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WBC's Protest Disproves Censors' Case

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Richmonders responded in one of the two correct ways they could have when the Westboro Baptist Church picketed in front of the Holocaust Museum yesterday. The first correct way would have been simply to ignore the four extremists -- well, three extremists with a brainwashed child in tow. Richmond went with the second, more useful option: civil counter-demonstrations. (Jay Ipson, a founder of the Holocaust Museum, even tried to engage the four in dialogue -- a noble but fruitless gesture.)

The WBC presents Americans with a test. Richmond passed. Other communities haven't. Several localities have sought to ban the church's practice of picketing at funerals for American servicemen, where it rejoices in the deaths of soldiers who died to protect what it sees as a nation that mocks the commands of the Almighty. So far, the courts consistently have struck down such measures.

The test presented by the WBC is straightforward: Do Americans really mean what they say about free speech? It is said, quite often, that the First Amendment does not protect popular views, because popular views need no protection; the amendment protects the speech we abhor. But the First Amendment does that only so long as Americans believe that it should.

If any group's activities could make the case for prohibiting hate speech, the WBC's would do so. The church seems to delight in making outrageous claims in the most inflammatory venues. But precisely because of that, its protests provide a good case against hate-speech laws.

Supporters of such laws tender several claims. For instance, they argue that hate speech encourages hate crimes and spreads hate generally. But as the counter-protests yesterday showed, these days hate speech tends to produce precisely the opposite effect. It provokes communities to reinforce, resoundingly, communal mores about tolerance and diversity. Observers learn that those who espouse prejudice will face ostracism and censure. Wednesday's event did not win any converts to the Westboro Baptist Church, but it reminded everyone that Americans today detest no one so much as they detest a bigot.

Advocates of censorship also argue that hate speech is not really speech at all; it is a "performative speech act," akin to slapping someone in the face, and therefore does not deserve protection as pure speech does. For the most part, this is merely an attempt to evade the question by redefining terms, like arguing that eating human flesh isn't really cannibalism unless it's sautéed in butter. But it carries at least a germ of an idea, because some speech does do double duty as action. When a judge says, "I now pronounce you husband and wife," he changes the legal status of two individuals. When a mugger says, "Give me your money or I will kill you," he commits an act of coercion.

But saying "God Hates Fags" does not change the legal status of gays and lesbians. Nor does it interfere with their ability to go about their day. It is not legally binding the way contracts are; it carries no real weight in the world. Nor does it, as some would-be censors suggest, lower the social or moral standing of the object of the hatred. Again, hateful messages today lower the standing of the speaker. How much social cachet attaches to membership in the Ku Klux Klan? How much community respect would you get parading around in a T-shirt with a photo of President Obama bearing the legend, "Uppity N*****"? Not bloody much.

The only remaining rationale for censoring hate speech -- or a similar incendiary expression of opinion, such as flag-burning -- is that it inflicts emotional pain. But the Cato Institute's Jason Kuznicki makes quick work of this by asking a few simple questions: How are we supposed to measure emotional pain? If we could measure it, what level of pain would be sufficient to trigger punishment? If a news organization broadcasts a hateful message to Jews and gays simply by reporting on a demonstration by the WBC, then should the news organization also be held liable for damages? What else should we ban?

And if we are to balance rights against feelings, then what about the feelings of the members of the Westboro Baptist Church? Their willingness to subject themselves to nearly universal loathing suggests they must feel very strongly indeed. Weighed on a purely utilitarian scale against the broader -- but less intense -- feelings of their critics, their intensely felt feelings might win the day . . . especially if their emotional state were added to the feelings of the many people who cherish free speech, and would experience genuine dismay at an act of government censorship.

The wonderful thing about free speech, Kuznicki reminds us, is that it is compossible: One person's exercise of the right does not diminish anyone else's. But a regime in which feelings hold sway inevitably requires government

to dismiss some people's claims as less worthy: If a wahhabi Muslim and a gay-rights advocate started denouncing each other's ideals, then whoever could claim to have been more wounded or demeaned would get to silence the other.

A regime of rights lets each of us defend the other's right to speak, without endorsing the message. A regime of feelings, on the other hand, inevitably pits religious and ethnic groups against one another in a war of perpetual indignation. Probably few things could make the Westboro Baptist Church more happy than that.

My thoughts do not aim for your assent -- just place them alongside your own reflections for a while.

--Robert Nozick.

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[Flag Comment](#) Posted by tadchem on March 03, 2010 at 2:02 pm

Thank you. Robert, for the sanest exposition regarding the WBC that I have yet seen.

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