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The Autonomy Defense of Free Speech*

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The concept of autonomy has been invoked by legal and political theorists in defense of a wide range of rights, including the right to vote,[1] the right to be free from taxation for redistributive purposes,[2] rights to contraception, abortion, freedom of association, and freedom of religion,[3] and the right to free speech.[4] The autonomy defense of free speech is

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1. See David A. J. Richards, "Autonomy in Law," in *The Inner Citadel: Essays on Individual Autonomy*, ed. John Christman (New York: Oxford University Press, 1989), pp. 246–58. Richards also considers autonomy to ground the right to free speech, as well as defendants' rights under the criminal law. According to Richards, "Autonomy is a core value in American public and private law, since it is one of the constitutive ingredients of the generative idea of background rights of the person to which interpretive controversy in American law characteristically appeals" (p. 246).

2. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 48–51, 169–74.

3. Rogers M. Smith refers to these rights, as well as the right to free speech and the right to privacy relied upon in recent Fourth and Fifth Amendment cases, as grounded in "the fundamental value [of] autonomy," in "The Constitution and Autonomy," *Texas Law Review* 60 (1982): 175–205, p. 175. In this article, Smith analyzes what he takes to be "a broad and basic transformation in liberal political theory, and correspondingly in American constitutional thought, that has given a new centrality to autonomy concerns" (p. 176).

4. I use the term "free speech" to cover freedom of the press as well. Autonomy defenses of free speech can be found in David A. J. Richards, "Autonomy in Law," "Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment," *University of Pennsylvania Law Review* 123 (1974): 45–91, "Pornography Commissions and the First

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arguably the one most commonly used by liberal legal and political theorists, and it appears to be gaining in popularity. Those who have attempted to ground the right of free speech in an account of autonomy include C. Edwin Baker, Ronald Dworkin, Charles Fried, Diana T. Meyers, Thomas Nagel, Martin Redish, Thomas Scanlon, and David Strauss. In addition, as Robert Post has argued, even those defenses of free speech that appeal to uninhibited public discourse as essential for a well-functioning democracy can be viewed as ultimately based on "the ideal of autonomy."[5]

In this article I examine a variety of liberal defenses of free speech based on autonomy, especially as they are employed in arguments against restricting so-called hate speech. I then discuss six accounts of autonomy found in the philosophical literature and argue that five of these are unsatisfactory as accounts of autonomy and that none of them yields a defense of free speech that precludes restrictions on hate speech.

For well over a decade we have witnessed an increase in reported incidents of hate speech—speech that vilifies individuals or groups on the basis of such characteristics as race, sex, ethnicity, religion, and sexual orientation, which (1) constitutes face-to-face vilification, (2) creates a hostile or intimidating environment, or (3) is a kind of group libel.[6]

Amendment: On Constitutional Values and Constitutional Facts," *Maine Law Review* 39 (1987): 275–320, "Toleration and Free Speech," *Philosophy and Public Affairs* 17 (1988): 323–36; Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), "Liberty and Pornography," *New York Review of Books* (August 15, 1991), pp. 12–15, "Women and Pornography," *New York Review of Books* (October 21, 1993), pp. 36–42, "The Coming Battles over Free Speech," *New York Review of Books* (June 11, 1992), pp. 55–64; Thomas Scanlon, "A Theory of Freedom of Expression," *Philosophy and Public Affairs* 1 (1972): 204–26, "Freedom of Expression and Categories of Expression," *University of Pittsburgh Law Review* 40 (1979): 519–50; Charles Fried, "The New First Amendment Jurisprudence: A Threat to Liberty," in *The Bill of Rights in the Modern State*, ed. Geoffrey R. Stone, Richard A. Epstein, and Cass R. Sunstein (Chicago: University of Chicago Press, 1992); David Strauss, "Persuasion, Autonomy, and Freedom of Expression," *Columbia Law Review* 91 (1991): 334–71; Martin H. Redish, *Freedom of Expression: A Critical Analysis* (Charlottesville, Va.: Michie, 1984); C. Edwin Baker, "Scope of the First Amendment Freedom of Speech," *UCLA Law Review* 25 (1978): 964–90, *Human Liberty and Freedom of Speech* (New York: Oxford University Press, 1989); Diana T. Meyers, "Rights in Collision: A Non-punitive Compensatory Remedy for Abusive Speech," *Law and Philosophy* 14 (1995): 203–43; and Thomas Nagel, "Personal Rights and Public Space," *Philosophy and Public Affairs* 24 (1995): 83–107. Kent Greenawalt, who criticizes some attempts to ground free speech in the singular value of autonomy, nonetheless appeals to autonomy as one of "the subtle plurality of values that does govern the practice of freedom of speech." Kent Greenawalt, "Free Speech Justifications," *Columbia Law Review* 89 (1989): 119–55, p. 119.

5. Robert C. Post, "Managing Deliberation: The Quandary of Democratic Dialogue," *Ethics* 103 (1993): 654–78, p. 666.

6. For a selected list of reported incidents of hate speech on college campuses from 1986 to 1988, see Howard J. Ehrlich, *Campus Ethnoviolence and the Policy Options* (Baltimore: National Institute against Prejudice and Violence, 1990), appendix. For discussions of incidents of hate speech through 1994, see Laura J. Lederer and Richard Delgado, eds., *The*

Some forms of pornography are put into the category of hate speech by those who consider it to be, as Susan Brownmiller put it, "the undiluted essence of anti-female propaganda."[7] Certainly not all that is labeled "pornographic" counts as hate speech against women. But much of pornography presently on the market—especially the extremely violent and degrading variety that has been on the rise over the past decade—does count as hate speech when it constitutes face-to-face vilification, creates a hostile and intimidating environment, or is a kind of group libel.[8]

The disjunctive definition of "hate speech" employed in this article is based on definitions that have been used in hate speech ordinances in municipalities and on university campuses. The first disjunct, defining hate speech as face-to-face vilification, makes use of the so-called fighting words doctrine and was employed in the following code adopted by Stanford University: "Speech or other expression constitutes harassment by vilification if it: (a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and (b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and (c) makes use of 'fighting words' or non-verbal symbols [which] are commonly understood to convey direct and visceral hatred or contempt."[9]

The second disjunct is based on a University of Michigan hate speech code regulating "any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, [etc.], and that . . . creates an intimidating, hostile, or demeaning environment."[10] I will label this form of hate speech 'hostile environment harassment'.

Price We Pay: The Case against Racist Speech, Hate Propaganda, and Pornography (New York: Hill & Wang, 1995).

7. Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Bantam, 1975), p. 443.

8. For numerous examples of pornography that could be construed as hate speech under this definition, see the analyses of pornography in Catherine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987), *Only Words* (Cambridge, Mass.: Harvard University Press, 1993), *Toward a Feminist Theory of the State* (Cambridge, Mass.: Harvard University Press, 1993); Attorney General's Commission on Pornography, *Final Report,* U.S. Department of Justice, July 1986; Laura Lederer, ed., *Take Back the Night: Women on Pornography* (New York: William Morrow, 1980); Catherine Itzen, ed., *Pornography, Women, Violence and Civil Liberties* (New York: Oxford University Press, 1992); and Lederer and Delgado, eds.

9. Quoted in Charles R. Lawrence III, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," in Mari J. Matsuda et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder, Colo.: Westview, 1993), p. 67. The Stanford code was struck down by the court because of the Leonard Law which requires even private educational institutions in California to abide by the U.S. Constitution.

10. *Doe v. University of Michigan,* 721 F. Supp. 852, 856 (E.D.Mich. 1989). This is a partial definition taken from the University of Michigan policy on discrimination and dis-

The third disjunct, which characterizes hate speech as a kind of group libel, is modeled on criminal libel law as well as on the tort of defamation. It holds that speech counts as hate speech if it (*a*) vilifies individuals or groups on the basis of sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin and (*b*) harms the reputation of individuals or groups because of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin. In *Beauharnais v. People of the State of Illinois* (1952), the U.S. Supreme Court upheld an Illinois group libel law making it "unlawful for any person, firm or corporation to manufacture, sell . . . or exhibit . . . any publication [which] portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion [and thereby] exposes [them] to contempt, derision, or obloquy or which is productive of breach of the peace or riots."[11] Although critics of *Beauharnais* consider its ruling on group libel laws to have been implicitly overturned by *New York Times Co. v. Sullivan,*[12] it has never been officially overruled by the Court, and some legal theorists still consider it to be good law.[13]

While increasing numbers of individuals have been reporting that they have been the victims of hate speech, the courts have been striking down legislation intended to provide the targets of hate speech with some protection from it. Some universities initially responded to the recent proliferation of hate speech by instituting antiharassment codes—or by enforcing existing ones—only to have these codes ruled unconstitutional. The courts have ruled, in several recent cases, that even if hate speech constitutes a form of harassment or race or sex discrimination, it is protected under the First Amendment.[14] In his opinion in *American Booksellers Association v. Hadnut,* ruling the Indianapolis antipornography ordinance unconstitutional, Judge Frank Easterbrook conceded the empirical claims of the ordinance.[15] He wrote, "we accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language of the legislature, 'pornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex

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criminatory harassment, a policy which was ruled unconstitutional in *Doe v. University of Michigan*. This definition was based on existing sexual harassment law prohibiting "hostile environment" harassment. See *Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986).

11. *Beauharnais v. People of the State of Illinois,* 343 U.S. 250 (1957) at 251.

12. *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

13. See, e.g., Kenneth Lasson, "Group Libel versus Free Speech: When Big Brother *Should* Butt In," *Duquesne Law Review* 23 (1984): 77–130.

14. *Doe v. University of Michigan; UWM Post v. Board of Regents of the University of Wisconsin,* 774 F. Supp. 1163 (E.D. Wis. 1991).

15. For the U.S. Court of Appeals, 771 F.2d 323 (7th Cir. 1985).

which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women's opportunities for equality and rights [of all kinds].' Indianapolis Code § 16–1(a)(2)." Easterbrook concluded, rather stunningly, "Yet this simply demonstrates the power of pornography as speech." [16]

Likewise, in *John Doe v. University of Michigan,* an opinion ruling unconstitutional a University of Michigan policy on discrimination and discriminatory harassment, Judge Avern Cohn wrote: "It is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict. The difficult and sometimes painful task of our political and legal institutions is to mediate the appropriate balance between these two competing values." [17] Judge Cohn concluded that "while the Court is sympathetic to the University's obligation to ensure equal educational opportunities for all of its students, such efforts must not be at the expense of free speech." [18] In 1992, the U.S. Supreme Court ruled unconstitutional a Saint Paul, Minnesota, ordinance that made it a misdemeanor to "place on public or private property a symbol, object, [etc.] which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." [19]

A number of prominent liberal theorists who have argued strenuously and persuasively for a more egalitarian society and for an end to race and sex discrimination have at the same time defended a position, similar to that of the courts, which is that hate speech is constitutionally protected. This position has been defended by such influential liberal political philosophers and legal theorists as Ronald Dworkin, Charles Fried, David Richards, Thomas Scanlon, Thomas Nagel, and others who have argued that restrictions on hate speech would violate individuals' right to autonomy.[20] Although such liberal theorists, unlike libertarians, support government intervention in the service of such causes as welfare rights and greater racial and gender equality, when the issue is whether hard-core pornography should be regulated or whether neo-Nazi marches should be allowed in Skokie or whether hate speech should be tolerated on college campuses, they are in agreement with libertar-

16. Ibid., p. 329. One doesn't, however, hear the courts declaring that if segregation harms minorities' opportunities for equal rights this simply demonstrates the power of freedom of association.

17. *Doe v. University of Michigan,* 721 F. Supp. at 853.

18. Ibid., p. 863.

19. *R.A.V. v. St. Paul,* 120 L.Ed.2d, 305 (1992). Justice Scalia's opinion raises too many issues for me even to begin to discuss them here, but I examine them in my *Speech, Harm, and Conflict of Rights* (Princeton, N.J.: Princeton University Press, in press).

20. As Nagel observes, "The censorship of a fanatical bigot is an offense to us all." He makes it clear that he is "not just talking about the more ridiculous excesses of political correctness, but about the prohibition of hard-core, intentional expressions of hostility." See Nagel, p. 98.

ians who argue that we have a right to be free from governmental interference in these areas. Why such speech should be legally protected, especially when most of us feel strongly inclined and perhaps morally obligated to condemn it, is a difficult question for liberal theorists to answer.[21]

In this article I do not defend the positive thesis that there should be restrictions on hate speech. Rather, I argue *against* the main argument contemporary liberal theorists have given against such restrictions: the argument from autonomy. It may be that hate speech should be protected, but, if so, my argument shows that such protection must be grounded in a different defense of free speech.

In what follows, I employ the disjunctive definition of hate speech presented above because it captures most of what has been called "hate speech" in the legal literature. I do not claim that this is the only or the best definition. I am not arguing that it would pass constitutional muster at a public university or that it would be good policy at a private one. If used in a hate speech code at a public university and then challenged in the courts, this definition would certainly raise questions concerning vagueness and overbreadth and the group libel disjunct would probably be ruled unconstitutional for lack of a clear legal precedent. I am using this definition in an attempt to delimit the class of what counts as hate speech in order to examine whether the autonomy defense of free speech explains why hate speech should be protected.

The further question of whether hate speech is sufficiently harmful to warrant regulation is, of course, controversial, and although I think words can wound—as well as threaten, intimidate, harass, and subordinate—in much the same ways, and to the same extent, as other forms of conduct, I am not going to defend this controversial claim here.[22] One does not need to take a stand on the empirical claims about the harm of hate speech in order to enter this free speech fray, since a principle of free speech that is strong enough to be useful states that even if speech causes harms which, if brought about by nonspeech conduct, could justify restricting that conduct, such harms do not justify restricting that speech.

21. As Lee Bollinger notes, "There is a curious disjunction in our attitudes about the degree to which we should tolerate the speech of others. When we compare our reluctance to impose legal restraints against speech with our readiness to employ a host of informal, or nonlegal, forms of coercion against speech behavior, the paradox is striking." Lee Bollinger, *The Tolerant Society* (New York: Oxford University Press, 1986), p. 12.

22. I defend this claim in "Speech, Harm, and the Mind-Body Problem in First Amendment Jurisprudence," forthcoming in *Legal Theory*. For discussions of the nature of the harm of hate speech, see also Frederick Schauer, "The Phenomenology of Speech and Harm," *Ethics* 103 (1993): 635–53; Matsuda et al.; Kent Greenawalt, *Speech, Crime, and the Uses of Language* (New York: Oxford University Press, 1989), pp. 292–301; and Robert C. Post, "Racist Speech, Democracy, and the First Amendment," *William and Mary Law Review* 32 (1991): 267–327, pp. 271–77.

It might be thought, however, that the problem about restricting hate speech is a pseudoproblem, at least practically speaking, since hate speech, being speech, after all, is protected by the First Amendment. So, it might be claimed, however desirable one might consider restrictions to be, they could never be found to be constitutional. But the Supreme Court has not followed the absolutist interpretation of the First Amendment that one might have thought could be read off its straightforward wording: "Congress shall make no law . . . abridging the freedom of speech, or of the press." (The Fourteenth Amendment due process guarantee is taken to apply this constraint to the states as well.) In spite of Justice Black's famous statement—"I read 'no law abridging' to mean no law abridging . . ."—the courts have considered many categories of speech to be unprotected.[23] Some examples of speech the courts have over the years considered to be unprotected (or less protected than other categories of speech) are: words posing a "clear and present danger that they will bring about the substantive evils that Congress has a right to prevent";[24] "fighting words";[25] libel of private individuals;[26] obscenity;[27] and false advertising and advertising of harmful, but legal, products or activities.[28] With the exception of "fighting words," however, none of these categories has been taken to include hate speech.[29] And

23. Justice Hugo L. Black, *Smith v. California,* 361 U.S. 147, 157 (1959). See also his article, "The Bill of Rights," *New York University Law Review* 35 (1960): 865–81.

24. *Schenck v. United States,* 249 U.S. 47 (1919).

25. Fighting words are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. State of New Hampshire,* 315 U.S. 568 (1942).

26. Libel is printed defamatory speech that impeaches the reputation of an individual, exposing him or her to hatred, contempt, ridicule, or financial injury. At times, group libel has also been unprotected. Group libel is speech that "exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots." *Beauharnais v. People of State of Illinois,* 343 U.S. at 251. *Beauharnais,* though never formally overturned, is no longer considered to be authoritative. Group libel is now considered to be constitutionally protected speech. After *New York Times Co. v. Sullivan* was decided in 1964, it became extremely difficult for public figures to win libel suits, since the Court determined that "the constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan,* 376 U.S. at 279–80. Libel of private individuals continues to be less protected, however.

27. 'Obscenity' is defined as works that "appeal to the prurient interest in sex . . . in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value." *Miller v. California,* 413 U.S. 15 (1973).

28. See, e.g., *Posadas de Puerto Rico Assocs. v. Tourism Co.,* 478 U.S. 328 (1986).

29. Although the ordinance adopted by Stanford University touched only hate speech that counts as fighting words, it was recently struck down by the courts, since Stanford employs a definition of "fighting words" that is no longer considered good law, and since, although Stanford is a private institution, it is forbidden by California's "Leonard Law" to violate constitutionally protected rights.

even though some hate speech ordinances have classified hate speech as "fighting words," they have not defined "hate speech" as all and only fighting words, and so have been ruled unconstitutional in the courts.[30]

Philosophers have the luxury (not shared by judges or university administrators) of being able to focus on whether the courts' stance on hate speech is justified, not simply on what the courts' recent decisions have been. I think the fact that the United States is virtually unique among Western nations in providing legal protection for hate speech should prompt a response to the Court's doctrine that goes beyond unreflective self-congratulation.[31] The U.S. courts have, thus far, failed to develop a consistent and principled free speech doctrine which would explain why hate speech should be protected. Rather, the courts' decisions in free speech cases have resulted in what Laurence Tribe has called a "patchwork quilt of exceptions" with no underlying doctrine that unifies and explains them.[32] Can such a doctrine be found?

Contemporary philosophers and legal theorists writing on free speech join the Court in rejecting First Amendment absolutism. Some argue that certain reasons for restricting speech are always impermissible or presumptively invalid. Others advocate some sort of balancing between free speech interests and other interests, for example, the interest in security. Even on the balancing approach, however, the value of free speech is taken to justify weighing interests with "a thumb on the scales" in favor of speech. But what justifies this presumption in favor of special protections for speech? What makes speech special?

One popular view, based on a distinction between speech and conduct, is that speech has no costs (or at any rate none worthy of governmental concern). This misguided claim is disappearing from the more thoughtful legal literature, but it is still a common refrain in popular debates. All the proponents of the autonomy defense whom I discuss, however, acknowledge that speech costs, that, in one sense of the title of Stanley Fish's latest book, "there's no such thing as free speech."[33] Even Ronald Dworkin, who dismisses claims that pornography and hate speech can harm women and racial minorities by violating their rights, acknowledges that considerations of utility alone could lead to restrictions on such speech if one relied on a utilitarian defense of free speech

30. See *R.A.V. v. St. Paul* and *Corry v. Leland Stanford Junior Univ.*, California Superior Court at Santa Clara, case no. 740309, February 27, 1995.

31. For example, Canada and most Western European countries have laws prohibiting speech that incites or promotes racial hatred. See Bollinger, pp. 253–56.

32. Quoted in Mari Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," *University of Michigan Law Review* 87 (1989): 2320–81, p. 2349.

33. Stanley Fish, *There's No Such Thing as Free Speech: And It's a Good Thing, Too* (New York: Oxford University Press, 1994). For discussions of the costs of hate speech to its victims and proposals for compensating them, see Frederick Schauer, "Uncoupling Free Speech," *Columbia Law Review* 92 (1992): 1321–57; and Meyers, "Rights in Collision."

(which he rejects). Proponents of the autonomy defense argue, however, that hate speech deserves stringent protection even if it turns out to be quite costly to its victims.

Proponents of the autonomy defense of free speech, indeed proponents of any defense of a free speech principle, deny the more profound claim in Fish's title, however, namely that no justification can be given for a free speech principle.[34] I follow Frederick Schauer (and standard First Amendment jurisprudence) in holding that a free speech principle must be distinct from a principle of general liberty. It must hold that speech is special, in the following way: "Under a Free Speech Principle, any governmental action to achieve a goal, whether that goal be positive or negative, must provide a stronger justification when the attainment of that goal requires the restriction of speech than when no limitations on speech are employed."[35] Or, as Kent Greenawalt puts it, "A principle of freedom of speech asserts some range of protection for speech that goes beyond limitations on government interference with other activities."[36]

A free speech principle does not imply that speech can never be restricted. Rather, it generates a presumption against restricting speech, even harmful speech. A showing of harm will not, by itself, be sufficient to justify restriction. As Scanlon notes, "On any strong version of the doctrine [of freedom of expression] there will be cases where protected acts are held to be immune from restriction despite the fact that they have as consequences harms which would normally be sufficient to justify the imposition of legal sanctions."[37] On Scanlon's view, any theory of free speech which counts as a "significant" one—including his own—has this consequence, namely, that it considers immune from restriction not only offensive or morally repugnant speech, but also genuinely harmful speech, even where the resulting harms are so serious that the government would normally be justified in restricting individual liberties in order to prevent them. But why should speech be considered so special as to be worthy of protection, even when it is conceded to cause real harms—harms which, if brought about by any other means, would be considered unjust and legitimately preventable by governmental intervention?

Before I analyze the response given by advocates of the autonomy defense, I should mention that a number of other defenses of a free

34. Fish clearly means to assert both senses of his ambiguous title. Others who argue that no justification can be given for a free speech principle are Lawrence Alexander and Paul Horton, "The Impossibility of a Free Speech Principle," *Northwestern University Law Review* 78 (1984): 1319–57.

35. Frederick Schauer, *Free Speech: A Philosophical Enquiry* (New York: Cambridge University Press, 1984), pp. 7–8.

36. Greenawalt, "Free Speech Justifications," p. 120.

37. Scanlon, "A Theory of Freedom of Expression," p. 204.

speech principle have been given: the argument from truth,[38] the argument from diversity,[39] the argument from democracy,[40] the argument from distrust,[41] the argument from tolerance,[42] the pressure release argument,[43] and the slippery slope argument.[44] Mixed views combining two or more of the above defenses have also been defended.[45]

The above arguments are consequentialist, in that they hold that the reason to protect speech is that doing so will bring about desirable results, whereas restricting it will bring about undesirable results. Or, to put the position more precisely, restricting speech is more likely to have bad consequences than protecting it. Numerous objections have been raised to each of these arguments, and I am not going to discuss them here, except to point out a weakness common to all consequentialist defenses of the right to free speech.[46] If speech is to be protected solely

38. John Milton, *Areopagitica* (1644; reprint, New York: New York University Press, 1968); John Stuart Mill, *On Liberty* (1859; reprint, Indianapolis: Hackett, 1978); Oliver Wendell Holmes, dissenting, in *Abrams v. United States*, 250 U.S. 616, 630 (1919).

39. Mill.

40. Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper, 1948), *Political Freedom* (New York: Harper, 1960); Cass R. Sunstein, *Democracy and the Problem of Free Speech* (New York: Free Press, 1993); Owen Fiss, "Free Speech and Social Structure," *Iowa Law Review* 71 (1986): 1405–25.

41. Vincent Blasi, "The Checking Value in First Amendment Theory," *American Bar Foundation Research Journal*, no. 3 (1977), pp. 521–649; Schauer, *Free Speech;* Richard A. Epstein, "Property, Speech, and the Politics of Distrust," in Stone, Epstein, and Sunstein, eds.

42. Bollinger; David Lewis, "Mill and Milquetoast," *Australasian Journal of Philosophy* 67 (1989): 152–71.

43. Nadine Strossen, "Regulating Racist Speech on Campus: A Modest Proposal?" *Duke Law Journal* (1990), pp. 484–572; Thomas I. Emerson, *The System of Freedom of Expression* (New York: Vintage, 1970). Emerson includes this along with a number of other defenses of free speech.

44. The slippery slope argument is the one I hear most often from students and popular commentators. Judges are also fond of it. Judge Pell used a slippery slope argument in an appellate court opinion striking down the Village of Skokie's ordinance prohibiting dissemination of material which "promotes and incites hatred against persons by reason of their race, national origin, or religion, and is intended to do so." *Collin v. Smith*, 578 F.2d 1197, 1199 (1978). Pell argued that "the ordinance could conceivably be applied to criminalize dissemination of *The Merchant of Venice*," *Collin v. Smith*, 578 F.2d at 1207. In discussion (April 6, 1990), Lewis characterized his own defense of free speech in "Mill and Milquetoast" as a version of the slippery slope argument, but I think it is more accurately characterized as a version of the argument from tolerance.

45. Greenawalt, "Free Speech Justifications"; Joshua Cohen, "Freedom of Expression," *Philosophy and Public Affairs* 22 (1993): 207–63; and Thomas I. Emerson, "Toward a General Theory of the First Amendment," *Yale Law Journal* 72 (1963): 877–956.

46. See, e.g., Schauer, *Free Speech*, and "Slippery Slopes," *Harvard Law Review* 99 (1985): 361–83; Alexander and Horton; the recent debate about Mill's theory of free speech in *Ethics* by David Dyzenhaus, "John Stuart Mill and the Harm of Pornography," *Ethics* 102 (1992): 534–51; Robert Skipper, "Mill and Pornography," *Ethics* 103 (1993): 726–30; Richard Vernon, "John Stuart Mill and Pornography: Beyond the Harm Principle," *Ethics* 106 (1996): 621–32; and Greenawalt, "Free Speech Justifications." As Greenawalt warns,

on the basis of controversial empirical claims about the positive effects of free speech and the negative effects of restrictions (rather than on the grounds that speech is intrinsically worthy of protection), then this leaves the right to free speech vulnerable to being outweighed by the benefits of restrictions if the scales happen to tip the other way.

The argument from autonomy,[47] which maintains that not to honor an individual's choice to speak—or to receive others' speech—would violate that person's right to autonomy, is typically presented as a nonconsequentialist defense of free speech.[48] This defense is supposed to have the advantage of showing why the right to free speech is immune to balancing. As I will argue, however, not all versions of the argument from autonomy are nonconsequentialist, and even those that are cannot justify a free speech principle strong enough to preclude restrictions on hate speech.

Joshua Cohen has recently presented an objection to the autonomy defense (which he dubs the "maximalist view" of free speech on account of the high, indeed trumping, value it places on the right to free speech). Cohen points out that the view that "expression always trumps other values because of its connection with autonomy . . . suggests that a commitment to freedom of expression turns on embracing the supreme value of autonomy" which "threatens to turn freedom of expression into a sectarian political position."[49] Cohen asks, "Is a strong commitment to expressive liberties really available only to those who endorse the idea that autonomy is the fundamental human good—an idea about which there is much reasonable controversy?" In reply, Cohen states, "I am not doubting that such a strong commitment *is* available to those whose ethical views are of this kind, but I reject the claim that such views are really necessary."[50] I want to make it clear that I am doubting, and am in fact rejecting, precisely this: that the acceptance of any theory of autonomy yields a defense of free speech that precludes restrictions on hate speech. This makes my critique of the autonomy approach more decisive and in one important way less controversial than Cohen's, since the liberal

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however, we should be wary of strategies that attempt to eliminate certain reasons for free speech by showing that they are "applicable to things other than speech" since a "reason that applies to other subjects may apply with special intensity to speech; various reasons may coalesce in a unique way with respect to speech" (p. 126).

47. This argument has been given by R. Dworkin, Scanlon, Richards, Fried, Strauss, Baker, Redish, Meyers, and Nagel. See references in n. 4.

48. Greenawalt notes that not all versions of the argument from autonomy are nonconsequentialist in nature, although his classification of these versions differs from my own. For example, he considers Richards to be a proponent of a consequentialist version, whereas I place him in the nonconsequentialist camp, since he claims to derive the right to free speech from a moral right to autonomy which functions as a side constraint on governmental interference. Greenawalt, "Free Speech Justifications," pp. 143–45.

49. Cohen, p. 222.

50. Ibid.

theorists who advocate the autonomy defense of free speech argue, contrary to Cohen, that they do not "endorse the idea that autonomy is *the* fundamental human *good*" (my emphases). Rather, they claim that respect for autonomy is required by the correct view of right.[51]

In order to evaluate the autonomy defense of free speech, we first need to determine what is meant by 'autonomy'. There is a rapidly growing philosophical literature on the subject, too vast and diverse to canvass here.[52] Although everyone agrees that the word 'autonomy', true to its etymological roots, refers in some way to self-government; some consider it to denote a capacity to govern oneself, while others think it refers to an achieved state of self-government, a right to govern oneself, or an ideal of virtue, that is, a value to be pursued.[53] Some write about moral autonomy, others about personal autonomy or individual autonomy. The term 'moral autonomy' is frequently employed in the free speech literature, for, I think, a variety of reasons: those employing this defense of free speech are heavily influenced by Kantian accounts of autonomy equating autonomous judgment with moral judgment; they are most concerned about the threat of governmental abuse in the area of "morals legislation"; they consider all persons to be capable of arriving at their own moral convictions, but not, typically, their own theories in physics or medicine, for example, where they must rely on the opinions of experts; and, finally, they assume that the urge to restrict speech comes from a desire to prevent "moral harm." However, proponents of the autonomy defense of free speech take themselves to be justifying the protection of much more than "moral" speech or speech about moral issues, and, as even Judges Easterbrook and Cohn conceded, the harms wrought by speech are not restricted to those in the dubious category of "moral harms." So to be of use in defending free speech, especially the right to engage in hate speech, an account of autonomy must address more than self-rule in the domain of moral decision making. It must be a more general account of personal or individual autonomy.

51. For the classic discussion of the distinction between "the good" and "right," see John Rawls, "The Priority of Right and Ideas of the Good," *Philosophy and Public Affairs* 17 (1988): 251–76.

52. See Christman, ed., for an insightful overview of the field and a collection of articles representing a wide range of positions except, unfortunately, feminist theories of autonomy. Feminist accounts include Diana T. Meyers, "Personal Autonomy and the Paradox of Feminine Socialization," *Journal of Philosophy* 84 (1987): 619–828, and *Self, Society, and Personal Choice* (New York: Columbia University Press, 1989); Lorraine Code, "Second Persons," in *What Can She Know?* (Ithaca, N.Y.: Cornell University Press, 1991), pp. 71–109; Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts, and Possibilities," *Yale Journal of Law and Feminism* 1 (1989): 7–36; and Marilyn Freidman, "Autonomy and Social Relationships: Rethinking the Feminist Critique," in *Feminists Rethink the Self,* ed. Diana T. Meyers (Boulder, Colo.: Westview, 1997), pp. 40–61.

53. Joel Feinberg doubts that "autonomy" has a single meaning, and holds that it has, instead, these four related meanings. Joel Feinberg, *Harm to Self,* vol. 3 of *The Moral Limits of the Criminal Law* (New York: Oxford University Press, 1986), pp. 27–51.

Although most proponents of the autonomy defense of free speech do not say very much about what they mean by 'autonomy', hints of at least six different accounts of autonomy can be found in the free speech literature. I will discuss each in turn, arguing that the first five are unsatisfactory as accounts of autonomy and that none of them yields a defense of free speech that explains why hate speech should be protected.

1. The first owes its inspiration largely to Mill, and holds that autonomy is simply freedom from governmental interference in some specified domain. This notion of autonomy is what Isaiah Berlin, in his essay "Two Concepts of Liberty," calls "negative liberty."[54] On this view, a right to autonomy is a side-constraint on governmental action. Ronald Dworkin employs and defends this account of autonomy in an article entitled "Liberty and Pornography."[55]

An account of autonomy as a right to negative liberty, however, cannot be used as a premise in anything other than a circular argument against restrictions on speech. What would such an argument look like? Governmental constraints (on, for example, speech) violate the right to be free of governmental constraints. True enough, if we acknowledge such a right, but this is strikingly uninformative as an argument. What remains in question is whether we have such a right, and, if so, what domains of human conduct it protects.[56]

2. A second account of autonomy, invoked by Ronald Dworkin in his earlier essay, "Do We Have a Right to Pornography?" construes it to be the basis for a constraint on the kinds of justification that can be given for governmental interference.[57] In this essay, Dworkin defends the right to pornography by appeal to a right to autonomy, which he labels a "right to moral independence." He writes: "People have the right not to suffer disadvantage in the distribution of social goods and opportunities, including disadvantage in the liberties permitted to them by the criminal law, just on the ground that their officials or fellow-citizens think that their opinions about the right way for them to lead their own lives are ignoble or wrong. I shall call this . . . the right to moral independence."[58] Rights, according to Dworkin, trump considerations of social utility and thus, on his view, "if someone has a right to moral independence, this

54. Isaiah Berlin, "Two Concepts of Liberty," in *Four Essays on Liberty* (New York: Oxford University Press, 1969). In describing the following accounts of autonomy, I do not mean to be taken as accepting uncritically Berlin's distinction between negative and positive liberty. See Gerald C. MacCallum, "Negative and Positive Freedom," *Philosophical Review* 76 (1967): 312–32, for arguments undermining Berlin's distinction.

55. Dworkin, "Liberty and Pornography."

56. For a persuasive critique of autonomy as negative liberty, see Virginia Held, *Rights and Goods: Justifying Social Action* (New York: Free Press, 1984).

57. Dworkin, *A Matter of Principle,* pp. 353–72. Dworkin also uses this approach in his review of MacKinnon's *Only Words.* See Ronald Dworkin, "Women and Pornography."

58. Dworkin, *A Matter of Principle,* p. 353.

means that it is . . . wrong for officials to act in violation of that right, even if they (correctly) believe that the community as a whole would be better off if they did."[59]

On Dworkin's view, to restrict people's speech (or their access to others' speech) out of contempt for their way of life or their view of the good violates their right to moral independence or autonomy. This amounts to an unacceptable failure to treat them with equal respect and concern. This line of reasoning resurfaces in a more recent article in which he argues against restrictions on racist hate speech.[60]

However, the only grounds for restricting speech that Dworkin considers are ones based on external preferences about the morally correct way for others to live, preferences which on his view are inadmissible grounds for legislation. The only cost of speech that he considers is the "moral pain" it can inflict on those who disapprove, on purely moral grounds, of the way of life represented in or propounded by the speech, and we have no right, on Dworkin's view, to be protected against such "moral harm." This autonomy defense of free speech does not explain why it would be impermissible to restrict hate speech as defined earlier as face-to-face vilification, hostile environment harassment, or group libel, if, as is almost always the case, such restrictions are motivated by concern for the rights of victims of hate speech not to be harmed unjustly by it, rather than, as Dworkin assumes, by moral disapproval of those who engage in, or willingly listen to, such speech.

What Dworkin fails to consider is that others' rights, for example, their rights to free speech or to equality of opportunity, may be undermined by someone's engaging in hate speech.[61] Since he does not consider this case, he does not tell us how invoking the right to autonomy could resolve that conflict of rights. Furthermore, given that his theory of law specifies no procedure for weighing competing rights, this is not an oversight that could be rectified on his account.

3. Scanlon, in contrast, acknowledges that speech can cause more than mere "moral" harm, and he defends the view that at least some serious harms which result from acts of expression nonetheless cannot be taken to justify legal restriction of those acts. In the first of two influential articles on free speech, "A Theory of Freedom of Expression,"

59. Ibid., p. 359.

60. Dworkin, "The Coming Battles over Free Speech," p. 58.

61. For arguments that hate speech (including pornography) violates the rights of its victims, see MacKinnon, *Feminism Unmodified, Only Words, Toward a Feminist Theory of the State;* and Matsuda et al. Rae Langton has given a perceptive analysis of MacKinnon's claim that pornography silences women, thereby depriving them of their free speech rights, in "Speech Acts and Unspeakable Acts," *Philosophy and Public Affairs* 22 (1993): 293–330. See also Rae Langton's "Whose Right? Ronald Dworkin, Women, and Pornographers," *Philosophy and Public Affairs* 19 (1990): 311–59, in which she argues that given the conflict posed by pornography between liberty and equality, Dworkin's own account of liberal equality can be used to justify restrictions on pornography.

Scanlon defends a view similar to Dworkin's in that it is based on an account of autonomy as a constraint on the kinds of justification that can be used for governmental interference. However, the nature of the constraint proposed by Scanlon differs from that proposed by Dworkin. In this article, Scanlon defends the following principle of freedom of expression, which he calls the "Millian principle":

> There are certain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a justification for legal restrictions on these acts. These harms are: (a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; (b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing.[62]

The Millian principle precludes restrictions on hate speech if such restrictions are justified by an intention to reduce harms in categories (a) or (b) above. Do the harms of hate speech defined as face-to-face vilification, hostile environment harassment, or group libel fall into one or the other of these categories? Face-to-face vilification and hostile environment harassment have been documented as causing harms in category (a); that is, they harm their victims by leading them to form the false beliefs that they are inferior and not as worthy of respect as members of other nonvilified or nonharassed groups.[63] Likewise, group libel can cause members of the targeted group to suffer loss of self-esteem as a result of the formation of false beliefs about their self-worth.[64] In addition, all three forms of hate speech can lead to harms in category (b). Group libel is perhaps the most obvious form of hate speech to cause harmful acts to be performed on the basis that it "led the agents to believe (or increased their tendency to believe) these acts to be worth performing." It is beyond the scope of this article to argue that group libel can, like libel of a private individual, function to harm the reputation of individual members of a group which, in turn, can lead to harmful acts against them,[65] but I would suggest that it is plausible to suppose, as did Justice Frankfurter in *Beauharnais,* "that a man's job and his educational

62. Scanlon, "A Theory of Freedom of Expression," p. 213. (Although Scanlon calls this "the Millian Principle," it owes more to Kant than to Mill.)

63. See Matsuda et al.; Lederer and Delgado, eds.; and Charles R. Lawrence III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism" *Stanford Law Review* 39 (1987): 317–88.

64. Ibid.

65. I defend this claim in *Speech, Harm, and Conflicts of Rights.*

opportunities and dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits."[66] Although face-to-face vilification and hostile environment harassment are not, like group libel, intended to persuade those not targeted to demean, discriminate against, or otherwise harm those in the targeted group, they can, if witnessed or reported, lead some to hold the view that the members of the targeted group deserve the vilification or hostility.[67]

Scanlon argues that the Millian principle is derivable from a view of persons as autonomous moral agents. "To regard himself as autonomous in the sense I have in mind," Scanlon writes, "a person must see himself as sovereign in deciding what to believe and in weighing competing reasons for action. . . . An autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do."[68] On his view, autonomous persons could not allow the state to protect them against the harm of coming to have false beliefs, and so legal restrictions on speech for the purpose of protecting people from such harms would violate citizens' autonomy. In a recent article, Nagel invoked a similar view in defending hate speech against restrictions, arguing that "the sovereignty of each person's reason over his own beliefs and values requires that he be permitted to express them, expose them to the reaction of others, and defend them against objections. It also requires that he not be protected against exposure to views or arguments that might influence him in ways others deem pernicious, but that he have the responsibility to make up his own mind about whether to accept or reject them. Mental autonomy is restricted by shutting down both inputs and outputs."[69]

66. *Beauharnais v. People of the State of Illinois,* 343 U.S. at 263. See also Cass R. Sunstein, "Social Norms and Social Roles" *Columbia Law Review* 96 (1996): 903–68, for a discussion of the ways social norms, meanings, and roles, constructed largely through speech, affect our views about and actions toward others.

67. Victim blaming is a common feature of our society, perhaps because of a deep-seated, if irrational, belief that we live in a basically just world in which people get what they deserve. See William Ryan, *Blaming the Victim* (New York: Pantheon, 1971); and Melvin J. Lerner, *The Belief in a Just World: A Fundamental Delusion* (New York: Plenum, 1980).

68. Scanlon, "A Theory of Freedom of Expression," p. 216. In a later article, he employed a revised autonomy account to argue against restrictions on hate speech (as in the proposed Skokie march) and pornography. See Thomas Scanlon, "Freedom of Expression and Categories of Expression," *University of Pittsburgh Law Review* 40 (1979): 519–50. This revised account will be discussed next.

69. Nagel, p. 96. Nagel points out that his autonomy defense of free speech "is close to the argument Scanlon offers for his principle of free expression, except that his argument goes through the conditions of legitimacy in the exercise of state power, and its conclusion is a limit on legal restrictions of expression rather than a general moral right" (p. 97). Nagel argues that the right to free speech is a general moral right, that is, a universal human right. Nagel still owes the skeptic, however, an argument for why the right to free speech should be considered to be a universal human right. Fried has also argued against

As Robert Amdur has noted, Scanlon derives the Millian principle from this idea of the autonomous person in two different, though not clearly distinguished, ways.[70] The first argument relies on a certain intuition about agency and responsibility, namely, that, as Scanlon puts it, "a person who acts on reasons he has acquired from another's act of expression acts on what *he* has come to believe and has judged to be a sufficient bias for action. The contribution to the genesis of his action made by the act of expression is, so to speak, superseded by the agent's own judgment."[71] An obvious problem with this argument, however, is that false or misleading information can undermine autonomous agency and responsibility. As Scanlon later acknowledged, his earlier position would rule out even restrictions on false advertising—restrictions that arguably enhance, rather than undermine, autonomous choice.[72] Another difficulty with this argument is that not all speech is processed rationally, and not all beliefs are formed as the result of considered judgment. If, as some have argued, hate speech changes attitudes subliminally or via nonrational unconscious belief-formation mechanisms, there may be no instance of "the agent's own judgment" that can be determined to "supercede" the influence of the speech.[73] Finally, in the case of face-to-face vilification that is experienced as something akin to a slap in the face, or in the case of hostile environment harassment, there is no intermediate agent who is persuaded to do something harmful on the basis of the speech, so the defense of the Millian principle, in such cases, cannot rely on Scanlon's intuition about agency and responsibility quoted above.

The second argument Scanlon gives for the Millian position is that autonomous persons, presumably in a hypothetical social contract situation such as Rawls's original position, would not be willing to grant the government the power to regulate speech on the grounds prohibited by the Millian principle. However, as Amdur and Greenawalt have pointed out, it is plausible to suppose that rational, autonomous hypothetical contractors would agree to allow the government to protect them from

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restrictions on hate speech and pornography by appealing to autonomy. In a recent article he states, "Freedom of expression is properly based on autonomy: the Kantian right of each individual to be treated as an end in himself, an equal sovereign citizen of the kingdom of ends with a right to the greatest liberty compatible with the like liberties of all others." Charles Fried, "The New First Amendment Jurisprudence: A Threat to Liberty," in Stone, Epstein, and Sunstein, eds., p. 223. It is not entirely clear from the article just what Fried means by "autonomy," but a plausible interpretation is that he has in mind something like the account Scanlon gives in "A Theory of Freedom of Expression."

70. Robert Amdur, "Scanlon on Freedom of Expression," *Philosophy and Public Affairs* 9 (1980): 290.

71. Scanlon, "A Theory of Freedom of Expression," p. 212.

72. Scanlon, "Freedom of Expression and Categories of Expression," p. 532.

73. See MacKinnon, *Feminism Unmodified;* and Lawrence, "The Id, the Ego, and Equal Protection."

certain harms wrought by people acting autonomously or nonautonomously. According to Greenawalt, Scanlon's account "neglects the likelihood that at this preliminary stage autonomous people might well agree to foreclose some inputs for themselves which they would ideally like to have in some situations. That sacrifice might be an acceptable price for preventing some inputs for other people who are not rational and autonomous when they receive the communications or who, though autonomous, may commit antisocial acts."[74]

Furthermore, on this view, autonomous citizens could not allow the state to outlaw advocacy of illegal conduct, even when this advocacy is effective.[75] Although Scanlon does not spell out this implication, on his view, even if hate speech leads to an increase in illegal conduct such as discrimination against—and violence toward—targeted groups, it must not be restricted, for to do so would violate individual autonomy. Suppose, however, that in a hypothetical original position, one is trying to decide whether to allow restrictions on such hate speech. It is plausible to suppose that rational, autonomous contractors would choose to allow that such speech be regulated in light of the seriousness of the harms that they might be subject to as victims of such speech. In any case, neither Scanlon nor Nagel has given an argument for why that could not be the case. The above considerations show that the account of autonomy on which the Millian principle rests is unsatisfactory.

It should also be noted that, according to this earlier article of Scanlon's, the Millian principle "rests on a limitation of the authority of states to command their subjects rather than on a right of individuals . . . [which] explains why this particular principle of freedom of expression applies to governments rather than to individuals."[76] Individuals do not, according to Scanlon, have a right to whatever is necessary for them to be autonomous individuals. The government, on this view, does not have an affirmative duty to provide citizens with the conditions for autonomy. However, if Scanlon's principle of free speech is derived from a view of persons as autonomous moral agents, autonomy must be considered to be a valuable, indeed essential, characteristic of persons. If the value of autonomy is the basis for limiting "the authority of states to command their subjects," then a further argument is needed to show why govern-

74. Greenawalt, *Speech, Crime, and the Uses of Language,* p. 115. See also pp. 32–33 and 265. Amdur makes a similar point in arguing that "autonomous citizens, deciding whether to grant the state authority to regulate thought and discussion, would not only think of themselves as potential speakers and listeners, examining different views and deciding what to believe and when to obey the law. They would also think of themselves as potential victims of harms brought about by acts of expression." Amdur argues persuasively that rational, autonomous individuals would not "demand anything as strict as the Millian principle." See Amdur, p. 299.

75. Scanlon, "A Theory of Freedom of Expression," p. 218.

76. Ibid., p. 221.

mental intervention (for example, in the form of restrictions on speech) could not be justified when necessary to protect citizens' autonomy (as discussed below).

4. In a more recent article, "Freedom of Expression and Categories of Expression," Scanlon rejects his earlier construal of autonomy as merely a constraint on the kind of justification that can be given for governmental action. Instead, he takes "autonomy, understood as the actual ability to exercise independent rational judgment, as a good to be promoted."[77] He acknowledges that the appeal of the idea of a constraint on governmental action in the area of speech "derives entirely" from the value of autonomy in this other sense.[78] He argues in this later article that the protection of both Nazi demonstrations and pornography can be justified by appeal to the value of autonomy.

Scanlon's revised autonomy defense of free speech employs a fourth account of autonomy which holds that autonomy is a good consisting of the actual ability to be rationally self-legislating. This version of autonomy is one of a number dubbed "positive liberty" by Berlin.[79] This account of autonomy suggests a view of the self divided against itself—a true, higher, sovereign self, and an impulsive, lower self that occasionally needs to be brought into line. An autonomous person is able to control herself—to choose which desires to act on—and this requires the ability to reflect on her desires. Harry Frankfurt has argued that it is this ability to have second-order desires concerning first-order desires that sets humans apart from the beasts.[80]

Some accounts of autonomy that could be dubbed "positive liberty" accounts emphasize the role of rational self-legislation in autonomy.[81]

77. Scanlon, "Freedom of Expression and Categories of Expression," p. 533. Richard H. Fallon calls this concept of autonomy "descriptive autonomy." The accounts (1–3) above would presumably be classified as accounts of "ascriptive autonomy." According to Fallon, "Ascriptive autonomy—the autonomy that we ascribe to ourselves and others as the foundation of a right to make self-regarding decisions—is a moral entailment of personhood," whereas "descriptive autonomy refers to the actual condition of persons and views autonomy as partial and contingent" (p. 876). Richard H. Fallon, "Two Senses of Autonomy," *Stanford Law Review* 46 (1994): 875–905. As I argue in this article, there are more varieties of autonomy invoked in the free speech literature than just these two. Furthermore, I question whether any defense of "ascriptive autonomy" could be given that did not refer to the more fundamental value of "descriptive autonomy."

78. Scanlon, "Freedom of Expression and Categories of Expression," p. 534.

79. Berlin.

80. Harry Frankfurt, "Freedom of the Will and the Concept of a Person," in *The Importance of What We Care About* (New York: Cambridge University Press, 1988), p. 12. Although Scanlon himself does not invoke Frankfurt's account of autonomy, it is the position in the philosophical literature on autonomy that appears to be closest to the view Scanlon invokes in this later article on free speech. It may be of some interest to note that Frankfurt himself has commented (in conversations during the spring of 1995) that he does not think his account of autonomy can be used to defend free speech.

81. For example, Scanlon's account of autonomy.

Others stress the necessity of the autonomous agent's endorsement of or identification with her action.[82] Still others count as crucial to autonomy the ability to critically reflect on and revise or reject first-order desires, regardless of whether the agent endorses them.[83]

David Richards asserts, in an article defending the right to pornography, that freedom of expression "supports a mature individual's sovereign autonomy in deciding how to communicate with others. . . . In so doing, it nurtures and sustains the self-respect of the mature person. Further, freedom of expression protects the interest of the mature individual, with developed capacities of rational choice, in deciding whether to be an audience to a communication and in weighing the communication according to his own rational vision of life. . . . The value of free expression, in this view, rests on its deep relation to self-respect arising from autonomous self-determination without which the life of the spirit is meager and slavish."[84] Richards has explicitly invoked Frankfurt's view of autonomy in a recent article on rights. "Autonomy, in the sense fundamental to the idea of human rights, is a complex assumption about the capacities, developed or undeveloped, of persons, which enable them to develop, want to act on, and act on higher-order plans of action which take as their self-critical object one's life and the way it is lived." He goes on to quote Frankfurt, who notes that persons "are capable of wanting to be different, in their preferences and purposes, from what they are. Many animals appear to have the capacity for . . . 'first-order desires' . . . which are simple desires to do or not to do one thing or another. No animal other than man, however, appears to have the capacity for reflective self-evaluation that is manifested in the formation of second-order desires."[85]

In addition to the later Scanlon and Richards, David Strauss explicitly adopts a "positive liberty" account of autonomy in his defense of free speech.[86] These theorists assume that what follows politically from our valued capacity for autonomy is a prohibition on governmental restriction of individual liberties such as the right to free speech. But no argument is given to show how to get from the premise that we have the capacity to be rationally self-legislating to the conclusion that governmental interference is unjustified.[87] The connection between individ-

82. Frankfurt, "Freedom of the Will and the Concept of a Person." See also Harry Frankfurt, "Three Concepts of Free Action," "Identification and Externality," and "Identification and Wholeheartedness," all in *The Importance of What We Care About.*

83. Gerald Dworkin, *The Theory and Practice of Autonomy* (New York: Cambridge University Press, 1988). See pp. 15–17 for his reasons for rejecting the endorsement account.

84. Richards, "Free Speech and Obscenity Law," p. 62.

85. Richards, "Rights and Autonomy," in Christman, ed., p. 205.

86. Strauss.

87. This is a somewhat misleading objection to Strauss, since he does present an argument of sorts, although I do not think it is successful. He argues along Kantian lines that

uals' actual ability to be rationally self-governing and the absence of governmental restrictions on speech is, on this account of autonomy, an empirical one, not one that can be asserted a priori. It turns out that on this and on the fifth and sixth accounts of autonomy, discussed below, the autonomy defense of free speech is actually a consequentialist argument and does not show why speech should be immune to balancing.

This "positive liberty" version of the autonomy defense of free speech offered by the later Scanlon et al. might initially seem to presuppose that autonomous persons must be able to act on their choices. Otherwise, no one's autonomy would be considered to be violated by restrictions on speech, for persons could always autonomously choose to speak even if they were prevented from—or penalized for—doing so. But on this view, autonomy is an internal relation within an agent (between a higher and a lower self or between first-order desires and second-order volitions) and such a relation is unaffected by constraints on an agent's freedom of action, including speech. Scanlon rightly denies that autonomy in this sense requires freedom of action. On his view, being autonomous is "quite consistent with being subject to coercion with respect to one's actions. A coercer merely changes the considerations which militate for or against a certain course of action; weighing these conflicting considerations is still up to you."[88]

These considerations reveal that the free speech defense yielded by this account of autonomy is one focusing not on the speaker's autonomy, but on that of the audience. For, on this account, a speaker's autonomy is not diminished by restrictions on speech, since the speaker can always choose to speak and be deterred from acting on the choice or, alternatively, choose to speak, act on the choice, and pay the penalty for doing so. Indeed, on this account, a would-be speaker's autonomy would not be diminished if the government bound and gagged him and threw him in a dungeon, since he would retain his ability to reflect on and selectively endorse his first-order desires. He could still, as Frankfurt would put it, choose to have the will he wanted to have.[89] Such an account of

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restricting speech classified as "persuasion" (i.e., speech appealing to reason) violates autonomy in the same way that lying does, but I am not persuaded by his claim that only governmental, and not private, restrictions on speech violate autonomy in this way.

88. Scanlon, "A Theory of Freedom of Expression," p. 216. Although Scanlon makes this point in this earlier article, it also applies to the view defended in his later article.

89. In one passage of "Freedom of the Will and the Concept of a Person," Frankfurt acknowledges that "when an agent is aware that there are certain things he is not free to do, this doubtless affects his desires and limits the range of choices he can make" (p. 20). Elsewhere, however, he describes his view of freedom of the will (what I and others call his account of "autonomy") in an ahistorical manner which does not take into account the conditions on the formation of first order desires and second-order desires and volitions. For example, on p. 22, he asks us to suppose that someone "enjoys both freedom of action and freedom of the will. Then he is not only free to do what he wants to do; he is also free to want what he wants to want. It seems to me that he has, in that case, all the freedom it is

autonomy is clearly unsuitable as a foundation for a theory of speakers' rights against the government and it also fails to account for the high political value that we attach to autonomy.

Nonetheless, this account of autonomy might explain how restrictions on speech do limit the audience's autonomy if they deprive the audience of information they would otherwise have. It should be pointed out, though, that hate speech rarely says anything new—and there is seldom an audience eager for it. If it turned out that everyone but the speakers wanted it restricted, then the audience-autonomy defense would not justify protecting it. It might be argued that autonomy is promoted by subjecting audiences to speech they choose not to hear. But this reply would assert, paradoxically, that autonomy is promoted by thwarting people's autonomously made choices.

Another difficulty with invoking this account of autonomy in a defense of audience rights to speech is that, as Gerald Dworkin argues, autonomy can be undermined by misinformation or lack of information.[90] In the area of advertising, for example, we consider it appropriate for government to deprive us of access to false or misleading speech. This is seen as enhancing, not hindering, autonomy. If it is access to correct information that is required for autonomy then the autonomy defense motivates the governmental noninterference conclusion only if one accepts Mill's account of the marketplace of ideas as truth-tracking, and there are good reasons to reject that view.[91] At any rate, there is a conflict here between two requirements for autonomy—one, that people not receive (avoidable) doses of misinformation and, two, that they be allowed to decide for themselves which ideas are true and which are false, even when they are not the best judges of the matter.

Furthermore, on this account of autonomy, one cannot assume that more speech is always better than less, just as one cannot assume that more choice is always better than less.[92] There are opportunity costs associated with having choices to make—and with being informed of the availability of those choices. Phone solicitors who repeatedly disrupt our work or leisure activities by offering us ever-changing incentives to switch phone companies when we would rather not be bothered by them can-

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possible to desire or to conceive." On this account of autonomy, even a woman confined to a harem all her life, with no awareness of—and no desire for—any alternative kind of existence, must be considered to have "all the freedom it is possible to desire or to conceive."

90. G. Dworkin.

91. See Schauer, *Free Speech;* Virginia Held, "Access, Enablement, and the First Amendment," *Philosophical Dimensions of the Constitution,* ed. Diana T. Meyers and Kenneth Kipnis (Boulder, Colo.: Westview, 1988), pp. 158–79; Judith Lichtenberg, "Foundations and Limits of Freedom of the Press," *Philosophy and Public Affairs* 16 (1987): 329–55.

92. For an argument that more choice is not always better than less, see G. Dworkin, pp. 62–81.

not be said to enhance our autonomy. On this account of autonomy, toleration of hate speech cannot be defended simply by asserting that it exposes audiences to speech they would otherwise not hear, since not all speech is autonomy enhancing.

In addition, we need to ask whether private pressures and market constraints on speech are less violative of audience autonomy, on this account, than are public, governmental restrictions.[93] Those presenting the autonomy argument against governmental restrictions on speech fail to acknowledge the ways in which the market, or the private sphere, can restrict access to speech, and thus, on their own view, undermine autonomy. A governmental policy of allowing this to go unchecked cannot be defended by appeal to the value of autonomy, as no argument has been given for supposing the market-induced restrictions to be more respectful of autonomy than a well-reasoned and carefully implemented governmental policy would be. In our society, for example, the mass media are not only the main sources of information for most people, but also the selectors of what information we receive.[94] Decisions about what speech to give people access to are not only based on the corporations' judgments of profitability, but are also influenced by advertisers' effective veto power concerning content.[95] Why should we assume that government regulators would have even less pure motives in deciding what speech to restrict? The exclusive concern with governmental skewing of the market may arise from the view that the default position is no censorship, rather than censorship of the market. The view that there is agency involved in the marketplace as well as in government is noticeably absent in, for example, Oliver Wendell Holmes's famous reference to "the power of the thought *to get itself accepted* in the competition of the market," and it is rarely mentioned in discussions of autonomy and free speech.[96] An implicit premise in the autonomy defense of free speech is that only governmental regulation of speech can be autonomy undermining, but no argument is given for this assumption.

93. For a discussion of the ways in which private pressures can constrain speech as effectively as governmental regulation, see Frank Michelman, "Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation," *Tennessee Law Review* 56 (1989): 291–319.

94. See Lichtenberg, "Foundations and Limits of Freedom of the Press"; Held, "Access, Enablement, and the First Amendment," p. 172.

95. C. Edwin Baker discusses the seriously distorting effects of advertising on access to speech in *Advertising and a Democratic Press* (Princeton, N.J.: Princeton University Press, 1994).

96. *Abrams v. United States*, 250 U.S. at 630–61, (Holmes, J., dissenting) (emphases added). Holmes's claim that the principle of free speech embodies "freedom for the thought we hate" (*United States v. Schwimmer*, 279 U.S. 644, 655 [1929] [Holmes, J., dissenting]) also suggests an absence of agency behind the instilling and shaping of thoughts, in addition to asserting that it is thoughts rather than (or along with) their expressions that are protected by the principle of free speech.

We also need to take into account the autonomy of those in the group Scanlon calls the bystanders—those who are not the speakers, are not (willingly) in the audience, and are nonetheless affected by the speech, by being unwilling audience members or by suffering indirect harms at the hands of willing audience members. Scanlon's later article usefully distinguishes three different interests in freedom of expression: the participant's (or speaker's) interest ("an interest in being able to call something to the attention of a wide audience"),[97] the audience's interest ("the interest in having a good environment for the formation of one's beliefs and desires"),[98] and the bystander's interest (the primary one being the interest "in the effect expression has on its audience," especially "when expression promotes changes in the audience's subsequent behavior").[99]

The targets of hate speech—whether it is in the form of face-to-face vilification, hostile environment harassment, or group libel—are in the category of bystanders, for even if they are directly targeted, and are thus within hearing range of the speech, they are not willing audience members. Their interests include not only the interest in the effect the hate speech has on willing audience members, but also the interest in the effect it has on them, the targets. These effects can be autonomy undermining, on this account of autonomy. Face-to-face vilification and hostile environment harassment can short-circuit reason and inhibit the victim's ability to be rationally self-legislating.[100] It might be replied that our system of freedom of expression rightly requires us to be sufficiently thick-skinned so that we do not suffer cognitive dysfunction when victimized by hate speech. But those who give this reply have the burden of showing why this is a reasonable requirement to impose on would-be victims of verbal assaults when we do not require that potential victims of rape and other forms of physical assault engage in bodybuilding, self-defense instruction, and assertiveness training courses in order to render themselves less vulnerable to the harms of physical attacks.[101]

Furthermore, if hate speech has, as some have argued, the effect of silencing the bystanders, or at least preventing others from listening to what they have to say, then audiences are being deprived of their speech.[102] If restrictions on hate speech could help to prevent this silencing effect, then there would be an additional audience interest in having

97. Scanlon, "Freedom of Expression and Categories of Expression," p. 521.

98. Ibid., p. 527.

99. Ibid., p. 528.

100. For discussions of how hate speech can disorder reason, see the articles in Matsuda et al.

101. For further discussion of this point, see Brison, "Speech, Harm, and the Mind-Body Problem."

102. See Langton, "Speech Acts and Unspeakable Acts"; MacKinnon, *Feminism Unmodified;* and Jennifer Hornsby, "Speech Acts and Pornography," in *The Problem of Pornography,* ed. Susan Dwyer (Belmont, Mass.: Wadsworth, 1995), pp. 220–32.

such restrictions. For all of these reasons given above, this fourth account of autonomy fails to yield an argument against restricting hate speech.

5. A fifth account of autonomy, advocated by Baker[103] and Redish,[104] is similar to the above in stressing the value of self-legislation, but involves more than a decisional component and is not restricted to rational self-legislation. Although Baker and Redish disagree on a number of things, they both argue that the right to free speech can be grounded in the value of self-fulfillment or self-realization, which may take irrational or nonrational forms, and which also requires the ability to express or act on what one chooses to do as a form of self-expression. Such an account of autonomy would seem to be a more promising one to use in a defense of free speech since it assumes that autonomy requires not only freedom of thought, but also freedom of action in the relevant domains. Furthermore, this account seems more likely to yield a defense of the speaker's right to free speech if it could be combined with empirical evidence showing that the absence of governmental restrictions on speech is the best way to foster the self-realization of speakers, audience, and bystanders. But such evidence has not been found, and it is unlikely to be, given the extent to which hate speech undermines the ability of its victims to engage in self-realization.[105] In addition, this account of autonomy, like the ones previously discussed, fails to take into account the conditions on the formation of one's desires and the phenomenon of adaptive preference formation, and thus, for reasons discussed below, turns out to be inadequate as a theory of autonomy.

6. A sixth account of autonomy adds a historical dimension to this fifth theory by specifying some conditions on the formation of higher-order desires.[106] On this account, some forms of conditioning and other external constraints are autonomy undermining, whereas others are autonomy enhancing. If, for example, one has been socialized, in large part as a result of others' speech, to expect very little of herself or to defer to others, she is hardly in a position to make autonomous choices. Likewise, if one has very few genuine options to choose from, one's very capacity to make choices is diminished. This theory of autonomy takes into ac-

103. Baker.

104. Redish.

105. See the numerous examples in Matsuda et al.

106. For defenses of this kind of account of autonomy, see John Christman, "Autonomy and Personal History," *Canadian Journal of Philosophy* 21 (1991): 1–24; Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1986); Cass R. Sunstein, "Preferences and Politics," *Philosophy and Public Affairs* 20 (1991): 3–34; Meyers, "Personal Autonomy and the Paradox of Feminine Socialization," and *Self, Society, and Personal Choice;* Code; Nedelsky; and Friedman. This concept of autonomy has not, however, been explicitly discussed in the free speech literature, although Meyers suggests, in "Rights in Collision," that the right to free speech is grounded in the combined values of autonomy (presumably of this variety, since this is the account she defends elsewhere) and democracy.

count the phenomenon of adaptive preference formation, discussed by Jon Elster and Amartya Sen, among others.[107] The sour-grapes phenomenon (in which choosers eliminate or fail to form preferences that cannot be satisfied because their objects are unattainable) is very common, especially among those historically deprived of equality of opportunity. In addition, preferences can be manufactured or modified by what John Kenneth Galbraith called the "dependence effect"—the creation of demand by supply, that is, the instilling of preferences in consumers for products that were not previously desired. (This can be accomplished by seductive advertising or simply by making the product available.) Marxists have claimed that the preferences created or eliminated in these ways are often "false," but one does not have to accept that claim in order to grant that the ability or inability to act on one's choices can affect the choices themselves. Because of this connection between preferences and options, one cannot entirely separate the question of whether someone has freedom of choice from the question of whether she is free to act on that choice. For example, a woman cloistered in a harem may lack not only the option to live a different sort of life, but also the ability to imagine any other sort of life, which would prevent her from even choosing to live otherwise.[108]

Preferences are affected not only by one's options, but also by one's beliefs about the actual attainability of these options.[109] These beliefs are typically arrived at by receiving others' speech. And not only first-order desires but also second-order volitions are affected by others' speech. (Antismoking ads can lead one to form the second-order desire to stop craving cigarettes. Scenes of glamorous movie stars smoking in forties films sometimes instill in me a faint second-order desire to want to smoke, even though my first cigarette prompted a coughing fit and a strong first-order desire never to smoke again.)

This sixth theory of autonomy takes into account not only the ways in which secondary volitions get formed, but also the range of important

107. Jon Elster, *Sour Grapes* (New York: Cambridge University Press, 1983); Amartya Sen, *Inequality Reexamined* (Cambridge, Mass.: Harvard University Press, 1992). See p. 55, where he discusses the effects of entrenched inequalities and deprivations on preferences. See also Meir Dan-Cohen, "Conceptions of Choice and Conceptions of Autonomy," *Ethics* 102 (1992): 221–43.

108. This example comes from Simone de Beauvoir's memoirs, in which she recalled arguments she had with Jean-Paul Sartre in 1940 about his account of freedom as an active transcendence of one's situation. She had maintained that not every situation offered the same scope for freedom: "what sort of transcendence could a woman shut up in a harem achieve?" Simone de Beauvoir, *The Prime of Life* (New York: World, 1962), p. 346.

109. As Sunstein puts it, "The notion of autonomy should refer . . . to decisions reached with a full and vivid awareness of available opportunities, with reference to all relevant information, and without illegitimate or excessive constraints on the process of preference formation." Sunstein, "Preference and Politics," p. 11.

options available to people and their ability to realize them.[110] On this view, autonomy admits of degrees, and one is more or less autonomous depending on the range of goals one is aware of having as real options. The sheer number of options is not what is relevant here. What matters is the range of available significant options contributing to human flourishing. There is a strong normative component in this theory of autonomy, since specifying such options requires defending a particular view of human flourishing or of the good.[111]

I find this sixth, more substantive and normative notion of autonomy to be the most defensible account, but it does not, without additional premises, yield an argument against restricting hate speech, if one grants the empirical claim conceded by the courts in the cases mentioned above that failure to restrict such speech can impair the ability of individuals in targeted groups to act autonomously on their choices. If the absence of restrictions can, for the reasons cited by Judge Easterbrook, restrict individuals' employment options, limit their political potential, and even undermine their ability to take advantage of those options that are available to them, then autonomy, in this sense, cannot be invoked to defend such a policy unless one adds the implausible claim that the threat to the would-be speakers' and audience members' autonomy is even greater. The kinds of harms acknowledged by Easterbrook and others to result from hate speech are serious autonomy-undermining harms, on this view of autonomy, and so one cannot employ this account of autonomy to argue that such speech must always be protected.

Finally, on any of the above accounts of autonomy, the autonomy defense of free speech fails to yield an explanation for why hate speech should be protected any more than discriminatory conduct of other sorts (e.g., discrimination in housing, education, employment, etc.). Why is autonomy considered so much more closely tied to speech than to other forms of conduct? Why do those liberal theorists who defend free speech by invoking autonomy suppose that autonomy requires the absence of interference in the area of speech but not in other areas?[112] As the lib-

110. As Raz argues, "If having an autonomous life is an ultimate value, then having a sufficient range of acceptable options is of intrinsic value, for it is constitutive of an autonomous life that it is lived in circumstances where acceptable alternatives are present." Raz, p. 205. See also pp. 373–80.

111. For a defense of this account of autonomy and an application of it to free speech issues, see Susan J. Brison, "Relational Autonomy and Freedom of Expression," in *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self*, ed. Catriona Mackenzie and Natalie Stoljar (New York: Oxford University Press, in press).

112. Owen Fiss, in arguing for a more activist role for the government in the regulation of speech, urges us to "begin with the fact of state intervention in economic matters, and then use that historical experience to understand why the state might have a role to play in furthering free speech values." See Owen Fiss, "Why the State?" *Harvard Law Review* 100 (1987): 781–94, p. 783.

ertarian Aaron Director has lamented, "free speech [is] the only area where laissez faire is still respectable."[113] According to the liberal proponents of the autonomy defense of free speech, the restrictions on income spending imposed by redistributive taxation do not violate the autonomy even of libertarians who are morally opposed to mandatory taxation for redistributive purposes. Nor do restrictions on the right to freedom of association (such as mandatory desegregation of schools and restaurants or laws against certain male-only private clubs). Nor does government regulation of hiring practices (for example court-ordered affirmative action programs, or laws prohibiting race and sex discrimination). In all of these cases, liberty and equality are seen to be in conflict, and equality is determined to take priority. Why not also in the area of hate speech? Nothing in the autonomy defense of free speech precludes it.

113. Aaron Director, "The Parity of the Economic Marketplace," *Journal of Law and Economics* 7 (1964): 1–10, p. 5. See also R. H. Coase, "The Economics of the First Amendment: The Market for Goods and the Market for Ideas," *American Economic Review* 64 (1974): 384–91.