



Kindly Inquisitors, Revisited

Twenty years on, the case for restricting speech in the name of tolerance is weaker than ever.

By: Jonathan Rauch from the December 2013 issue

*In 1993, reason published an essay by Jonathan Rauch derived from his book *Kindly Inquisitors: The New Attacks on Free Thought*. In it, he defended what he called "liberal science"-liberal societies' open-ended, decentralized system for developing knowledge by subjecting ideas, and often their proponents, to public criticism-from then-newfangled attacks by those who sought to protect minorities from excoriating or discriminatory speech.*

*This month, on the book's 20th anniversary, the Cato Institute and the University of Chicago Press are publishing an expanded electronic edition of *Kindly Inquisitors*. This essay is adapted from the author's new afterword.*

Twenty years ago, in 1993, Salman Rushdie was a hunted man. Iran had sentenced him to death for writing a novel that allegedly defamed Islam; governments and intellectuals in the West had responded with a measure of defiance, but a larger measure of ambivalence and confusion. Was Rushdie entitled, really, to write a book that he could have anticipated would deeply offend Muslims?

In 1998, as part of an agreement to restore diplomatic relations with Great Britain, the Iranian government formally withdrew its support from the fatwa against Rushdie, and the author resumed public life. But Rushdie's freedom has not put to rest the Rushdie affair. The fatwa's report echoed loudly in 2005 when a Danish newspaper published cartoons, some of them provocative, depicting the Prophet Muhammad. The resulting uproar occasioned, in the West, a chaotic mix of confusion, apology, and defiance, not unlike that which met the Rushdie affair.

The Danish government said, "Freedom of expression is the very foundation of the Danish democracy," but then went on to say, "However, Danish legislation prohibits acts or expressions of a blasphemous or discriminatory nature." When Danish authorities chose not to prosecute the cartoons' publisher, death threats and violent protests around the world led to the murders of several hundred people. In France and Canada, publications that republished the cartoons found themselves under government investigation for inciting hatred or violating human rights. Ultimately, they were not prosecuted. It would be fair to say that the West's defense of intellectual freedom was ringingly ambivalent. The more things change!

Today, what I called in 1993 "the new attacks on free thought" are no longer new. The regulation of speech deemed hateful or discriminatory or harassing has spread internationally and dug in domestically. In the United States, hate-speech laws as such are unconstitutional. But indirect, bureaucratic prohibitions have burrowed into workplaces and universities. Federal law holds employers

civily liable for permitting the workplace to become a "hostile environment"-a fuzzy concept which has been stretched to include, for example, a Bible verse printed on a paycheck (could upset an atheist) or a Seventh-Day Adventist's discussion of religion ("religious harassment" because it "depressed" a plaintiff).

Unlike most workplaces, universities are at the heart of intellectual life, and so the bureaucratization of speech controls there is more disturbing. In American universities, the hostile-environment and discriminatory-harassment doctrines have become part of the administrative furniture. "Most colleges and universities in the United States have instituted what are in effect speech codes," write the law professors Arthur Jacobson and Bernhard Schlink, in their contribution to the 2012 collection *The Content and Context of Hate Speech: Rethinking Regulation and Responses*. "The codes range widely in the speech they prohibit," but even the narrower ones "can define harassment more broadly than have the federal courts." Moreover, "colleges and universities are noticeably reticent to afford defendants in campus adjudications procedural protections that in federal and state courts are routine and necessary."

Alas, these sorts of bureaucratic controls have become a background thrum of academic life. They sometimes run into challenges when they go too far in particular cases-as when Brandeis University found a professor guilty of racial harassment for explaining the origin of the word wetbacks. But the idea that minority rights justify speech codes and quasi-judicial inquisitions is barely controversial among academic administrators. History will someday wonder how the very people who should have been most protective of intellectual freedom took such a wrong turn.

Abroad, without a First Amendment to act as a buffer, direct government restrictions on hate speech have become the norm, enacted by many countries and encouraged by several human rights treaties. Miklós Haraszti, of Columbia University's school of international and public affairs, writes of "a growing, punitive trend that is introducing new speech bans into national criminal codes. Most of them target bad speech specific to the country or to the worries of its ruling parties, the two being practically indistinguishable." The United States and Hungary, according to the British political theorist Bhikhu Parekh, are the only countries which have recently resisted the trend to ban hate speech. (He and Haraszti write in *The Content and Context of Hate Speech*.)

But there is good news, too. Frontal humanitarian and egalitarian attacks on the legitimacy of liberal science-our decentralized, criticism-based global system for developing knowledge -have waned. Arguments for restricting speech in the name of equality and compassion are more sophisticated and concomitantly more modest.

Version 2.0 of the case for bans on speech relies less on metaphorical notions like "words that wound" and "verbal violence," which could mean almost anything. Instead it looks to a narrower hostile-environment doctrine which justifies penalties only in relatively extreme cases, such as when speech seems likely to create a pervasively demeaning or threatening social environment for recently persecuted minorities, denying them (the theory goes) equal status as fully protected citizens. "Offensiveness by itself is not a good reason for legal regulation," writes Jeremy Waldron, a law

professor at New York University, in his fine 2012 book, *The Harm in Hate Speech*. "Where there are fine lines to be drawn the law should generally stay on the liberal side of them."

I don't think Version 2.0 has succeeded in answering the challenges that I and others have posed. It has not demonstrated that hate speech silences minorities, rather than mobilizing or energizing them; it has not shown that restrictions ameliorate hate or silence haters, rather than intensifying hate and publicizing haters. It has not figured out how to make political authorities interpret and enforce political restrictions apolitically, or how to prevent majorities and authorities from turning restrictions to majoritarian and authoritarian ends. It does not reckon the cost of overdeterrence and of chilling important but controversial conversations; or the cost of stereotyping minorities as vulnerable and defenseless; or the cost of denying the agency of the listener, who, after all, can choose how to react to the maunderings of haters. It has yet to enunciate a limiting principle. Why, after all, stop with speech deemed harmful to minorities, when there is so much other socially harmful speech in the world? Doesn't it harm society to let climate-change deniers yammer on?

But save those arguments for another day. I want to try to answer the deepest challenge that Version 2.0 poses. It is an epistemological challenge, and it goes like this:

Some ideas actually are false, and at some point the process of checking establishes their falsehood so firmly that to proceed as if they might be true becomes ridiculous. For example, Holocaust denial: Isn't it a stretch to claim we can learn something by debating neo-Nazis about the existence of gas chambers? Fallibilism is all well and good, but come on-enough is enough. In the 21st century, do Jews really need to put up with *The Protocols of the Elders of Zion*, a notorious anti-Semitic fraud? Shouldn't governments at least be allowed to regulate the most injurious of lies in the most blatant of cases?

As for enforcement, it may not be perfect, but what ever is? Even though politicians and courts won't always strike the right balance between free speech and minorities' dignity, they won't always get it wrong, either; the solution is to do a better job of balancing, not to throw away the scales. And we must not overlook the specific effects on minorities; it doesn't seem fair to sacrifice their interests on the altar of free speech. Do gays and Jews benefit from toleration of homophobic or anti-Semitic claptrap?

I believe the answer is yes. Society benefits from the toleration of hate speech, and so do targeted minorities.

Today's narrower, Version 2.0 argument for hate-speech laws asks us to imagine a really hard case: not a society where people say offensive things in random directions now and then (which should be allowed), but one where (in Jeremy Waldron's words) vulnerable groups "have to live and go about in a society festooned with vicious characterizations of them and their kind and with foul denigrations of their status." [T]he upshot might be that they would avoid much public life or participate in it without the security that the rest of us enjoy; either that, or they would have to summon up (from their own resources) extraordinary reserves of assurance as they went about their business, a burden that is not required of the rest of us." Surely, in so extreme a case, promising to punish violence or discrimination after the fact is not enough; surely, in this case, laws preemptively suppressing bigotry are appropriate?

Such societies exist. I grew up in one, because I was born in the United States in 1960, and I am homosexual.

You may remember those days. Gay Americans were forbidden to work for the government; forbidden to obtain security clearances; forbidden to serve in the military. They were arrested for making love, even in their own homes; beaten and killed on the streets; entrapped and arrested by the police for sport; fired from their jobs. They were joked about, demeaned, and bullied as a matter of course; forced to live by a code of secrecy and lies, on pain of opprobrium and unemployment; witch-hunted by anti-Communists, Christians, and any politician or preacher who needed a scapegoat; condemned as evil by moralists and as sick by scientists; portrayed as sinister and simpering by Hollywood; perhaps worst of all, rejected and condemned, at the most vulnerable time of life, by their own parents. America was a society permeated by hate: usually, it's true, hateful ideas and assumptions, not hateful people, but hate all the same. So ubiquitous was the hostility to homosexuality that few gay people ever even dared hold hands in public with the person they loved.

Obviously, passing a hate-speech law to protect homosexuals, much less enforcing one, was not on anyone's agenda. The very idea would have seemed preposterous. Any hate-speech law which might have passed would have targeted gay people (in the name of defending children), not protected us.

The case for hate-speech prohibitions mistakes the cart for the horse, imagining that anti-hate laws are a cause of toleration when they are almost always a consequence. In democracies, minorities do not get fair, enforceable legal protections until after majorities have come around to supporting them. By the time a community is ready to punish intolerance legally, it will already be punishing intolerance culturally. At that point, turning haters into courtroom martyrs is unnecessary and often counterproductive.

In any case, we can be quite certain that hate-speech laws did not change America's attitude toward its gay and lesbian minority, because there were no hate-speech laws. Today, firm majorities accept the morality of homosexuality, know and esteem gay people, and endorse gay unions and families. What happened to turn the world upside-down?

What happened was this. In 1957, the U.S. Army Map Service fired an astronomer named Franklin Kameny after learning he was gay. Kameny, unlike so many others, did not go quietly. He demanded reinstatement from the U.S. Civil Service Commission and the Congress. When he got nowhere, he filed a Supreme Court brief. "In World War II," he told the Court, "petitioner did not hesitate to fight the Germans, with bullets, in order to help preserve his rights and freedoms and liberties, and those of others. In 1960, it is ironically necessary that he fight the Americans, with words, in order to preserve, against a tyrannical government, some of those same rights, freedoms and liberties, for himself and others."

In 1965, Kameny led dignified gay-rights demonstrations, the first of their kind, in front of the White House and Philadelphia's Independence Hall. (Signs said: "Denial of equality of opportunity is immoral." "We demand that our government confer with us." "Private consenting sexual conduct by adults is NOT the government's concern.")

In 1969, gays rioted against police harassment in New York. In 1970, two gay student activists, Jack Baker and Michael McConnell, walked into a county clerk's office in Minnesota and asked for a marriage license. Much, much more was to come.

In ones and twos at first, then in streams and eventually cascades, gays talked. They argued. They explained. They showed. They confronted. If the pervasiveness of bigotry was supposed to silence them, as hate-speech allegedly does, Frank Kameny missed the memo. "If society and I differ on something," he said in 1972, "I'm willing to give the matter a second look. If we still differ, then I am right and society is wrong; and society can go its way so long as it does not get in my way. But, if it does, there's going to be a fight. And I'm not going to be the one who backs down."

Kameny and others confronted the psychiatric profession about its irrational pathologizing of homosexuality, bombarded the U.S. Civil Service Commission with demands that it end the ban on gay government employment, and confronted Christians with their hardly Christ-like conduct. "If your god condemns people like me for the crime of loving," Kameny would say, "then your god is a false and bigoted god." In the 1980s and early 1990s, a few visionaries—Andrew Sullivan, Evan Wolfson—argued that gay couples should be allowed to marry, a cause seemingly so hopeless that even many gay people hesitated to endorse it.

Frank Kameny lost every appeal to get his job back; the Supreme Court refused to hear his case. In 1963, he launched a campaign to repeal the District of Columbia's sodomy law and lost (that effort would take three decades). He ran for Congress in 1971 and lost. But at every stage he fired moral imaginations. He and others saw Jerry Falwell and Anita Bryant not as threats to hide from but as opportunities to be seized: opportunities to rally gays, educate straights, and draw sharp moral comparisons. "Is that what you think this country is all about? Really?"

To appeal to a country's conscience, you need an antagonist. Suppression of anti-gay speech and thought, had it been conceivable at the time, would have slowed the country's moral development, not speeded it. It would have given the illusion that the job was finished when, in fact, the job was only beginning. It would have condescended to a people fighting for respect.

I am not naive about the bravery it took for Kameny and others of his generation to step forward. They were hammered. They suffered severely. Kameny lived long enough to be honored by President Obama and, in 2009, to receive an official government apology from the U.S. Office of Personnel Management, which by then was headed by an openly gay man. But most of us are not Kamenys.

Most of us are also not Galileos or Einsteins, or Sakharovs or Kings. The good news is that most of us don't need to be. We need only a few Kamenys—plus a system that is very good at testing and rejecting bad hypotheses and at bringing forward better ones. As gay people stepped forward, liberal science engaged. The old anti-gay dogmas came under critical scrutiny as never before. "Homosexuals molest and recruit children"; "homosexuals cannot be happy"; "homosexuals are really heterosexuals"; "homosexuality is unknown in nature": The canards collapsed with astonishing speed.

What took place was not just empirical learning but also moral learning. How can it be wicked to love? How can it be noble to lie? How can it be compassionate to reject your own children? How can it be kind to harass and taunt? How can it be fair to harp on one Biblical injunction when so many others are ignored? How can it be just to penalize what does no demonstrable harm? Gay people were asking straight people to test their values against logic, against compassion, against life. Gradually, then rapidly, the criticism had its effect.

You cannot be gay in America today and doubt that moral learning is real and that the open society fosters it. And so, 20 years on, I feel more confident than ever that the answer to bias and prejudice is pluralism, not purism. The answer, that is, is not to try to legislate bias and prejudice out of existence or to drive them underground, but to pit biases and prejudices against each other and make them fight in the open. That is how, in the crucible of rational criticism, superstition and moral error are burned away.

I believe the hope of living in a world free of discrimination and prejudice is a utopian pipe dream, and is as anti-human and dangerous as most other utopian pipe dreams. The quest to stamp out discrimination or bigotry or racism wherever it appears is a quest to force all opinion into a single template. I reject the premise-not just the methods-of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, which calls on signatory countries to prohibit "all dissemination of ideas based on racial superiority or hatred." In my view, if minorities know what is good for us, we should at every turn support pluralism, with all its social messiness and personal hurt. Politicians and activists, however well intentioned, who would shelter us from criticism and debate offer false comfort.

History shows that, over time and probably today more than ever, the more open the intellectual environment, the better minorities will do. It is just about that simple. So here is a reply to advocates of hate-speech regulation who wonder if, today, it really serves any purpose to let people go around touting The Protocols of the Elders of Zion. The answer is yes, it does. We cannot fight hate and fraud without seeing them and debunking them. John Stuart Mill, writing in *On Liberty* in 1859, was right. "Wrong opinions and practices gradually yield to fact and argument: but facts and arguments, to produce any effect on the mind, must be brought before it."

Today I fear that many people on my side of the gay-equality question are forgetting our debt to the system that freed us. Some gay people-not all, not even most, but quite a few-want to expunge discriminatory views. "Discrimination is discrimination and bigotry is bigotry," they say, "and they are intolerable whether or not they happen to be someone's religion or moral creed."

Here is not the place for an examination of the proper balance between, say, religious liberty and anti-discrimination rules. It is a place, perhaps, for a plea to those of us in the gay-rights movement-and in other minority-rights movements-who now find ourselves in the cultural ascendancy, with public majorities and public morality (strange to say it!) on our side. We should be the last people on the planet to demand that anyone be silenced.

Partly the reasons are strategic. Robust intellectual exchange serves our interest. Our greatest enemy is not irrational hate, which is pretty uncommon. It is rational hate, hate premised upon falsehood. (If you believe homosexuality poses a threat to your children, you will hate it.) The main way we eliminate hate

is not to legislate or inveigh against it, but to replace it-with knowledge, empirical and ethical. That was how Frank Kameny and a few other people, without numbers or law or public sympathy on their side, turned hate on its head. They had arguments, and they had the right to make them.

And partly the reasons are moral. Gay people have lived in a world where we were forced, day in and day out, to betray our consciences and shut our mouths in the name of public morality. Not so long ago, everybody thought we were wrong. Now our duty is to protect others' freedom to be wrong, the better to ensure society's odds of being right. Of course, we can and should correct the falsehoods we hear and, once they are debunked, deny them the standing of knowledge in textbooks and professions; but we equally have the responsibility to defend their expression as opinion in the public square.

Finding the proper balance is not easy and isn't supposed to be. If a Catholic adoption agency wants to refuse placements to same-sex couples, we will have to argue about where to draw lines. What I am urging is a general proposition: Minorities are the point of the spear defending liberal science. We are the first to be targeted with vile words and ideas, but we are also the leading beneficiaries of a system which puts up with them. The open society is sometimes a cross we bear, but it is also a sword we wield, and we are defenseless without it.

We ought to remember what Frank Kameny never forgot: For politically weak minorities, the best and often only way to effect wholesale change in the world of politics is by effecting change in the world of ideas. Our position as beneficiaries of the open society requires us to serve as guardians of it. Playing that role, not seeking government protections or hauling our adversaries before star chambers, is the greater source of our dignity.

Frank Kameny, an irascible man with a capacious conscience, had it right. In more than 50 years of activism, he never called for silencing or punishing those he disagreed with, but he never cut them any argumentative slack, either. In his spirit, I hope that when gay people-and non-gay people-encounter hateful or discriminatory opinions, we respond not by trying to silence or punish them but by trying to correct them.