

# Hatred, Hostility, and Defamation: The United Nations' Exceptions to Free Speech

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**ABSTRACT:** The current UN policy regarding free speech presents a philosophical dilemma between accepting the free speech provisions in the Universal Declaration of Human Rights and exceptions carved out for hatred, hostility, and religious defamation. The Declaration should be understood to imply viewpoint neutrality and the exceptions for defamation are not viewpoint neutral. If the UN were to adopt J. S. Mill's crucial distinctions between expression and performative speech, content and context, and mental states and the acts motivated by them, it would be clear that hatred, hostility, and defamation cannot be exceptions to viewpoint neutral free speech. If the heart of free speech is freedom especially for the thought we hate, then the UN should abandon its exceptions or abandon appeals to free speech. However, I will offer a strong reason that it should not do the latter.

No serious advocate of “freedom of speech” has used that term to refer to an absolute right to say anything at any time. Arguably, the staunchest free speech champion, J. S. Mill, advocated freedom of thought and opinion while excluding certain speech acts such as incitement. Strictly speaking it would be nearly impossible to allow anyone to say anything. Such a stance would protect shouting in a hospital or monastery, protests in the middle of lectures or religious services, and criminal solicitation. It is better to conceive of free speech—as Mill does—as a protected class of speech acts that excludes shouting for no reason, threats and other things we do with words. Free speech advocates like Mill do not seek to protect “speech” in whatever form but rather a certain class that is labeled “free speech.”<sup>1</sup>

There remains one class of protected speech that is thought to be completely protected by Millian defenses of free speech. That core class consists of opinion and sentiment regardless of how pernicious or offensive or useless.<sup>2</sup> The state must remain neutral about the value of the viewpoint (opinion, sentiment) within the public square and refrain from censoring a viewpoint outright. This state restriction on abridging opinions is often referred to as viewpoint neutrality.

The spirit of viewpoint neutrality is not unique to Mill. It is expressed in the Universal Declaration of Human Rights (hereafter the Declaration). Article 19 says the following: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."<sup>3</sup> However, just as with the general principle of free speech, no free speech advocate seriously thinks this provision does not admit exclusions. After all, a literal reading of this tenet would require the UN to protect incitement to riot and tolerate the publishing of the formula for making a dirty bomb.

A more charitable reading would interpret the UN commitment, in Millian fashion, to require that any law excluding some speech-act from the class of protected speech should be neutral between viewpoints. Time, place, and manner restrictions may regulate when and where an opinion may be expressed but not specific opinions in any form.

But why should we think all viewpoints on a par? Why not think that incitement to hatred of some group on the basis of their race or religion should not be included in the exclusions to free speech along with incitement to violence, or threats, or criminal solicitation? After all, the objection might go, they all harm, and the latter kind of indirect influence is often more pervasive, incendiary, and devastating than an isolated incident of racial or religious violence.

Concern about pernicious and harmful speech is included in the International Covenant on Civil and Political Rights (ICCPR), an international treaty enforced by the UN Human Rights Council based on the Declaration.<sup>4</sup> The ICCPR treaty includes an expansion of the free speech article in the Declaration. Article 20 of the ICCPR states: "Any propaganda for war shall be prohibited by law. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

According to the ICCPR some speech goes beyond the pale because it represents not expression but defamation of some religious or ethnic group which leads to hostility, violence, and discrimination. A recent resolution (7/19) adopted by the UN General Assembly urges states to "prohibit the dissemination, including through political institutions and organizations, of racist, xenophobic ideas and material aimed at any religion or its followers that constitute incitement to racial and religious hatred, hostility or violence."<sup>5</sup> This represents an expansion of the traditional exclusions against incitement to include opinions and sentiments concerning race, ethnicity, or religion.

I want to show that current UN policy regarding free speech presents a dilemma between the Human Rights provisions for free speech and the ICCPR exceptions for hatred, hostility, and religious defamation. To do this I will argue two main points

- 1) The Declaration should be understood to imply viewpoint neutrality
- 2) The ICCPR and Resolution 7/19 against religious defamation are not viewpoint neutral.

This presents a dilemma. If the UN accepts (2) they cannot hold to (1) and vice versa. I will also argue that the reason for the apparent shift from the UN's viewpoint neutrality to anti-defamation is caused by a lack of clarity just what

is meant by free speech without borders in the Declaration 19–20. If the heart of free speech is viewpoint neutrality, then the UN should abandon free speech. However, I will also offer a reason why that is a grave mistake.

## **CRUCIAL DISTINCTIONS FOR VIEWPOINT NEUTRALITY**

Mill distinguishes between expression and expressive acts, viewpoints and their contexts, and mental states and actions motivated by mental states. However, the ICCPR does not make these distinctions.

Mill says that the opinion that “corn-dealers are starvers of the poor” or “private property is robbery” expressed in a newspaper article is pure opinion and must be immune from censorship (III, 1). However the same opinion uttered to a group assembled outside a corn dealer’s house is not opinion but an expressive act and thus not as free as an opinion. It will be helpful to look at Mill’s exact words: “An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of the corn-dealer, or when handed out among the same mob in the form of a placard” (III, 1).

It is significant that Mill, a utilitarian, does not directly appeal to the consequences to decide whether or not some expression loses immunity from censorship or prosecution. Mill says that if the newspaper article (or pamphlet) leads to the same violent outcome as a speech before a gathered crowd, it is nonetheless pure opinion and should not be censored.

We can take Mill’s example and update it to cover recent concerns about racial or religious pernicious speech. A recent controversy has arisen about the enforcement of libel laws in the U.K. with respect to expose books concerning the funding of terrorism.<sup>6</sup> If the opinion “Middle-Eastern philanthropist X is an Islamo-fascist” is published in a book that causes others to hate X and harm him, then according to Mill, the opinion should be protected. However, if the same opinion were uttered to a mob outside of said philanthropist’s house, the speech could be subject to prior restraint or if violence occurred, the speaker could be punished.

Why is it that only the latter context can be censored given that both have the same content? The answer seems to be that the speech to the mob is not expression (as the publication of an article would be) but rather an expressive act.<sup>7</sup>

Mill makes a crucial distinction between expressive actions and expressions of opinion and says no one expects the former to be as free as the latter. Then he says that opinions may lose their immunity to censorship when they become instigation to some harmful act. The most charitable way to read this is that there are two poles, at one end is opinion and at the other end are actions that may express. Mill does not immediately place incitement into the camp of pure action but acknowledges that opinions can lose their status as being immune from legal sanction which is a status already assumed for pure actions.<sup>8</sup>

The concept that an opinion can lose its immunity when it becomes a performative act like incitement is consistent with the Declaration’s provision for freedom of

speech without frontiers. This is because the opinion itself is always free. The use of the opinion for a performative act is not. The ICCPR, however, does not make this distinction. Any speech that incites hostility, discrimination or violence can be censored by law. Resolution 7/19 calls for the prohibition of the dissemination of any xenophobic ideas in any context. This means that the viewpoint itself must not be uttered. Ostensibly, there is no distinction between expression disseminated before a mob and expression disseminated through a blog.

The aforementioned example of the corn-dealer from Mill highlights a second crucial distinction between the viewpoint itself and context. For Mill, what determines immunity from censorship is the context in which the viewpoint is uttered *and* the content. Content can be immune from censorship based on where or when it is expressed. Likewise, context is not sufficient to turn speech into incitement. Shouting baseball scores before a mob is not incitement for the purposes of state action.

To see how this distinction would apply to the current concerns about incitement and hostility, consider the so-called Mohammed Cartoon controversy. On September 30, 2005 the Danish newspaper, *Jyllands-Posten* published twelve political cartoons lampooning Islam and the prophet Mohammed. This sparked protests throughout Denmark and several other Muslim countries.

Two imams, Akkari and Abu Laban, constructed a dossier entitled "Dossier about Championing the Prophet Muhammad Peace Be upon Him." (hereafter the AL dossier). In the dossier, Akkari and Abu Laban expressed the opinion that Denmark was overcome by secularism and that the Danish people who supported the cartoons are infidels.<sup>9</sup> The inclusion of the term "infidels" sparked a particularly violent response from Islamic militants who interpreted jihad to include violence against infidels. Violence did indeed occur. On February 4, 2006, the Danish embassies in Syria were burned.

A Millian response to the AL dossier and the subsequent violence would not exclude the expression on the basis of its viewpoint. The opinion did not call for violence which would be an expressive act. The imams stated an opinion about the moral state of Denmark. The imams' viewpoints were, therefore, expressions of opinion and not performative speech-acts. However, if the same dossier were read to a mob assembled in front of the Danish embassy, the context would transform the viewpoint from pure expression to incitement. In order to be excluded from the protected class of speech-acts, the content would have to have a reasonable expectation of causing incitement to violence and the context (time and place) must be specific. The ICCPR, however, does not make this distinction.

The last crucial distinction that the ICCPR fails to make is the distinction between mental states and actions that can be motivated by mental states. This omission is evident in Article 20.2 when pernicious speech that incites discrimination, hostility or violence is prohibited. The language of the ICCPR conflates actions (discrimination and violence) with mental states like hostility.

Is there a difference between incitement to violence and incitement to hostility? The terms are not conceptually tied together. One could be hostile without discriminating. One could discriminate without hostility. One could act violently without hatred. One could discriminate without violence etc. Likewise, violence need not be motivated by hostility. It can also be motivated by other attitudes.

If we define violence as only those acts of harm that stem from some negative attitude, this only proves the point. The definition would prove that the act of violence can be separated from the mental state that sparked it.<sup>10</sup>

When we isolate “hostility toward a race or religion” the divide becomes even more apparent. It is relatively easy to imagine someone being hostile toward a religious group and manifesting that hostility in ways other than violence or discrimination. For example atheists can often be said to be hostile towards any religion, yet it is reasonable for an atheist to be hostile toward a religion or even religious people but not engage in violence or discrimination.

An argument could be raised that hostility, discrimination, and violence all harm; therefore, they violate the Millian harm principle. Proponents of this argument could appeal to the harm caused by hostility as a reason to exclude it from the protected class Mill says is immune from censorship.

Mill never uses the term “harm principle” however. Instead Mill says that exclusion from the sphere of liberty occurs only when a clear and assignable duty has been violated (IV, 10). Not all harms violate clear and assignable duties to others. Thus, if some action does not violate a clear duty, it may still harm without losing its status as part of the protected class of speech acts.

Surely when the imams uttered their opinion that Danes are infidels, these utterances were a cause of the harm that resulted; however, the opinions themselves did not violate any clear duty to those harmed.<sup>11</sup> Hostility should be clearly distinguished from violence because the latter represents a violation of clear and assignable duty. Without due process and just authority, violence is always a violation of the clear right not to be physically assaulted. No one, however, has a duty not to have hostility toward another.

Likewise, violence should be distinguished from discrimination for the same reason. While violence violates a duty not to assault, discrimination toward another may or may not violate a clear duty depending on the grounds for the discrimination and what is discriminated. We do not have a duty to refrain from the mental state of discriminating. We make discriminating decisions all the time. Rather it could be said that we have a duty not to *act* on *unjust* discriminatory grounds—race, sex, religion etc.—to deny someone their due.

Given that hostility is a mental state, can it be argued that incitement to hostility is the same as incitement to violence or discrimination in such a way as to say they harm in the same way? There are two reasons that the answer should be negative. First, since hostility is a state of mind, it can be separated from the action that was motivated by the hostility. Second, legal punishment makes this distinction as a matter of course.<sup>12</sup>

If all of this is true, does it even make sense to speak of incitement to hostility rather than incitement to hostile actions? Another way to put the question is to ask: Can a person make someone else feel hostile without persuading him to feel hostile towards a third person? Setting aside drugs and brainwashing, incitement to hostile states of mind seems to be, in reality, persuasion. If so, what is required is a distinction between good persuasion and bad persuasion. If that distinction is made, however, then it seems the only difference between good and bad persuasion is the opinion itself—not the hostile state of mind.

## VIEWPOINTS AND JUSTIFIED OPINIONS

The ICCPR and Resolution 7/19 do not make Mill's three crucial distinctions between opinions and performative acts, between viewpoints and the context of their utterance, and the utterance of opinions and the mental states that they spring from. But these examples and worries only prove that there are crucial interpretive distinctions not spelled out in the ICCPR. It might be objected that no covenant can be completely clear. Someone might object that splitting hairs may be the pastime of philosophers, but it is a luxury that international policy makers do not have. What is needed is some compelling reason why it is crucial to draw a sharp line between the class of speech acts that represent the expression of opinions which are to be protected and performative acts that are excluded from the protection.

In *On Liberty*, Mill gives a substantive reason why governments should not interfere with the exchange of ideas no matter how pernicious. Mill claims that a man is not deserving of his confidence in his opinion unless:

He has kept his mind open to criticism of his opinions and conduct. Because it has been his practice to listen to all that could be said against him; to profit by as much of it as was just, and expound to himself, and upon occasion to others, the fallacy of what is fallacious. (II, 32)

The cost of abridging viewpoints is *not* being entitled to consider one's opinion justified. If pernicious speech directed toward some religious group is abridged completely, it is not just the speakers who suffer from the censorship. The intended targets of the pernicious speech also lose something very important. They lose the confidence they have in their own opinions about the pernicious speakers and their message. To have confidence that one's opinion is justified requires that one pay critical attention to the opinions of detractors, adjust one's own position where the detractors' opinions have merit, and, finally to expound to oneself and others those opinions that are fallacious and blameworthy.

To return to the cartoon controversy, if as many imams would require, the Danish state were to fine, imprison or otherwise punish those who would defame the prophet Mohammed in image or message, the Muslim community would not be deserving of confidence in its own claim that these anti-Muslim opinions are blameworthy, misleading etc.<sup>13</sup> Indeed if this is true, we can agree with Mill that the peculiar evil of censorship is not that it robs the speaker of his expression but that it robs those who dissent from the means and the justification from which to criticize and protest (II, 1).

The position embodied in the ICCPR is not compatible with the UN Declaration's right to free speech. The ICCPR amendments call for exclusions that are incompatible with viewpoint neutrality implicit in the Declaration. The ICCPR fails to make explicit three key distinctions between opinions and performative acts, between the content and the context of an opinion when it is uttered, and between the expression of opinions and the mental states that they spring from. All of these distinctions are necessary to uphold the viewpoint neutrality implied by the Declaration's freedom to hold opinions. More importantly these distinctions are crucial to preserving and promoting the practices of justification

necessary for free societies. Regimes that would abridge pernicious speech rob their citizens of justified opinions about their detractors and their own judgments of pernicious expression.

## Endnotes

1. In fact the only people to ever suggest that freedom of speech or “expression” must not exclude any speaking are those who attack the very concept of free speech. See Stanley Fish, *There's No Such Thing as Free Speech, and it's a Good Thing Too* (New York: Oxford University Press, 1994), 102ff.

2. Mill's formulation of this idea: “In the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological. . . . No society in which these liberties are not, on the whole, respected is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified” (I, 12). Unless otherwise noted, all quotations from *On Liberty* are from *J. S. Mill On Liberty in Focus*, ed. John Gray and G. W. Smith (London: Routledge, 1991). Specific references within *On Liberty* will be given simply as (chapter, paragraph).

3. <http://www.un.org/en/documents/udhr/> [available June 2009].

4. The full text of the ICCPR can be found at <http://www2.ohchr.org/english/law/ccpr.htm> [available September 2009].

5. The entire text of Resolution 7/19 can be found at <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf> [accessed September 28, 2009]. It is worth quoting articles 19 and 20 of the ICCPR in their entirety:

### *Article 19*

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

### *Article 20*

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.
6. See Stanley Kurtz, “Not without a Fight,” *New Criterion* Supplement (2008): 5–15.
7. “Let us now examine whether . . . men should be free to act upon their opinions—to carry these out in their lives, without hindrance, either physical or moral, from their fellow man, so long as it is at their own risk and peril. This last proviso is of course indispensable. No one pretends that actions should be as free as opinions. On the contrary, even opinions

lose their immunity, when the circumstances in which they are expressed are such as to constitute instigation to some mischievous act" (III, 1).

8. One need not delve into the complexities of speech-act theory for the purposes of this argument. We can simply stipulate that there is a distinction between opinions and use of words to perform some act. Austin and Searle have differentiated speech acts which are utterances of content from the other things we do with words such as promise, bestow titles, and threaten. If this is accurate, incitement is not just a speech act but a performative act using utterances.

See J. L. Austin, *How to do Things with Words* (New York: Oxford University Press, 1965, c1962), 166, and John R. Searle, *Speech Acts: An Essay in the Philosophy of Language* (Oxford: Cambridge University Press, 1970), 203.

9. The complete Dossier (in Arabic) can be found at [http://monkeydyne.com/photos/?d=akkari\\_dossier](http://monkeydyne.com/photos/?d=akkari_dossier) [accessed January 12, 2011].

10. Violence need not stem from a negative attitude toward the victim. Some serial killers are motivated to violence without any particular negative attitude toward the victim. Violent offenders do violence out of many attitudes which are not blameworthy as an attitude but only blameworthy when wrongfully applied or as instigation for some violent act. Pride, anger, lust, and pleasure may all motivate violence but so does honor, fear, courage. These are also attitudes that can be the impetus for violence.

11. As Jacobson points out, it is more accurate to say that Mill has an anti-paternalism principle than a harm principle given that he admits some self-regarding acts will harm yet be immune to state intervention. Daniel Jacobson, "Mill on Liberty, Speech, and the Free Society," *Philosophy and Public Affairs* 29.3 (Summer 2000): 276–309.

12. If Alan hits Betty out of hostility for Betty's religion, Alan can be punished for hitting Betty. In Mill's terms, he has violated a clear duty to leave Betty alone. It is controversial whether or not the state of mind Alan had means that his assault should be punished more harshly, but what is not controversial is that his punishment is for hitting Betty, not for being in a hostile state of mind. Evidence of this is that most people would not think that Alan should be arrested if he confessed to being hostile to Betty's religion but did nothing to her. We might call him blameworthy or cruel, but not punish him. Alan may harm Betty by his hostile state of mind if he expresses it. Just knowing that Alan is hostile may harm Betty, but Betty has no clear right to Alan's mental state as long as Alan fulfills his duties not to assault Betty.

13. It should be clear why traditional exclusions to free speech do not threaten the practices of attention, adjustment, and exposition. Exclusions for time, place, and manner do not ultimately censor the opinions themselves. It is true that traditional restrictions on time, place, and manner can combine to produce a draconian effect that raises the costs of accessing opinions in ways that could affect the practices as much as outright censorship. However, such measures would quickly show that they betray the Declaration itself—especially the principle that everyone should have the ability to hold opinions without interference. Other traditional exclusions do not bar access to the practices of justification. If the government restricts certain content—such as the publishing of state secrets, false advertising or false scientific data—the censorship does not bar access to opinions necessary for the practices of justification. None of these exclusions, including those for incitement, bar access to the opinions themselves to the extent that citizens cannot engage in their own justification of their viewpoints. The same cannot be said for exclusion of pernicious opinions. While there are many ways to accommodate the practices of justification and even encourage them, it seems unlikely that such practices will flourish in a regime that declares some opinions to be anathema. Slippery slopes aside, when some opinions are deemed unworthy of critical attention because they are censored out of the public square, it undermines the whole enterprise of justifying one's personal beliefs on the basis of individual judgment.