

“Hate Speech” and the Risks of Free Speech

The Wrong Kind of Climate Control

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As sure as rain follows upon dark clouds, the cry has gone up to “do something” about so-called hate speech. Fairly typical of the reactions to the shooting of Congresswoman Gifford and several others by Jared Loughner was ‘Tikkun’s’ Rabbi Michael Lerner, who rhetorically [intoned](#): “Isn’t it time for us to demand that our government investigate the violence-generating discourse of the racists and the haters?”

The Constitutional answer is: absolutely not! Lerner and those of like mind need to read — thrice and slowly — the words of James Madison on this very issue:

“There are ... two methods of removing the causes of [political] faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

“It could never be more truly said of the first remedy, than it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

“The second expedient is as impracticable as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed.” (Federalist Paper No. 10.)

What Lerner is urging, in modern form, is the revival of laws against sedition. The “protected values” (or in modern legal lingo, the “cognized groups”) may be different but the principle is the same: words which have a “tendency” to incite violence and/or threaten the security or wellbeing of ... [insert your cherished value-of choice here]... need to be outlawed and criminally punished.

Whether enacted in 1789, 1918 or 2011, laws against sedition are inimicable to a free society; and no amount of spurious sociological “impact studies” (so-called) can change that constitutional fact.

What does it actually mean to call for government “investigation” of “violence-generating” speech?

The investigation part is fairly easy to answer: it means police and FBI agents keeping tabs of what you say, interviewing your neighbors about what do, getting warrants to poke into

your reading habits and ultimately detaining you for further questioning. Such investigations inevitably entail what the Nazis called “block wardens” — neighbors and other snitches who make it their business to overhear your chat and take note of the books and guests you bring home. Already both the government and various interest groups have set up networks and web pages to recruit security-volunteers to poke around and keep an ear out for terrorism- or racist- generating violence.

What then is to be the casus for such inquisitions? What exactly is ‘violence-generating’ speech?

Let us be plain and simple, for Thucydides tells us that simplicity of speech is the mark of a noble man. Websters (1913 edition), [defines violence](#) as “physical force, strength of action or motion; as the violence of a storm; the violence of a blow or conflict;” also, “to assault or injure”. By metaphorical extension: “moral force; vehemence.”

Clearly (and simply) words are not violence; they do not cause physical injury. Concoctions like ‘verbal assault’ are confusions of speech which are the marks of hysteria or sophistry.

Words may be uttered with “moral vehemence.” Preachers do it all the time. Implacable foes along the Great Abortion Divide are very morally vehement. But is it ‘violence generating’ to call abortion murder?

According to Lerner, violence-generating words are those which “create a climate of hate.” Murder is certainly loathsome. Pictures of aborted fetuses certainly engender revulsion and disgust. But are the pictures false? If abortion foes cannot call abortion “murder” then what must they call it? Whether it is or is not murder is the whole issue of the debate. In effect, Lerner’s demand “creates a climate” where abortion foes are intimidated (under threat of government investigation) into silence. The same holds true when the intimidation works in the other direction.

Attentive readers of Lerner’s article will have noticed a subtle switch from his vaguish opening reference to “violence-generating” speech to the ensuing and even more vague reference to “rhetoric” which “contributes” to a “climate of hate” which “individuals act on.”

The reason for the verbal shuffling is that Lerner can’t quite get himself to say that speech causes violence. It doesn’t, period. The quintessential scientific test of causality is replication and predictability; and no one has ever demonstrated that a particular word, phrase or book has consistently and predictably caused a violent reaction — the dread ‘Mein Kampf’ included. Even if human predispositions are genetically determined or environmentally influenced, action is the result of free will.

Sometimes, action is the result of craziness as in Loughner’s case or as in the case of Don Quixote who devoured novels of chivalry until “being quite out of his wits, he hit upon the strangest notion that ever a madman in this world hit upon, and that was that it was right and requisite that he should make a knight-errant of himself, roaming the world in full armor on horseback ... righting every kind of wrong, and exposing himself to peril and danger from which he was to reap eternal renown and fame.” In other words, he became a militia-man.

But the underlying point of Cervantes’ satire was precisely that books do not cause madness. In case anyone might not get it, he made this clear in a prefatory couplet where he wrote that madness is the “cure” for sadness. What drove Don Quixote on his errands of

mayhem, chaos and absurdity was an inner grief.

The fact is that people make of words what they will, often bending them all out of shape to suit some inner purpose or drive. Perhaps we might all be better off without speech altogether. As Jesus advised, “let your speech be, Yea or Nay: for whatsoever is more than these cometh of evil.” (Math. 5:37) But Man is nothing if not a loquacious animal, and the desire to speak freely is the foremost urge of our souls or at least of our egos.

Laws against sedition, in whatever guise, are an attack on free speech. They are always couched in vague, open ended terms because the real target is not the alleged “dangers” protected against but some political agenda or ideology that is opposed.

Section 2 of the [Alien and Sedition Act](#) of 1789 provided

“...be it further enacted, That if any person shall write, print, utter, or publish,... any false, scandalous and malicious writing or writings against the government of the United States, ... with intent to defame the said government, ... or to excite against [it] ... the hatred of the good people of the United States, ...”

The [Sedition Act of 1918](#) made it a crime to

“willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States....”

California’s Criminal Syndicalism Act 1919 made it a crime to advocate or teach “any doctrine or precept” that espoused “unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control or effecting any political change.”

Section 13 of the [Reich Editorial Law](#) (4 October 1933) prohibited publication of anything which “tends to weaken the strength of: the German Reich, outwardly or inwardly, the common will of the German people, the German defense ability, culture or economy....” (1933 Reichsgesetzblatt, Part I, page 713.)

What all these laws have in common is a heap of nefarious adjectives coupled with a “tendency” connected to some protected good.

The United States Supreme Court initially upheld these laws precisely on the grounds that they combatted a subversive climate.

In [Frohwerk v. United States](#) (1919) 249 U.S. 204 the Court held that “a person may be convicted of a conspiracy to obstruct recruiting by words of persuasion.” In that case the defendant had published a pamphlet in which he called war “murder” and in which he went “on to give a picture, made as moving as the writer was able to make it, of the sufferings of a drafted man.” Most horribly, the author had sneered at various British nobles and had said that “the sooner the public wakes up to the fact that we are led and ruled by England, the better.”

In [Debs v. United States](#) (1919) 249 U.S. 211, the Court followed suit and upheld the criminalization of a pamphlet by Eugene Debs in which the famous labor leader had given:

“illustrations of the growth of Socialism, a glorification of minorities, and a prophecy of the success of the international Socialist crusade, with the interjection that ‘you need to know that you are fit for something better than slavery and cannon fodder.’ “

That statement, the Court held, did not simply oppose war in general but opposed the present and the particularly noble war the nation was embarked upon and “opposition was so expressed that its natural and intended effect would be to obstruct recruiting.” (Id., at p. 251.)

This line of reasoning culminated in [Whitney v. California](#), (1927) 274 U.S. 357, where the Court ruled that “the Constitution d[id] not confer an absolute right to speak, without responsibility, whatever one may choose,” and that government had the power to punish those who “abused” their rights of speech “by utterances inimical to the public welfare, tending to incite crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow.” (Id., at p. 371.)

The common theme of these and too many like cases is that they sought to punish a “tendency” which is subjectively perceived to “endanger” some asserted good. Just as typically, some untoward event such as a Reichstag Fire, a bombing or the murder of an official, was exploited as the necessity to protect “public safety.”

Tyranny always rides to town on the pony of safety.

Today’s political correctness mavens may use adjectival gerunds and verbal-burble which has an impressive sociological sounding ring, but the mental paradigm is the same. They either seek to mandate a uniformity of opinion on whatever subject they are obsessing over, or they seek to cast any opposition to their pet-rocks as creating some kind of danger.

Often times they heighten the “climatology” by invoking a so-called “clear and present danger” to something or other. But this erstwhile standard — derived from [Schenck vs. United States](#) (1919) 249 U.S. 47 — is simply a rhetorically tweaked version of the “bad tendencies” rule. Any danger is always “present” precisely because a ‘danger’ is simply the present prospect of some possible future harm. Schenck was overruled because, as Justice Douglas put it, “[t]he only difference between the ‘expression of an opinion’ and an ‘incitement’ ... is the speaker’s enthusiasm for the result. ([Brandenburg v. Ohio](#) (1969) 395 U.S. 444, 452.)

And Man is certainly an enthusiastic animal. Once again it behooves us to listen to Madison:

“As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other....

“The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation

as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts.” (Federalist Paper No. Ten.)

Madison’s misanthropy is more than justified by the media’s screaming rabble-rousers and by Palin’s smart-alec thuggishness. But Madison also understood that “the most common and durable source of factions has been the various and unequal distribution of property.” (Ibid) Put another way, the human tendency toward disputatious vehemence is increased by inequality and insecurity.

Thus, it is a useless, if pretty, piety to urge everyone to be “civil” in their discourse. The reason for the inflamed nature of present political debate in the United States is that the country is in decline and economic inequality and insecurity have destroyed our social and cultural fabric. This creates a terminal downward spiral because the insecurity-generated yelling and accusing prevents the emergence of fair and reasonable solutions to economic and social problems whose very gravitational pull is aggravated by the inflamed rhetoric generated.

To make matters even worse, some of the very forces which generate the economic inequality also finance the spewing of inflamed rhetoric which they then assert needs to be controlled in the name of personal or national safety.

It is a false consciousness to think that “civility” in discourse can be restored by political correctness or laws against seditious incivility. A greater modicum of civility will be restored to political discourse when and only when our civis itself becomes more fair and just and when we cease chasing after the chimera of militarized security. That will be a hard reversal to manage.

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