

## Smith on Liberalism and Hate Speech

This essay comes from a 2022 speech given by Steven Smith (San Diego State Law School) at the Law and Religion Forum. You can find further details at: <https://lawandreligionforum.org/2022/09/22/smith-on-liberalism-and-hate-speech/>

What is the relation between liberalism and the regulation of—or, conversely, the legal protection of—“hate speech”? And what if anything does the problem of hate speech tell us about liberalism?

Hate speech is pretty much by definition vicious and hurtful, and a legal regime without “liberal” aspirations might have no *prima facie* reason to respect or protect it (assuming that it could be adequately defined). Conversely, a liberal government might extend constitutional protection to hate speech—for pragmatic reasons (slippery slope concerns, for example, or worries about overbreadth) but also for more principled reasons. More specifically, liberalism implies that people should have the freedom to do and say things that are objectionable or wrongful so long as they cause no harm to others.

“Harm,” to be sure, turns out to be a complicated—and often conclusory or question-begging— notion. Suppose Puritan is profoundly disturbed by his neighbor Pru’s practice of watching prurient movies in her basement. Puritan’s emotional distress may be real enough. And emotional distress is unpleasant; in other contexts it can constitute a compensable injury. But under liberalism, Puritan’s emotional distress in this context will not count as “harm”—or at least not as the cognizable harm that can justify a restriction on Pru’s liberty. Why not? We will *say* that Pru’s practice cannot be restricted because it causes no harm, but what we mean is that Puritan’s very real pain cannot count as harm here because (we know in advance) Pru’s liberty should not be restricted. We will express this foreordained conclusion by saying that Puritan’s “offense” or “hurt feelings” do not amount to cognizable “harm.”

But offense and hurt feelings are exactly the kinds of harm—or rather of non-harmful “hurts”— produced by hate speech (unless, that is, such speech goes beyond mere hatefulness by, for example, inciting listeners to violence). Or so it may seem. And on this view, there is no justification for regulating people’s ability to express themselves hatefully, no matter how worthless such speech may be.

## II.

In a different way, though, liberalism may strengthen the case for regulating hate speech. To see how, let us notice the importance of something that is typically taken for granted but that modernity and liberalism, in particular, can render fragile—namely, personal identity.

Think of it this way: public policy decisions are typically debated by reference to people’s “interests”—in health, prosperity, etc. But “interests” presuppose persons who are the bearers of those interests: no persons, no interests. And to be a person, one must be biologically alive and possessed of the DNA of *homo sapiens*, of course, but one must also have an identity: otherwise, we would be only a blob of tissue and psychic activity, not a person. Hence, a threat to persons’ identity is more fundamental than a threat merely to their “interests.”

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In most situations, identity may seem to be simply given. But identity can become problematic. Individuals may become perplexed and paralyzed by the question: “Who am I?” And such identity crises can proliferate to become a societal problem. Indeed, “the question *Who am I?* is now one of the most fraught of our time,” Mary Eberstadt reports.

Moreover, liberalism seems to aggravate this problem, in at least two interconnected ways. First, liberalism can subvert the grounds or sources of identity. Simplifying, we can say that in most times and places in Western history, people’s identity has typically been grounded in two main sources: their religion, and their family or social relations. You were James, Roman Catholic, son of Geoffrey and Alice—or Bonnie, Protestant, daughter of William and Anne. But the liberal project has been, if not exactly to undermine church and social structures, at least to liberate the sovereign individual from dependency on these institutions so that she can “be herself,” or “be who she really is.”

That is because a core commitment of liberalism is to the individual as the locus of “dignity” and meaning, and hence to individual autonomy as the central normative value. This individualist commitment pervades liberalism—in its conception of liberty and rights, in its emphasis on equality (equality of *individuals*), and in its commitment to authenticity and the individual conscience. And on these individualistic assumptions, it is demeaning to suggest that someone’s identity depends on a relation to a church or parent or spouse. You are “your own person,” not just someone’s son or daughter or spouse.

But if a person can no longer define who he is by reference to church or family or social position, how is he supposed to understand his identity?

Liberalism can also subvert identity in another way: it imposes a kind of compartmentalization that divides people between their public selves and their private selves, thereby cutting them in half and rendering identity problematic on both sides of the public-private divide. The phenomenon is perhaps most conspicuous in officials who are expected to perform their public duties without consulting the religious beliefs that define and guide them as private individuals. William Brennan, for example, explained, “I had settled in my mind that [as a Supreme Court Justice] I had an obligation . . . which *could not be influenced by any of my religious principles*. As a Roman Catholic, I might do *as a private citizen* what a Roman Catholic does, and that is one thing, but to the extent that that conflicts with what I think the Constitution means or requires, then my religious beliefs have to give way.”

Confronted with a decision about abortion, say, a religious official who tried to follow this policy would presumably disregard Church teachings that abortion is the taking of an innocent life. But if the person sincerely believes those teachings, it seems to follow that when acting as a public official, he is in effect role-playing: he is trying to decide not based on what *he* believes but rather is attempting to simulate what would be done by *someone else* whose beliefs are different from his. He might say, as Brennan did, “Yes, as a Justice I can’t be fully myself; but in my private life I am still a Catholic.” But even that statement is problematic, because now in his private life he is acting on the assumption that the wrongfulness of abortion is a merely private truth. But that view is both inconsistent with Church teachings and arguably incoherent, because truth—actual truth—does not relinquish its claims at the boundary of the public domain. And hence his Catholic identity is compromised even in his private life.

Much more space would be required to explain how this identity-compromising compartmentalization reaches beyond religion and beyond public officials. But a similar, if squishier, compartmentalizing extends to professions like law, and indeed to citizens generally.

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In these ways, liberalism contributes to the fragility of personal identity that is widely perceived in the Western world. The desperate quest for and obsession with identity—with questions of *Who am I really?* and *How can I be who I really am?*—is discernible in various contemporary phenomena: in the proliferating tribalism and identity politics, in the transgender movement, in the effort by millions of people to discover their biological parents or ancestors.

The current situation presents daunting conceptual questions, and also some serious ironies. In some ways, public discourse today appeals more often and more openly to identity as a fundamental normative source than has been true in the past. Consider freedom of religion. Why should the law protect people's freedom to live according to their religion? Two or three centuries ago, the central answer was "Because our duties to God transcend our civic duties." Today the most common answer is "Because religion is central to people's identity, or to their sense of who they are." The change is perhaps unsurprising: when traditional normative sources are embattled or discredited—I incorporate by reference Alasdair MacIntyre's *After Virtue*—it is natural to ground normative arguments in what might seem the surviving secure foundation: the self. Except that, as discussed, that source itself is *not* secure. On the contrary, it seems increasingly fragile and elusive.

### III.

In this context, the question of hate speech takes on a different character. It may now seem misguided and insensitive to describe the injury caused by hate speech as mere "hurt feelings." Something more basic may seem to be at stake. Thus, suppose that having been freed from the traditional dependence on church or family as the moorings for my identity, I have come to answer the *Who am I?* question by reference to my race, or my sex, or my sexual orientation. I am standardly classified—and so I come to conceive of myself, perhaps—as a "heterosexual white male." Now, if someone seems to be denigrating my race, or my sex, or my sexual orientation, they are not merely injuring my interests or hurting my feelings. Rather they are attacking the very bases of my identity.

True, the utterer of hate speech may not inflict any bodily injury on me. And yet, in undermining my identity, he is nonetheless threatening *me*—is threatening my very existence as the person I am—just as surely as if he were physically assaulting me. Or at least so I might perceive the matter, and so many people today seemingly do perceive the matter.

In this respect, by undermining the bases of identity, a liberal society may be indirectly creating a case for regulation of hate speech that is more urgent than would be true in a non-liberal society in which the traditional bases of identity remain intact and unthreatened, so that the injury caused by hate speech could be passed off as mere offense.

This undermining of identity is one specific way, though not the only one, in which liberalism may subvert the conditions for its own existence.