

INTO THE BREACH: THE LEGISLATIVE FUNCTION OF TABOO

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Taboos are often viewed with suspicion by modern eyes. The very word "taboo" evokes a sense of unfreedom, of limitation. Indeed, when one thinks of now-extinct taboos, the repressive and reactionary nature of taboos is clearly displayed. This, however, is not an argument for the dismantling of all taboos. There are many aspects of social life that a community may wish to govern but cannot through the regular legislative channels. In many cases, such governance might be viewed as an unjustifiable infringement on liberty. There are, however, some cases in which a taboo may be justified because of the protection it offers against a real harm. This article will explore the idea of informal social legislation through taboo, and will attempt to rescue (some) taboos from the position of disfavour they currently find themselves in. In the process, this article will establish criteria by which justifiable taboos may be separated from the unjustifiable.

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Introduction: Taboo and the Rule of Law

Ignorance of the law is not a defence. When the law inquires into the state of mind of an alleged murderer, for instance, the question of whether he

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was aware or should have been aware of the probable consequences of his actions arises. Whether he is aware of the *legal* consequences is irrelevant. In other words, what is important is the knowledge that he was killing, not the knowledge that he was committing a crime. Absent all knowledge of the law, the killer would still be found guilty. The main reason this result is deemed fair is that the killer *could have known* the law. Though in the case of murder it would be difficult to avoid knowledge of the law, even in cases where the law is less universal or obvious, the result is the same. The law is on the books, so to speak, and everyone is legally charged with having read them.¹ Application of the law in a specific case is not unfair — despite the fact that the defendant’s knowledge was merely constructive — because the law is accessible to all. Legal theorist Joseph Raz explains that open, clear, public rules are essential elements of fairness in a society governed by the rule of law.² A democracy has the added advantage of making the citizenry responsible for the rules adopted. If the society’s representatives promulgate a law, the population can be said to have consented to that law, and so they may be held to it. Such a rule structure allows the state to exercise power without seeming unfair, and allows individuals to make rational decisions when they regulate their behaviour.

Justice Holmes thus hypothesised the “bad man”: an individual who cared little for morality, but neither did he wish to be crushed by the engine of the law.³ The bad man would act in his own interest up to the line of illegality, and would generally decide it unprofitable to cross this line. The bad man would only act morally inasmuch as was required by the law; only inasmuch as was incidental to avoiding punishment. Raz’s requirements of clarity and openness in legislation are crucial to the bad man. For someone who lives on the border

¹ JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 395 (2005).

² JOSEPH RAZ, *Legal Validity, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 146, 146–159 (1979). It should be noted that Raz’s theory sought to define Rule of Law, and not, as is sometimes thought, Democracy. Raz’s requirements for legal validity could be met by an authoritarian regime as well.

³ See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460 (1897).

of illegality, knowledge of that border's precise contours is extremely important information. Aside from the danger of a very sudden shift in the border's location, Holmes' bad man would be relatively secure from prosecution as long as he remained informed. Rather more difficult to avoid would be moral condemnation (he is, after all, the *bad man*). As the Massachusetts Supreme Judicial Court explained almost two centuries ago,

What a man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the *interior* forum, as the tribunal of conscience has been aptly called. Is there not a moral obligation upon every son who has become affluent by means of the education and advantages bestowed upon him by his father, to relieve that father from pecuniary embarrassment, to promote his comfort and happiness, and even to share with him his riches, if thereby he will be made happy? And yet such a son may, with impunity, leave such a father in any degree of penury . . .⁴

The Court recognised that standards of morality⁵ could not be enforced through the legal system, except in certain cases of "perfect duty" where legal and moral obligation coincide. The vast majority of moral imperatives are "imperfect duties" that the law must leave to the "tribunal of conscience."⁶ There are good reasons for this being the case. It would be impossible for the law to enforce the morality of each member of society on every other member,

⁴ Mills v. Wyman, 20 Mass. 207, 210 (1825) [emphasis in original].

⁵ H.L.A. Hart has written extensively on the question of whether or not morality should be enforced by legal mechanisms and what place morality has in legal institutions. See H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963). I leave that issue to his competent treatment. For the purposes of this paper, morality is merely a subjective preference that the holder believes other people should share or by which they should be governed. Holders of certain moral beliefs will attempt to govern their own conduct in accordance with those beliefs. Given a large enough number of believers, the morality becomes social or public, and impacts social intercourse rather than merely individual action. See *id.* at 5-7.

⁶ Mills v. Wyman, 20 Mass. 207, 211 (1825).

for there is little consensus in diverse societies as to what is and what is not moral. For a man of no moral compunctions, such as the bad man, the internal moral tribunal seems unthreatening. However, in the context of a society that subscribes to a certain set of morals, the bad man can be subjected to a great deal of private persecution even if he cannot be subjected to public prosecution.

This brings us, finally, to the issue of taboo.⁷ Like law, morality and taboos are part of a regime designed to regulate individual behaviour. However, unlike the law, taboos do not attempt to adhere to Raz's criteria for good laws. Taboos need not be clearly spelled out, and generally are not. This complicates matters for the bad man. Let us assume that rather than simply being averse to legal sanction, the bad man is averse to social sanction as well. He will therefore seek to avoid taboo transgressions that could impose terrible costs on his finances, his reputation, or his physical person. It is difficult for our revised bad man to decide where the borders of acceptability lie because no map has been clearly laid out. Regardless of the Supreme Judicial Court's insistence that matters of morality should be tried by an internal tribunal, matters of taboo are generally tried by an external one: society. An amorphous code limiting speech and inquiry that is enforced by self-appointed guardians of taboo and morality, and that threatens serious consequences for transgressors, complicates the self-regulation of behaviour that Holmes believed would result from clear exposition of laws. Violators of taboos may be ostracised and branded. The violator's economic activities would be hindered by those who would refuse to enter transactions with him, either because they are outraged by the taboo transgression or because they fear branding by association. The psychological, social, and economic costs of this type of punishment can be as coercive as a state-run sanction regime, but here little process is accorded the violator.

⁷ For the purposes of this article, a "taboo" is a socially mandated prohibition on speech. To rise to the level of taboo, the prohibition must be so strong that many individuals internalise and self-enforce the taboo. This definition follows Freud's in large part: "Taboos, we must suppose, are prohibitions of primeval antiquity which were at some time externally imposed upon a generation of primitive men . . . They must then have persisted from generation to generation, perhaps merely as a result of . . . parental and social authority." SIGMUND FREUD, TOTEM AND TABOO 31 (1950).

The moral ground upon which taboo enforcers stand is difficult to justify when considering Raz's requirements for fairness in legislation. Perhaps most interesting is the scenario where the bad man, by violating a particular taboo, may become a hero for future generations who, by that time, have discarded that taboo. It is difficult to determine who will become such a hero beforehand. However, society must have some mechanism for determining when taboo violations will be allowed and when they will be silenced, when they will be punished and when trumpeted. In the absence of such a mechanism, it becomes difficult for actors to determine whether they are in breach of a taboo, and what the consequences of such a breach will be. Indeed, in the absence of due process of taboo violations, actors have little opportunity after the fact to prove their innocence. These problems are the subject of the present inquiry.

II. The Operation of Taboos

In order to determine how society makes quasi-judicial decisions regarding taboos and transgressors, a brief inquiry in the nature and operation of taboo in modern society becomes necessary. Taboos operate by preventing otherwise legal speech through some sort of dissuasion. Such dissuasion generally takes the form of social disapprobation and economic harm. The person revealed to be a racist may, for example, lose her job, become un-hirable in a particular market, suffer from a loss of reputation, lose friends, and so on. These are the sentences meted out by the tribunals of conscience in society. Taboos are, therefore, an exercise of power by one group in society over others. This power is derived from moral authority, historical experience, or influence. Societies at times decide to invest in a particular group the moral authority to set up taboos relating to a particular issue. Often this moral authority is the result of a historical experience, imbalance, or inequity: A terrible experience with racism, for example, often invests the victim group with the moral authority to render taboo ideas and words decreed to be racist. The hope, of course, is that the racist event will thereby be prevented from recurring. Similar logic applies to other historical events that are seen as oppressive or repulsive by later generations. Without history on their side, or lacking specific moral authority on an issue, a

group may still attempt to render an idea taboo through the exercise of influence, though this is less effective for reasons explained below.

In addition to the power or authority required to promulgate a taboo, the acquiescence of society in its creation is required. A taboo that nobody believes in or abides by is not much of a taboo at all. Dominant social groups, often guilty of some kind of oppression in the past feel guilt for its occurrence and thus submit to the moral authority of the victimised group. The meek thus inherit morality. Indeed, guilt becomes useful as the tribunal of conscience would be hard-pressed to enforce a taboo upon too great a number of violators. Most taboos must be self-enforcing. Many theorists have proposed mechanisms by which this might occur. The psychoanalyst Sigmund Freud posited a guilt complex that forced the individual in society to constantly compare himself to an unattainable standard, feel guilty for being inadequate, and thus try all the harder to attain the standard.⁸ Such guilt could arise out of historical wrongs. It is not often that heroes such as Dr. Martin Luther King, Jr. arise in history and after their passing are idolised. Those that opposed King are roundly condemned by later generations. Thus: guilt. Even for newer generations, constant comparison to the ideal, even for the average person who believes himself to be non-prejudiced, leads only to magnification of the ideal and increased feelings of guilt. Most whites, for example, openly favour equality for blacks and whites, but how many harbour secret doubts when their daughter decides to enter a relationship with an African American man? How many, even if only fleetingly, feel a stab of anxiety when walking toward a crowd of young black males? These feelings, unless vindicated by illegal acts performed by the African Americans in question, lead to pangs of guilt for having harboured such ideas,

⁸ See generally SIGMUND FREUD, *GROUP PSYCHOLOGY AND THE ANALYSIS OF THE EGO* (1989). Freud makes it clear that the adoption and internalisation of a standard, what he calls the adoption of an external object as the ego *ideal*— against which to compare the ego, or self — often requires some external impetus and an example. A champion is needed, one who, by example, leads people to accept the new taboo, or, in other words, convinces people that they should feel guilty.

for having racist thoughts, and, in the end, strengthen the taboo. Other reasons for the acquiescence of society to minority-promulgated taboos include the perceived danger of the taboo idea or topic, and the political considerations. If society believes the discussion of a topic will only breed harm, then it will acquiesce to its tabooisation.⁹

In order to prevent the recurrence of past wrongs, minimise certain perceived dangers, or simply to try to change the behaviour they find offensive, many segments within society have attempted, with varying success, to render certain issues, topics, ideas, acts, or associations taboo. The most successful of these movements have resulted in taboos regulating use of the word “nigger,” anti-Semitism, and racial supremacism.¹⁰ These three taboos share a common history. America, a nation declaredly devoted to freedom and equality, has a very long history of racism, slavery, and intolerance. One historical commentator characterised the fact that “slave-owners [were] signing a Declaration of Independence which asserted the inalienable right of every man to liberty and equality,” as a “grotesque absurdity.”¹¹ This absurdity eventually caught up with America, and slavery was abolished. The American experience in the Second World War served to further underline the grotesqueness of racism. The revelations of the unspeakable evils of the Holocaust, and the common use of African American soldiers shook the foundations of the ideology of racism. African Americans, American Jews, and other minority groups were eventually successful in eliminating racism on the legal plane.¹² This victory, the official admission that racism was wrong, granted these minority groups the moral authority to determine what fell under the purview of a taboo on racism. Perhaps

⁹ I am borrowing this word from the field of cultural anthropology. See, e.g., IDA MAGLI & JANET SETHRE, *CULTURAL ANTHROPOLOGY: AN INTRODUCTION* 124 (2001).

¹⁰ Jacinth Samuels, *Dangerous Liaisons: Queer Subjectivity, Liberalism and Race*, 13 *CULT. STUD.* 91, 102 (1999).

¹¹ 6 WILLIAM LECKY, *A HISTORY OF ENGLAND IN THE EIGHTEENTH CENTURY* 282 (1923).

¹² See Religious Action Center for Reform Judaism, Jews and the Civil Rights Movement, <http://rac.org/advocacy/issues/issuecr> (last visited May 2, 2007).

not immediately, but certainly over time, a great deal of society, having comprehended the dangers associated with racism and feeling a degree of guilt for their own or their ancestors complicity in its perpetuation, acquiesced to the taboo. This led to the tabooisation of the word “nigger” when employed by white people, the elimination of racial supremacism as a topic of legitimate debate, and the creation of a taboo against anti-Semitism. As noted, these taboos did not gain universal acquiescence, as some communities clung to past prejudices, and some would manufacture prejudice anew.¹³ However, these taboos did become fairly mainstream.¹⁴

In cases where a taboo fails to garner sufficient acquiescence from the population, the group advocating its adoption might remove itself from the battle for the minds of the populace and instead make the state its battleground. This course of action is adopted especially when the group advocating the taboo has access to political power or the idea in question is considered particularly dangerous. The hysteria surrounding the McCarthy witch-hunts, for example, provide an example of a taboo on ideas and association, in this case on left-leaning ideologies that became a national political issue.¹⁵ McCarthy turned a taboo on Bolshevism into a state effort to silence speech and apprehend individuals deemed too radical. The difficulties of this route are many, however. The major challenge is drafting a set of rules that would prohibit the speech or idea in question, but would allow other forms of speech that society does not wish to see limited. Most of McCarthy’s victims were not punished for their purported communist views for very long: convictions were overturned on substantive and procedural grounds (many determinations of guilt were made in extra-judicial “trials”) and anti-Communist laws were struck down as

¹³ See, e.g., KATHARINE GELBER, *SPEAKING BACK: THE FREE SPEECH VERSUS HATE SPEECH DEBATE* 126 (2002).

¹⁴ These taboos also have numerous exceptions, some of which will be discussed below.

¹⁵ RICHARD FRIED, *NIGHTMARE IN RED* 41 (1990).

unconstitutional.¹⁶ Other attempts, generally less successful, have been made to use the power of the state to extend obscenity laws to prevent certain types of clothing from being worn in public places¹⁷ or to ban hate speech.¹⁸ Such bans are generally confined to the realm of taboo, to be enforced by society rather than the state, because of the difficulties of legislating to deal with a particularised issue without using strokes broad enough to unintentionally blot out other discussion.

Domestic groups are not the only ones able to fulfill the dual requirements of power and acquiescence to create a taboo. Groups outside of society are sometimes able to exercise sufficient influence to, in effect, censor by means of a taboo. Various communities internationally are constantly vying to have their taboos recognised. The recent cartoon controversy involving the Prophet Muhammad¹⁹ is a case in point. Many Muslims attempted to force recognition of their own taboo against depictions of the Prophet by expressing their outrage with words and violence. Newspapers across Europe republished the cartoons above these protests, to show that freedom of the press — a core feature of a democracy — was not something they would be cowed into abandoning. The vast majority of American newspapers, however, refused to publish the cartoons,

¹⁶ See, e.g., *Yates v. United States*, 354 U.S. 298 (1957); *Slochower v. Board of Education*, 350 U.S. 551 (1956); *Faulk v. AWARE Inc.*, 14 N.Y. 899 (1964).

¹⁷ Tawnell D. Hobbs, *Ban on Saggy Pants to Get Look*, DALLAS MORNING NEWS, Aug. 24, 2006, http://www.wfaa.com/sharedcontent/dws/news/localnews/tv/stories/DN-pants_24met.ART.West.Edition1.3ead8bc.html.

¹⁸ Declan McCullagh, *U.S. Won't Support Net 'Hate Speech' Ban*, CNET NEWS, Nov. 15, 2002, <http://news.com.com/2100-1023-965983.html> (“According to a long line of U.S. Supreme Court rulings, ‘hate speech’ is generally protected by the First Amendment. There are relatively narrow exceptions that allow the government to ban threats, words designed to “incite an immediate breach of the peace” that are directed at an individual, and words that are intended to provoke ‘imminent lawless action.’”).

¹⁹ Peace be upon him. (The present author asks the reader's indulgence here.)

acquiescing to the demands of the mob of violent protestors and adopting their taboo.²⁰ Indeed, the adoption of this taboo was so widespread that the editors of a student newspaper that dared republish the images were subject to swift disciplinary action: they were removed as editors and suspended as students.²¹ The student editors told newspapers that they found the cartoons “repugnant” but that they “believe[d] that there was a certain endangerment of free speech [in this situation], especially given the general prudishness of the American press.”²² These concerns, unfortunately, were inadequately addressed. The inaction of the mainstream media served only to add legitimacy to the Islamic taboo.

III. Transgressors of Yesteryear

The observation of a taboo is not inaction. It is not simply silence. The observation of a taboo is in itself an act of speech. By acquiescing to a taboo an actor indirectly affirms some or all of the following propositions (while one who defends or advocates a particular taboo directly does the same):

1. The moral stance underlying the taboo is True. That is, those who breach the taboo are committing an act that is morally wrong.
2. The factual or empirical debate that the taboo prevents is resolved in a particular way. In other words, the factual claims enshrined by taboo are Correct, beyond question, and indisputable.
3. The taboo serves a useful function. It protects a certain group that might otherwise be harmed or abdicates some freedom to society’s non-governmental policing in the name of a greater good.

²⁰ William J. Bennet & Alan M. Dershowitz, *A Failure of the Press*, WASH. POST, Feb. 23, 2006, at A19.

²¹ Monica Davey, *Illinois Student Paper Prints Muslim Cartoons, and Reaction is Swift*, N.Y. TIMES, Feb. 17, 2006, available at <http://www.nytimes.com/2006/02/17/national/17cartoons.html>.

²² *Id.*

The certainty reflected by these propositions is hardly prone to empirical verification. This certainty may be reflective of a belief in an externally derived morality; that is, one that comes down to humanity from a divine source. For all of human history societies have disputed divine revelation, a fact that is unsurprising given the sparse evidence available. Indeed, many care little for morality built around divine *diktat* for that very reason, choosing instead to base their morality in history, science, and other forms of empirical experience. Such conflicts render certainty fundamentally impossible. Factual certainty is no easier to defend. As soon as an idea is taken out of public discourse based on “factual certainty,” a fundamental challenge is posed to that idea. The journalist Auberon Waugh once remarked, “What kind of historical fact is it that has to be protected by draconian measures such as these?”; a question echoed often by Holocaust deniers.²³ Finally, the greater good being advanced here could be the prevention of danger or harm to a particular group in society, or the prevention of government action in this area. This latter justification is particularly interesting. If taboos are an attempt to prevent government action, which is heavy-handed and not subject matter specific, while allaying the threat of a harm through non-governmental enforcement mechanisms, then there may be some justification for it that does not fall prey to the certainty problem noted above.

In the previous section it was shown that a particular group in society could create a taboo by using some form of power and gaining acquiescence from the populace for any number of reasons. Taboos, however, do not remain static once erected. We turn now to the method by which taboos are torn down.

Taboos have been challenged time and again throughout history. Often the development of technology plays a role in societal change. At other times, generational differences break down barriers that restricted older members of society. Historical changes of one sort or another may have a tendency to undermine certain taboos. And, often, already existing rights or protections are

²³ Posting of David Irving to <http://zgrams.zundelsite.org/pipermail/zgrams/2004-February/000752.html> (Feb. 13, 2004, 08:32:36 EST).

extended to taboo areas. The career of famed comedian Lenny Bruce has been hailed by many for its anti-taboo thrust.²⁴ One biographer has aptly summarised the comedian's life's work, saying, "Bruce, in his uncompromisingly frank humor, took on organised religion, government, jingoism, capitalism, the death penalty, war, and sexual mores. He was a true iconoclast, attacking every sacred cow of the 1950s and 60s from his underdog, working-class perspective."²⁵ Bruce was perhaps the leading member of a wave of popular entertainers and artists who challenged the hegemony of the moralists — who depended on taboo for their continued power — of the previous decade. No "sacred cow" would be safe. Reflecting the changes in morality of an up-and-coming generation, media began to edge toward the risqué. A few years before Bruce's popularity took off, a group known as the National League of Decency, and a Catholic Cardinal by the name of Francis Spellman took the creators of an allegedly sacrilegious film to court. Their hope was to block distribution of a work that violated Christian norms. The Supreme Court declined their request, holding that "the state 'has no legitimate interest in protecting any or all religions from views which are distasteful to them. It is not the business of government in our nation to suppress real or imagined attacks' upon religion."²⁶ Realising that blasphemy and sacrilege were no longer the formidable taboos of decades past, the National League of Decency and other vice vigilantes prosecuted Bruce for another form of taboo speech: obscenity. This charge allowed moralists to enforce their speech taboos through the power of the state.

Bruce's incendiary performances were designed to transgress the taboos of the era he was born into. Particularly, he and his supporters believed that his speech was, or at least ought to have been, covered by the First Amendment to the American Constitution. The legal basis for his arguments gave them a singular force that was difficult to silence. Despite numerous trials and some jail time,

²⁴ See, e.g., Martin H. Redish, *The Value of Taboo*, 130 U. PA. L. REV. 591, 628 (1981).

²⁵ RONALD COLLINS & DAVID SKOVER, *THE TRIALS OF LENNY BRUCE: THE FALL AND RISE OF AN AMERICAN ICON* 14 (2002).

²⁶ *Id.*

Lenny Bruce would continue to rebel against taboo, obscenity, and the exercise of government power in a context he believed to be protected by the First Amendment. Looking back upon his legacy today, most observers would find the image of vice officers raiding nightclubs and arresting the talent unthinkable.²⁷ Like Allen Ginsberg, the beat poet who challenged obscenity laws through his work (writing poetry laced with sexual and profane imagery) and championed the right of unpopular people and causes to speak (including American communists, the openly pedophilic North American Man Boy Love Association, and homosexuals)²⁸, Lenny Bruce helped topple a structure of obscenity taboos that are now commonly held to have simply been prudish. Though obscenity laws still exist, they seem to have been considerably defanged, as the seeming omnipresence of Howard Stern on the airwaves indicates. The very thought of a case being argued before the Supreme Court based on a charge of sacrilege or blasphemy, which occurred fifty-five years ago, is not so much unlikely as it is laughable today.

IV. Modern Offenders

The taboos overthrown by the likes of Allen Ginsberg and Lenny Bruce, and perhaps even Dr. Martin Luther King, Jr., all displayed the certainty feature of many taboos. Those who sought to prevent sacrilege were convinced of their morality, as were those who policed obscenity. While we celebrate the triumphs of past anti-taboo heroes, their victories tend also to be disturbing. If the Americans of yesteryear believed so strongly in a “certainty” that we have today thrown by the wayside, or at least discredited greatly, what does that

²⁷ When Michael Richards famously hurled racial epithets at black audience members, he transgressed a taboo against racism. The public demanded an apology, but nobody called for jail time. See Allen Salkin, *Comedy on the Hotseat*, N.Y. TIMES, Dec. 3, 2006, available at <http://select.nytimes.com/search/restricted/article?res=F70613F8355A0C708CDDAB0994DE404482>.

²⁸ MICHAEL SCHUMACHER, *DHARMA LION: A CRITICAL BIOGRAPHY OF ALLEN GINSBERG* (1994).

bespeak of the future of our own taboos, with their requisite certainties? How can we evaluate current taboos, and current transgressors? How are we to know who the next Martin Luther King, or Lenny Bruce, or Allen Ginsberg will be?²⁹

Since the Holocaust, as noted previously, anti-Semitism has been considered a taboo by most people in the Western world. Elsewhere, however, the taboo does not enjoy the same level of acquiescence. As the Rabbi Jonathan Sacks put it, "German fascism came and went. Soviet Communism came and went. Anti-Semitism came and stayed."³⁰ In the context of the preceding investigation of taboo, in which the concept of certainty has been undermined and we have seen old taboos toppled, it is difficult to decide what should be done about anti-Semites. The American Jewish Committee has published a short book reporting on the "new anti-Semitism": a disturbing trend in public discourse toward denying the Holocaust³¹, reviving Nazi-era stereotypes of Jews³², applying a double standard to the nation of Israel, calling into question the right of said nation to even *exist* rather than criticising particular policies³³, and inventing repulsive myths of genocides and conspiracies instigated and carried out by Jews going back as far as the Armenian genocide of 1915.³⁴ Denial of the Holocaust amounts to a transgression of a taboo based on a factual certainty. Much of the speech anti-Semites direct at Jews also violates taboos against racism and supremacism. This speech creates a very real danger of harm, as the history of the Holocaust has shown.³⁵

²⁹ The author here means no offense by the comparisons about to be made. All of this speculation exists only in the secure world of the hypothetical.

³⁰ ALVIN H. ROSENFELD, "PROGRESSIVE" JEWISH THOUGHT AND THE NEW ANTI-SEMITISM 1 (2006) (quoting Rabbi Jonathan Sacks).

³¹ *Id.*

³² *Id.* at 7.

³³ *Id.* at 8.

³⁴ Edgar J. Steele, *Holy Holocaust*, Dec. 19, 2005, <http://www.conspiracypenpal.com/rants/holy.htm>

³⁵ Though this argument would carry little weight against those who deny its occurrence.

Other examples abound. White supremacists, neo-Nazis, and racists gather daily online on the popular whites-only forum, StormFront, to share malicious words, designed to cause harm to people of other races.³⁶ The North American Man/Boy Love Association, many members of which have been tried and convicted of various pedophilic acts, calls itself an “activist” group intending to break down legal barriers and social taboos against what they term “intergenerational relationships.”³⁷ Prosecutors and investigators are struggling to keep up with the torrent of seemingly *legal* “pre-teen modeling” sites that are appearing with ever-greater frequency online, offering pictures of girls as young as six years old provocatively posing in thongs, see-through clothing, lingerie, and often even less.³⁸ Jewish director Dani Levy is releasing a comedy filmed in Germany with a shocking title character — Adolf Hitler — hot on the heels of another German film that sought to depict Hitler’s “human side.”³⁹ All of these situations involve some conduct that is not obviously in breach of the law, but does violate a taboo.

Final (Dangerous) Thoughts

We are left with a dilemma. Taboos are created by particular groups, generally in their own interests. This sounds more egotistic than it really is, for the interest a group is serving in creating a taboo might be survival or safety. The origins of the taboo against anti-Semitism and racism have been made apparent above. The interests protected by the other taboos listed are not difficult to discern: the security of children from sexual predation, or the prevention of conduct that trivialises the history of Nazism for fear that its seriousness will be

³⁶ *Hate on the Internet: Before the S. Comm. On Commerce, Sci., and Transp.*, 106th Cong. 3 (1999) (statement of the Anti-Defamation League).

³⁷ NAMBLA, <http://www.nambla.org> (last visited May 2, 2007).

³⁸ Mike Bruner, *Legal Child Porn' Comes Under Fire*, MSNBC, Mar. 28, 2002, <http://www.msnbc.msn.com/id/3339966/>.

³⁹ David Crossland, *Hitler Farce Breaks German*, SPIEGELONLINE, Mar. 6, 2006, <http://www.spiegel.de/international/0,1518,404573,00.html>.

diminished, and the lessons learned in the hellfire of the Second World War forgotten. As with other taboos, these taboos contain an element of certainty, and the institutionalisation of a certain viewpoint. Most members of society believe the behaviour these taboos prevent *should* be prevented. And yet, these same members of society look back and celebrate Lenny Bruce's or Allen Ginsberg's or Martin Luther King's triumph over taboos. These same members of society look back upon the overthrown taboos of past eras and shake their heads in disapproval, wondering how society could have believed what, with hindsight, seems to have been hogwash. Any given actor in society will abide by some taboos and ignore other, older ones. Is it contradictory to uphold taboos and the certainty they represent in one instance but not in the other? Must recognition of Martin Luther King's achievements lead us, logically, to eliminate taboos against racism?

As with any moral or factual claim that a taboo is based on, society cannot be completely certain of its veracity. Humans are limited, fallible beings, who simply cannot know to the level of a divine certainty. We can, however, come fairly close in some circumstances — especially so in cases involving factual claims. However, it is important not to lose site of the fact that society cannot know in advance which one of the transgressors of a taboo will become a latter day Lenny Bruce. Certainty is often ephemeral. Despite this fact, a taboo can be investigated to determine the interest it serves and protects. Often, especially in cases of taboos that grow *not from external morality, but from a collective experience or history*, we can more readily comprehend the harm that that taboo seeks to prevent, as an historical example is available. This can be used to distinguish the taboos of anti-Semitism and racism from others such as obscenity. This is not to say, of course, that the breach of other taboos does not lead to harm: such breaches may.

Thus, society must establish some method by which taboo transgressors can be dealt with. Two primary alternatives present themselves:

1. The marketplace of ideas will determine which ideas are true and which are false. Unfortunately, the marketplace operates with considerable lag

and by the time an idea is determined to be false, it may already have inflicted terrible and irreparable harm. The millions of victims of virulent anti-Semitism need only look to the goings-on in Iran to see the inadequacy of the marketplace propagating the best, truest ideas, or to prevent such harm as incitement. This model further fails because it anticipates rational, truth-seeking actors, whereas the real world seems full of actors willing to operate under a false set of premises that serve their own ends.

2. The coercive power of the state should be called in. This alternative is also unattractive. It requires society to sacrifice core values in order to prohibit undesirable, or taboo, activity. It would be impossible to draft a constitutionally sound law that managed to prevent neo-Nazis from spreading hate (so long as it did not constitute incitement or directly cause other crimes) without also preventing a great deal of legitimate and socially useful discourse. To silence the speakers of the white nationalist StormFront community through the law, for instance, would require a prohibition on most political speech.

Both of these alternatives are unsatisfying, costing a great deal in terms of either (1) blood, or (2) rights.

We have now come full circle, back to taboo. Taboo allows for the sort of subject-matter specific, informal legislation that the state simply cannot provide. Taboos are the means by which hate speech is suppressed without a dictatorial state. Taboos are the means by which ideas that have great potential to cause harm are regulated and kept from wide circulation. The strength of taboo is that it can fill in the gaps between legislation, allowing society some means by which to protect certain, often fragile (as in the case of children) interests. It is true that having taboos and social and economic punishments for their breach tends to discourage some speech. As a society, however, we have decided that we would rather forgo some speech and some *possible* (though perhaps unlikely) truths, in order to lessen the risk of harm caused by certain ideas. Three lessons can be drawn from past taboos, however:

1. If a person is willing to sacrifice a great deal in order to oppose the taboo, then the taboo may require reexamination. In circumstances where opposition is cheap, or even profitable, as with the new anti-Semitism, this consideration does not apply.
2. Taboos can be codified in order to make them more predictable and fair according to Raz's criteria. For example, Professor Alan Dershowitz has made a list of twenty characteristics that distinguish legitimate criticism of Israel from anti-Semitism.⁴⁰ Talk such as this, about where the rule actually stands, tends to make the taboo's application more predictable and helps the revised bad man, and everyone else, regulate their behaviour more efficiently.
3. Taboos can be distinguished into at least two categories based upon their origins. A taboo derived from some external (perhaps divine) moral code should presumptively be treated as more vulnerable to being overturned, and less defensible. Taboos that are derived from history or experience (e.g., racism, anti-Semitism) or that find their source in science (e.g., studies showing that child sexual exploitation causes psychological damage in children⁴¹, prompting a taboo on sexualised images of children) are presumptively more defensible as they reflect historical and scientific hypotheses that can be proven to a degree of reasonable certainty. If the questioning of these hypotheses is attempted and creates massive risks of harm, such questioning can be legitimately silenced if it fails to present clear and convincing evidence.

Taboos, thus, can develop into a parallel, citizen-run legal system that is able to provide protection that the legal system is unable to. Though the tribunal of conscience is not the same as the tribunal of the law, it should strive to

⁴⁰ Posting of Alan M. Dershowitz to The Huffington Post, <http://www.huffingtonpost.com/alan-dershowitz> (July 1, 2005, 05:42 PM EST).

⁴¹ K.A. Kendell-Tacket et al., *Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies*, 113 PSYCH. BULL. 164, 164-180 (1993).

emulate some of the best features our legal system (sometimes) displays: clarity, consistency, predictability, and an articulable reason or policy for a particular rule. Taboos ensure that society remains free of heavy-handed governmental intervention, while offering protections to those the government is not nimble enough to safeguard. By allowing taboos we do exhibit some certainty in our own correctness, some stagnation, some chauvinism that may discourage others from bringing forward other truths. As long as this chauvinism is circumscribed as described above, it will maximise truth while providing the considerable safeguards of taboo that cannot be ignored. The marketplace of ideas is notorious for its laggardly operation. It is better to wait in the relative safety of taboo prohibition, even if this takes somewhat longer, than to allow all manner of harm to occur while the market corrects itself. It is a choice we make: we sacrifice some debate, a little freedom, perhaps some small pieces of the truth, and in exchange some injuries need not be inflicted, some rights need not be extinguished, and some blood need not be shed.