t need one. But that put the question to the networks: If the government doesn’t care, do you? Do you really want to live by a code or did you have a code simply to fend off government regulation? The answer was: We really do want to live by a code. Our advertisers and viewers demand it, and we always fear content regulation.

“Our standards address the ‘mass audience’ that watches us,” says a statement of the CBS/Broadcast Group, “recognizing that, in the final analysis, it is the individual viewer that establishes his or her own standards, for it is in the viewer’s power simply to change channels or turn us off.” As one person in the industry told us, “Standards and practices is about brand protection.” Others have said: “One of the most important factors in our review is the audience’s expectation. Not only does the viewing audience for individual programs vary … but every individual viewer brings a different attitude and background…. The editors in Program Practices are trained to review program material with a view toward meeting this enormously complex set of audience expectations.”

The FCC currently regulates only indecency, and only in broadcast, not cable. Also, the focus of indecency regulation is narrow – content parents would like to keep from their children

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30 David E. Hutchinson, supra note 29, at 234. NAB replaced the code in October 1990 with an anodyne Statement of Principles of Radio and Television Broadcasters Issued by the Board of Directors of the National Association of Broadcasters. The Statement has little bark and no bite.  
32 Private conversation.  
33 Alice M. Henderson and Helaine Doktori, supra note 28, 131.
while children are likely to be watching television. Nevertheless, the possibility of more intrusive regulation always looms, and fear of that accompanies “brand protection” as a subsidiary impetus towards self-regulation. The networks have one eye cocked at the public, the other at the FCC.

Because the dominant aim of standards and practices is protection of the network against adverse public reaction, we can expect differences amongst codes. (Even if the language of two codes happens to be the same, there may be differences in application.) Some networks fish in the same waters. If “brand protection” is indeed the watchword of standards and practices, then these networks should make similar decisions about content. But other networks fish in other waters. Their standards and practices decisions should reflect the difference. And they do.

Even within a single network, individual stations have the ability to make their own decisions about content, and stations in different parts of the country have different sensitivities and different thresholds of tolerance. Variation also occurs within a network between different standards and practices divisions. News divisions have more flexibility in their standards and practices than do entertainment divisions. News standards and practices may permit the airing of a violent incident that entertainment standards and practices would prohibit. The word “nigger” is absolutely forbidden in entertainment, but would probably be allowed in a documentary about the Klu Klux Klan.

35 David E. Hutchinson, supra note 29, xxxx.
36 Private conversation.
37 Private conversation.
Standards and practices classifies hate speech under the code rubric of “offensive language,” though “offensive language” is a broader term. It is regarded as “one of the more difficult areas.” The actual standard depends on the context and content of the show. The offensive language standard is “thornier” than others. What’s allowable, the actual standard, “develops over time,” and is variable, depending on the audience and advertisers of a particular program and the particular genre (news vs. entertainment). In part, network standards and practices practitioners find the “offensive language” standard difficult because it presents them with a dilemma. On the one hand, they experience a sense of responsibility towards the clients, where the clients are the network’s advertisers and audience. On the other hand, where the goal is entertainment, they don’t want the end result to be bland. So it is that standards and practices practitioners find news and reality easier than fiction, because they don’t present this dilemma. Nonetheless, they have “made peace” with the need to regulate offensive speech.

Network standards and practices divisions are private censors. They represent their fraction of the public, just as the government as a whole claims to represent the public as a whole. But unlike the government they live under a perpetual referendum. The voters are the viewers and advertisers. They vote by turning a show on or turning it off, by placing ads for it or not placing ads for it. But standards and practices legislates just for their fraction. The broadcast and cable industry censors the public sphere, but only in a patchwork fashion. They do not distil the common sense of the community as a whole. Indeed network audiences don’t form a

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38 Private conversation.
39 Private conversation. Alice Henderson and Helaine Doktori capture the dilemma unwittingly: “Generally speaking, our concerns in Program Clearance are that plots and characters be balanced in the presentation of ideas and issues and the sexual themes, violent action, and language be neither gratuitous nor exploitative.” Alice M. Henderson and Helaine Doktori, supra note 28, 131. Enough said.
community of any sort. They are dispersed, anonymous. Also, the codes produced by these divisions are legislation only in a diminished sense of legislation. They are law, it is true. They rule what will and what won’t go on air. They result in what are, effectively, adjudications. They govern behavior. Producers know what they say and adjust program content accordingly. They have teeth; if standards and practices won’t approve content, it doesn’t get aired. And they do reflect the practical morality of a group of people – the network’s audience and its advertisers.

But the codes are secret, and that is what diminishes them as law. They do not announce the practical morality to the very people from whom it has been drawn. They do not permit a people to be in conversation with itself. That is an essential – perhaps the essential – function of law. If a people cannot be shown its practical morality, then the people cannot know itself. It can’t know what it is endorsing, because it can’t know what it is rejecting. It can’t know whether it approves or disapproves of what it has turned out to be. The most vulgar of metaphors is best. Law holds up a mirror to a people. It permits a people to see who they are and who they wish to be. Standards and practices codes cater to our moral predilections, but shield us from knowing what those predilections are. That is, perhaps, an act of mercy. But without knowledge, we cannot take responsibility. We lose the power of progressive moral beings. We lose the gift of dissatisfaction. It is one thing to have a moral predilection, quite another to acknowledge that one has it. We might be satisfied to have a predilection, but not to see it made into law.

Speech codes
The standards and practices codes do have an enormous advantage from one perspective. They allow Americans to hold on to a myth. They allow them to believe that they are a political culture in which the values of the First Amendment are paramount. By putting the suppression of hate speech under wraps, they permit Americans the conceit that their public discourse is freewheeling, no holds barred, a brawl. It is not. But myths are important, the myth of the First Amendment no less so than any other political origin myth. But there is another institution in the United States where Americans are not so shielded, where the constraints upon discourse are overt and meant to be felt and understood as constraints.

[College and university speech codes in the United States ban hate speech. They also ban much else. The codes vary enormously in content and justification. They also vary in origin and administration. Yet they are prevalent.]

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In this, as in other insights about democracy in America, Alexis de Tocqueville saw farthest and saw first. He saw that democratic governance does not necessarily or only take place through popular control of the organs of the state. Representative democracy is only indirectly, hence imperfectly, democratic. The people may form a government, but it is the government that rules, not the people. Only governance that is directly democratic can be perfectly democratic, when the people rules itself without the intermediation of the state. And that is what we find in the devices restraining hate speech in the United States. They are perfectly democratic. They are instruments by which civil society rules itself. The people acting
through civil society restrains its own speech. Popular self-restraint, not the government, governs hate speech in the United States.

Tocqueville’s insight was that democratic governance is far more powerful than any other sort of governance, and certainly more powerful than the aristocracies and autocracies of Europe. In Chapter 7 of *Democracy in America* Tocqueville discusses “the Omnipotence of the Majority in the United States and Its Effects.” He considers “the Power That the Majority in America Exercises over Thought.” “When it comes,” he says, “to examine what the exercise of thought is in the United States, then one perceives very clearly to what point the power of the majority surpasses all the powers that we know in Europe.” Thought “makes sport of all tyrannies,” but not in America: “as long as the majority is doubtful, one speaks; but when it has irrevocably pronounced, everyone becomes silent and friends and enemies alike then seem to hitch themselves together to its wagon.” A king has only material power. He can act on actions, but not reach the will. The majority’s power “acts on the will as much as on actions, and … at the same time prevents the deed and the desire to do it.” “I do not know any country,” Tocqueville says, “where, in general, less independence of mind and genuine freedom of discussion reign than in America.” Every government but democracy is divided government. So in every government but democracy one can always find a party or fraction willing to support what one wants to say. “But in the heart of a democracy organized as that of the United States, one encounters only a single power, a single element of force and success, and nothing outside it.” And here it is that we come to the point:

Under the absolute government of one alone, despotism struck the body crudely, so as to reach the soul; and the soul, escaping from those blows, rose gloriously above it; but in
democratic republics, tyranny does not proceed in this way; it leaves the body and goes straight for the soul. The master no longer says to it: You shall think as I do or you shall die; he says: You are free not to think as I do; your life, your goods, everything remains to you; but from this day on, you are a stranger among us. You shall keep your privileges in the city, but they will become useless to you; for if you crave the vote [choice] of your fellow citizens, they will not grant it to you, and if you demand only their esteem, they will still pretend to refuse it to you. You shall remain among men, but you shall lose your rights of humanity. When you approach those like you, they shall flee you as being impure; and those who believe in your innocence, even they shall abandon you, for one would flee them in their turn. Go in peace, I leave you your life, but I leave it to you worse than death.\(^{40}\)

If Tocqueville is right, what need has the United States of criminal sanctions to stop hate speech? If the majority can forestall hate thoughts, they don’t have any need to stop hate speech. America’s vaunted willingness to tolerate hate speech is a luxury in which only those who don’t have hate thoughts can indulge. The opinion of the majority in a democracy is far more powerful than any criminal sanction. Look at all the crimes that fall into desuetude. Criminal sanctions without the support of the opinion of the majority are even counterproductive. They just embolden the speaker who wants to break with the majority; they make a martyr of him amongst his peers. What one really wants is to convince him that he has no peers, to create an

environment where there are no like minded persons and where like minded persons, when they exist, are too cowed by the majority to speak.

It is inestimably useful, for this purpose, to have the collaboration of institutions, especially the collaboration of institutions to which citizens freely turn. These may be employers, or broadcast and cable networks or colleges and universities; it is all the same, so long as the citizen is freely there. But these institutions in particular form the “commanding heights” of a democratic public. Once the forces arrayed against hate speech have captured these institutions – the employers, the networks, the colleges and universities – they have effectively deprived hate speech of a meaningful public forum. They have turned the educative powers of these institutions against the First Amendment, at least against its position that hate speech ought not to be restrained. What is left for these forces to conquer? Where else is hate speech getting its purchase on the public?

These questions have answers. The quarantining of hate speech by civil society in the United States is by no means perfect or complete. But the Internet aside (which, after all, is equally present in the other constitutional democracies), the forums that hate speech musters are, by and large, not significant forums. That could change in a flash. Nothing guaranties that the tyranny of the majority will continue to be directed against hate speech. The scientific point, however, remains valid, that it is possible to regulate hate speech through the self-restraint of civil society as effectively as through the restraint of criminal law.