Michigan Law Review First Impressions

Volume 112

2014

Globally Speaking—Honoring the Victims' Stories: Matsuda's Human Rights Praxis

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GLOBALLY SPEAKING—HONORING THE VICTIMS' STORIES: MATSUDA'S HUMAN RIGHTS PRAXIS

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INTRODUCTION

Globally speaking, international law and the vast majority of domestic legal systems strive to protect the right to freedom of expression. The United States' First Amendment provides an early historical protection of speech—a safeguard now embraced around the world. The extent of this protection, however, varies among states.

The United States stands alone in excluding countervailing considerations of equality, dignitary, or privacy interests that would favor restrictions on speech. The gravamen of the argument supporting such American exceptionalism is that free expression is necessary in a democracy. Totalitarianism, the libertarian narrative goes, thrives on government control of information to the detriment of freedom and liberty. It is thus of paramount importance to have "uninhibited, robust, and wide-open" debate.[1] This approach places free speech above other equally significant constitutional values, such as racial, sexual, and sexual-orientation equality and privacy.

Internationally, a dramatically different approach is the norm. Most societies balance freedom of speech against other rights in a manner that does not deify expression. Unlike in the United States, where the right to free speech is virtually unqualified, in other democratic societies speech is but one of the many rights protected. In these other societies, speech may be limited if other rights, such as the right to racial equality or the right to privacy, are negatively affected.

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1. N.Y. Times v. Sullivan, 376 U.S. 264, 271 (1964). To be sure, this stance also reflects American absolutism, a position one sees in the areas of gun rights and property rights. It also perhaps reflects American hypocrisy. For example, the United States places greater weight on intellectual property rights when balanced against speech than other states do. Thus, the United States does not always value speech more; some countervailing interests are relevant to the analysis.

In her work, *Public Response to Racist Speech: Considering the Victim's Story*,[2] Professor Matsuda provides a compelling counter-narrative to the absolutist First Amendment canon that infuses the United States' jurisprudence. Her vision strongly aligns with the international jurisprudential method and offers a preferable model because it includes myriad democratic values.

This Essay begins by utilizing real stories to tease out the differences in various approaches to freedom of expression from around the world. The Essay reviews the divergent approaches and then reveals the stories' outcomes, along with providing critical commentary. It concludes by urging the adoption of a new approach, one that honors the victims' stories.

I. Stories

Positively Dylan. In November 2013, France recognized Bob Dylan's global cultural influence on peace and civil rights by presenting him with its highest civilian honor: the Legion of Honour. A year earlier, in an interview with *Rolling Stone*, he spoke about racism and said the following:

> It's the height of insanity, and it will hold any nation back – or any neighborhood back. Or any anything back. Blacks know that some whites didn't want to give up slavery – that if they had their way, they would still be under the yoke, and they can't pretend they don't know that. If you got a slave master or Klan in your blood, blacks can sense that. That stuff lingers to this day. Just like Jews can sense Nazi blood and the Serbs can sense Croatian blood.[3]

Team Sander T-Shirt. On November 21, 2013, during the stressful exam period in law schools, a Facebook post on the Western Region Black Law Students Association Facebook page read as follows:

> So this is happening at the school today . . . yes he & other 1Ls are wearing shirts that say "Team Sander" as in Richard Sander – UCLA faculty who believes Black students can 'neither learn nor compete effectively' at institutions such as UCLA. Thanks colleagues for yet ANOTHER signal of how I don't 'belong' here.[4]

Islam is of the Devil T-Shirt. During the 2009–2010 school year, seven children, from fifth to twelfth grade, wore T-shirts that said, "Islam is of the

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2. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

3. Mikal Gilmore, *Bob Dylan: The Rolling Stone Interview*, ROLLING STONE, Sept. 27, 2012, at 42, *available at* http://www.rollingstone.com/music/news/bob-dylan-unleashed-a-wild-ride-on-his-new-lp-and-striking-back-at-critics-20120927#ixzz2nBY5sFBu.

4. Facebook post on file with author.

Devil," on the back. Principals at the four relevant schools in Alachua County, Florida, informed the students that they could not wear the shirts on school grounds and sent them home for violating the dress code. The school also requested that the students leave a football game for wearing the shirts. The dress code in effect at the time required the students to "dress in a way that does not disrupt or distract from the educational process . . . [and] is not offensive to others or inappropriate at school and at school sponsored events."[5]

Anti-Gay Leaflets: At School. Four individuals distributed approximately 100 leaflets, which were created by an organization called National Youth, at an upper secondary school. The individuals were not students at the school, and the principal asked them to leave school grounds. Left in students' lockers, the leaflets said that the "homosexual lobby" downplayed pedophilia, that homosexuality was a "deviant sexual proclivity," and that it had "a morally destructive effect on the substance of society," resulting in the spread of HIV/AIDS.[6]

Anti-Gay Leaflets: At Home. William Whatcott of Saskatchewan, a member of the Christian Truth Activists, frequently protests in public places. In 2001 and 2002, he distributed two fliers, one titled *Keep Homosexuality out of Saskatoon's Public Schools* and the other titled *Sodomites in our Public Schools*. The fliers invited people to complain about curricular treatment of "homosexuality," referred to gays and lesbians as perverts, and suggested that such a lifestyle would result in disease, abuse, and death. Four individuals who received the fliers in their home were offended because they perceived the fliers as promoting hatred based on sexual orientation.[7]

Blog: Kill the Judges. Harold "Hal" Turner is an internet broadcaster who blogged that Judges Posner, Bauer, and Easterbrook of the Seventh Circuit "deserve[d] to be killed" after they upheld a ban on handguns in Chicago. The blog included photos and work addresses of the jurists. "Hal" noted that "[i]f they are allowed to get away with this by surviving, other judges will act the same way." Easterbrook testified that he felt threatened because recently, in an unrelated case, someone who was less than pleased with a court decision had murdered U.S. District Judge Joan H. Lefkow's husband and mother.

Islam is of the Devil: Burn the Koran. In July 2009, the Dove World Outreach Center, a church located in Gainesville, Florida, posted a billboard on church property with the statement "Islam is of the Devil." The

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5. Sapp v. Sch. Bd. of Alachua Cnty., 2011 WL 5084647 (N.D. Fla. Sept. 30, 2011).

6. Vejdeland v. Sweden, 2012 Eur. Ct. H.R. *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109046.

7. Saskatchewan (Human Rights Comm'n) v. Whatcott, [2013] 1 S.C.R. 467 (Can.), *available at* http://scc-csc.lexum.com/decisia-scc-csc/scc-csc/scc-csc/en/item/12876/index.do.

community reacted to the billboard by organizing protests across the street from the church. There was substantial press coverage and some acts of vandalism, such as protesters' tearing down the sign. About a year later, the pastor of the church, Dr. Terry Jones, announced that the church would conduct an "International Burn a Koran Day" on September 11, 2010. The announcement not only garnered much media attention but also led U.S. leaders, including the Reverend Jesse Jackson and General Petraeus, to ask him to refrain from holding the event. Petraeus feared retaliation against troops in Afghanistan. President Obama predicted the burning would lead to violence. Secretary of State Clinton labeled the anticipated action as "disgraceful." The Koran burning did not take place on the announced date but rather six months later. Dove's other pastor, Wayne Sapp, posted a photo of himself on Facebook lighting up a kerosene-soaked holy book. The predicted violence followed. In Afghanistan and throughout the world, protests were launched in which at least thirty lives were lost, including those of some United Nations workers who were targeted for retribution.

*God Hates F*gs.* Fred Phelps founded Westboro Baptist Church in 1955. He and his approximately forty followers—most of whom are family members—believe that God punishes the United States because it tolerates homosexuality. They express those beliefs by picketing military funerals. Their signs say, among other things, "God Hates the USA/Thank God for 9/11," "Thank God for Dead Soldiers," "Priests Rape Boys," "God Hates F*gs," and "F*gs Doom Nations." One such demonstration was at the funeral of Lance Corporal Matthew Snyder. He had been killed in Iraq in the line of duty.

*Newspaper Column: F*g.* In Mexico, Enrique Núñez Quiroz, the publisher of the newspaper *Intolerancia* ("Intolerance"), wrote and published a column referring to Armando Prida Huerta, the owner of the Puebla newspaper *Síntesis*, as a "puñal" and to Huerta's colleagues as "maricones." Both words roughly translate to f****t.

II. The First Amendment, Matsuda's Paradigm, and Human Rights

Whether any of these narratives, all of which can be categorized as "hate speech" stories, find protection under free speech principles depends on where the speech occurs. The Supreme Court of the United States has interpreted the First Amendment's Free Speech Clause very broadly. Such an interpretive move effectively deploys the idea of American exceptionalism. In the United States, therefore, hate speech is not per se actionable unless it fits into an established category of unprotected speech.[8]

8. *See, e.g.*, R.A.V. v. St. Paul, 505 U.S. 377 (1992).

Most of the rest of the world has a different view. Other countries are not so concerned about setting limits to expression that consist of "advocacy of national, racial or religious hatred that constitute[] incitement to discrimination, hostility or violence."[9] The world community recognizes that hateful statements can be harmful. Indeed, there is a conscious effort in Europe to reconcile free speech with other rights, especially in light of the culturally diverse societies that comprise the region.

In *Victim's Story*, Matsuda details the real harms that real people suffer because of hate speech—"racial slurs and epithets or other harsh language that has no purpose other than to injure and marginalize other people or groups."[10] By depriving citizens of the peace, stability, and security to which they are entitled in their daily lives, the United States' approach to hate speech becomes "a psychic tax imposed on those least able to pay": vulnerable, disempowered minorities. There are documented psychological symptoms and emotional consequences to hateful slurs.[11]

Targets of hate speech often must take action to avoid the slurs. Because of the real or perceived power differentials between the hate speaker and the target, targets can rarely just "talk back," as the First Amendment "marketplace of ideas" assumes. The real consequences of hate speech vary and may range from forcing someone to leave her job or educational institution to prompting her to move to a different city. It may even chill speech. The United States' exceptional approach to speech not only enables the uttering of hurtful words and actually inhibits speech but also supports the effects they cause.

The desire to eliminate discrimination justifies regulating hate speech. In turn, eradicating discrimination promotes the constitutional value of equality. Furthering equality and combatting the harms of racial epithets—including their offensiveness and their lack of social, political, or cultural value—provide legitimate grounds for regulating such speech. Members of the target groups have the right not to be exposed to such words. Rather than recognizing the value of their stories, the underlying policies of the First Amendment entrench the status quo, including the power differential between the powerful and the subordinated and marginalized. These policies foster inequality and implicitly support the harms that come from such speech.

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9. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S 171.

10. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 163 (2001) (NYU PRESS).

11. *See* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, *in* Mari J. Matsuda, Charles R. Lawrence, Richard Delgado, and Kimberlé Williams Crenshaw, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT.

Matsuda's proposal seems uncontroversial and even desirable (especially in light of the historical realities of racial minorities' disempowerment) because it simply asks that the victim's story be heard and be relevant to any analysis. Her measured approach requires three elements to make speech actionable: the message must be (1) of racial inferiority; (2) made against a historically oppressed group; and (3) persecutory, hateful, and degrading. Because these elements are focused and limited, Matsuda's approach should address concerns about slippery slopes or opened floodgates. Indeed, these elements serve to tie hate speech to the existing doctrinal requirements of threats, incitement, or fighting words.

Nonetheless, the Supreme Court's rulings establish that hate speech is protected speech, despite the documented harms it causes. Instead of an Equality track, the courts have opted for a Libertarian track that requires all ideas to be in the "marketplace" in order for everyone to have a voice. It is not for the government to identify who has good or bad ideas; indeed, "under the First Amendment there is no such thing as a false idea."[12]

The United States is out of step. International documents promote democracy by protecting free expression but prohibiting speech that harms others. The raison d'être for the European human rights system is to embrace democracy and reject totalitarianism and the extremism that led to the unspeakable acts that occurred during the Second World War. Mexico, Canada, France, Denmark, the Netherlands, and the United Kingdom are examples of democracies that limit hateful speech without opening any floodgates of censorship.

Europeans define hate speech much as it is defined in the United States: expressions of "racism, xenophobia, anti-Semitism, aggressive nationalism and discrimination against minorities and immigrants." The difference, however, is that such language can be proscribed in Europe. The European Court of Human Rights ("ECtHR") has expressly stated that

> [T]olerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression that spread, incite, promote or justify hatred based on intolerance . . . .[13]

While the First Amendment simply states that "Congress shall make no law . . . abridging the freedom of speech," no ifs, ands, or buts, the European Convention's articulation is not absolutist. Because the exercise of free expression "carries with it duties and responsibilities, [it] may be subject to

12. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

13. Erbakan v. Turkey, 2006 Eur. Ct. H.R. ¶ 56.

such formalities and conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of the reputation or rights of others . . . ." The very creation of the right recognizes justifiable limitations. This approach, methodologically, is compatible with Matsuda's three-element paradigm. The goal is not to curb speech; the goal is to protect speech while defending other constitutional values.

To be sure, the ECtHR does not endorse censorship any more than Matusda would; such an outcome is contrary to fundamental democratic values. Yet, the European system distinguishes the right to express one's views that can be offensive, disturbing, or even shocking from allowing proscriptions of hate speech that cause harm to real people. In short, Europe—like Matsuda—cares about the victims' stories.

III. The Victims' Stories

The examples provide insight into how the different perspectives of the United States and the rest of the world vindicate different values and at what cost. For instance, the Bob Dylan case is probably exactly why the United States' approach to free speech is unbending. Based on the *Rolling Stone* interview, prosecutors in Paris have brought preliminary charges against Dylan for "public injury" and "incitement to hatred." The Representative Council of the Croatian Community and Institutions in France complained about his comments, claiming that they are hateful to all Croatians and thus violate France's hate-speech law. To be sure, this is a disturbing scenario, especially because it is evident from Dylan's interview that he is condemning, not embracing, racism. Although Croatians just want an apology, which means the case will not be tried, it is these sorts of excesses of governmental intrusion on ideas in the marketplace that the United States' approach rejects in providing virtually absolute protection for all hurtful speech.

The U.S. government can censor some speech in certain situations, but the exceptions are rare. Compare *Islam is of the Devil T-Shirt* with *Team Sander T-Shirt*. In the *Islam is of the Devil T-Shirt* case, the court reached a decision in light of the norm that First Amendment rights of school students are not as broad as the rights of adults in public fora.[14] Schools can prohibit the use of "vulgar and offensive terms" as well as terms that are "highly offensive or highly threatening to others." Thus, the court deemed the T-shirt's "highly confrontational" message "not conducive to civil discourse on

14. *See, e.g.*, Morse v. Frederick, 127 S. Ct. 2618 (2007).

religious issues" or "appropriate for school generally."[15] By contrast, the *Team Sander T-Shirt* incident may well be sending a hateful message of inferiority on the basis of race. But because the Team Sander label accompanies an offensive picture rather than words, it is likely insulated from regulation, especially in the UCLA setting where the free-thinking, "marketplace of ideas" logic may embrace more rather than less speech. The T-shirt statement is protected as opinion and its racist message becomes a debatable, not actionable, matter of social interest.

The *Anti-Gay Leaflets: At School* incident underscores the difference between United States and European approaches to regulation of speech in school settings. In the leafleting at school scenario, the ECtHR ruled that convicting the leafleters for agitating against a national or ethnic group did not violate the Article 10 right to freedom of expression. The ECtHR found that "freedom of expression is applicable not only to 'information' or 'ideas' [that are inoffensive] but also to those that offend, shock or disturb," and that while the "statements did not directly recommend individuals to commit hateful acts, they are serious and prejudicial allegations." The state can thus curb racist speech that is used to insult or ridicule particular groups. Significantly, the court noted that "discrimination based on sexual orientation is as serious as discrimination based on 'race, origin or colour.'" While the ECtHR would likely issue a similar ruling as the United States did in the school T-shirt case, a U.S. court would not accept such a content-based prohibition on leafleting—although a general antileafleting, content-neutral prohibition might be acceptable, especially because it would take place in a school and lockers are not public fora.[16]

In *Anti-Gay Leaflets: At Home*, in which a protester opposed homosexuality as a religious matter, the Supreme Court of Canada concluded that notwithstanding the political nature of the speech, if it is hateful and targets a protected, vulnerable group, such speech can be prohibited. The relevant question is "whether a reasonable person, aware of the context and circumstances, would view the expression as exposing the protected group to hatred . . . [to] extreme manifestations of the emotions described by the words 'detestation' and 'vilification.' "Beyond the "repugnancy of the idea," the ECtHR continued, "[t]he key is to determine the likely effect of the expression on its audience" in light of the goals of

15. *See* Sapp v. Sch. Bd. of Alachua Cnty., 2011 WL 5084647 (N.D. Fla. Sept. 30, 2011) (quoting Scott v. Sch. Bd. of Alachua Cnty., 324 F.3d 1246 (11th Cir. 2003)) (internal quotation marks omitted).

16. *See* R.A.V. v. St. Paul, 505 U.S. 377, 380 (1992) (holding as overly broad a regulation prohibiting fighting words that cause "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender").

eradicating discrimination.[17] The "key" is the victim's story—precisely Matsuda's point.

The *Blog: Kill the Judges* scenario is an actual case that resulted in the conviction of Hal Turner and his being sentenced to twenty-five months in prison. Threats such as these are not protected speech under the First Amendment, although nobody was physically harmed. To be sure, Turner's prior rants on "bull-dyke lesbians," "savage Negro beasts," "f*****s," and a "portable n****r lyncher," although hateful, are protected speech in the United States.[18] As the Dylan case suggests, however, these cases could be actionable in Europe.

We can contrast the Turner case with the *Islam is of the Devil: Burn the Koran* case, where violence did occur and lives were lost but where the words were protected because they did not fall under the traditional exceptions. Indeed, the U.S. Supreme Court in Phelps confirmed the infeasibility of successfully challenging the Burn the Koran scenario or the Billboard scenario.[19] The Court stated that while the words "fall short of refined social or political commentary," they nevertheless refer "to broad issues of interest to society at large" and thus constitute protected speech in spite of their hurtful nature. The Court concluded that "[s]imply put, the church members had the right to be where they were," despite the devastating impact on the deceased's family. And the Court plainly stated that "the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." The victim's story—here, the assault of a father burying his son—was irrelevant to all of the justices except Justice Alito.

Finally, when Huerta sued Núñez for moral damages based on the publication, the Mexico Supreme Court ruled that the antigay words were hate speech and not constitutionally protected. The court balanced the tension between freedom of expression and the right to equality and concluded that the offensive and discriminatory terms, notwithstanding their roots in Mexican culture, constituted hate speech. The court recognized how words can wound, how they shape prejudice and promote and sustain the marginalization of persons or groups, and how they can form the foundation for inequality, subordination, and inferiority. In contrast, there is

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17. Whatcott, [2013] 1 S.C.R. 467.

18. Don Terry, *Shock jock Neo-Nazi walks Free*, SALON (Oct. 9, 2012, 6:31 PM), http://www.salon.com/2012/10/09/shock_jock_neo_nazi_walks_free.

19. Snyder v. Phelps, 131 S. Ct. 1207, 1222 (2011). In a strongly worded dissent, Justice Alito expressed the idea that the victim's story was important. He noted that "[o]ur profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case . . . . The Court now holds that the First Amendment protected respondents' right to brutalize Mr. Snyder. I cannot agree."

no way the hurtful words would be unprotected in the United States. The key is the victim's story.

CONCLUSION

Although we are much closer to the reality of equality in law than ever before, both equality in law and in fact are still not a reality in the twenty-first century. In Saudi Arabia, women cannot drive. Nowhere are women equal to men in social, civil, political, economic, or cultural rights. Racial and ethnic minorities around the world—north and south, east and west alike—are disempowered, marginalized, impoverished, illiterate, and innumerate in disproportionate numbers.

The very first amendment to the Constitution, the right to freedom of speech, was ratified in 1791. It was not until almost three quarters of a century later, in 1865, that the United States abolished slavery by ratifying the Thirteenth Amendment. For people of color, the right to vote did not exist until five years later, in 1870, with the ratification of the Fifteenth Amendment. And women did not enjoy the right to vote until half a century later, with the passage of the Nineteenth Amendment in 1920.

In 1791, the First Amendment and the Constitution embraced racial, sexual (and gender), and sexual-orientation inequality. This implicit structural bias takes on legal force by refusing to balance free speech rights with the constitutional values of equality and nondiscrimination that have emerged since 1791. Thus, the resistance to hate speech prohibitions today not only reflects the racial stratification that existed when the right to free speech was created but also modern entrenchment and reinforcement of that hierarchy at the expense of equally significant constitutional values.

The U.S. Supreme Court's conclusion that it is permissible to express ideas about the inferiority of a race as well as hatred toward vulnerable groups—racial, ethnic, sexual, religious, and gendered minorities—wholly undermines the dignitarian rights of those who are targets of the slurs. Matsuda and the rest of the world take a more nuanced and balanced approach that both respects rights of free expression and protects those historically subordinated groups. Such approaches value human rights by valuing the victims' stories.