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# Finding the Harm in Hate Speech: An Argument against Censorship

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Laws penalizing hate speech are designed to protect the members of societal groups deemed especially vulnerable to the mobilization of prejudicial attitudes in the society at large. Typically, the groups thought to be in need of protection are racial, ethnic or religious minorities, but the class of victims of hate speech can also include women and homosexuals, even when these persons belong to society's dominant racial, ethnic or religious groups. Otherwise, the members of socially dominant groups are not thought to merit protection from hateful utterances, presumably because their status relative to that of the hatemonger protects them from the injurious effects of hate speech.

Any law penalizing speech is inherently problematic in a state like Canada that has constitutionally entrenched the right to free expression. The liberal case for censorship implicitly relies on something akin to J.S. Mill's harm principle. Wherever freedom of expression enjoys constitutional protection it is necessary that the government be able to demonstrate some compelling harm stemming from hate speech to justify overriding the speaker's right to express her opinions. An unsuccessful challenge to the Canadian statute criminalizing the wilful promotion of hatred elicited a typical list of prospective harms from Chief Justice Dickson, author of the Supreme Court's majority decision in *R. v. Keegstra* (1990). These included a loss of self-esteem among members of the target group and a

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diminution of their sense of political efficacy, and the potential for a contagion of hatred spreading through the population, possibly leading to discrimination, violence and the destabilization of Canada's multicultural mosaic.

The report of the parliamentary Special Committee on Hate Propaganda (1966) stated unequivocally that "the individuals and groups promoting hate in Canada constitute a 'clear and present' danger to the functioning of a democratic society" (quoted in Braun, 2004: 13). Critics of the *Keegstra* decision point out, however, that the harms anticipated by the majority were described by Chief Justice Dickson as "not inconceivable." The state was not required to provide evidence of demonstrable injury before moving to suppress the impugned utterances (Heinrichs, 2002; Newman, 2004). In *Saskatchewan (Human Rights Commission) v. Whatcott* (2013) a unanimous court expressly linked the proscription of hate speech to the harm of discrimination but again excused government from having to make a showing of actual harm. L.W. Sumner, invoking Mill's defense of "the liberty of thought and discussion," finds the court's reliance on "not inconceivable" harms insufficient under the harm principle. Turning to the available social science evidence concerning the extent and impact of hate speech on Canadian society, Sumner discovers nothing to sustain the court's grave apprehensions (2004: 193–200). His analysis implicitly lends support to the more speech-protective American jurisprudential standard, which requires a showing by the government that the harms associated with speech it seeks to proscribe are genuine, imminent and of sufficient magnitude to justify overriding the speaker's First Amendment right to freedom of expression.

The connection between hate propaganda and violence, discrimination and social instability is contingent rather than necessary, requiring us to pay close attention to the social and political context in which the propagandist operates. It is perhaps all too easy to imagine circumstances under which the bonds of civil union fray, exacerbating group antagonisms and giving new life to old prejudices. Economic crises, terrorist attacks on the homeland, interminable foreign wars that deplete national resources and undermine public confidence in government, events of this sort (to which no nation is immune) can heighten societal tensions to a dangerous level. Consequently, governments as well as non-governmental actors have an ongoing responsibility to cultivate norms of civility and tolerance as a bulwark against dark times. Should these norms be undermined by extraordinary circumstances and the members of vulnerable groups be threatened with violence and discrimination, content restrictions on speech may prove necessary to prevent injury and preserve order even in states with strong constitutional guaranties of free expression. In a well-functioning liberal democratic society, however, censorship will be the exception and not the rule.

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**Abstract.** The liberal justification for censorship equates the harm in hate speech with the sort of tangible injury that would justify state intervention under J.S. Mill's harm principle. Recently, Jeremy Waldron has suggested that the real harm perpetuated by hate speech is less tangible, taking it to be a variety of moral pollution which undermines both the public good of inclusiveness and the minority's assurance of personal dignity. This paper scrutinizes Waldron's conception of the harm in hate speech, arguing that it lacks the specificity and gravity Mill's principle requires in order to justify censorship. The paper also questions the categorical distinction between hate speech and speech that is "merely offensive," arguing that Waldron's reasons for censoring the one also apply to the other. The result is a censorship regime that liberals ought not to accept.

**Résumé.** La justification libérale de la censure met sur un pied d'égalité le tort causé par le discours haineux et le préjudice tangible qui justifierait l'intervention de l'État en vertu du principe de non-nuisance à autrui de J.S. Mill. Récemment, Jeremy Waldron a suggéré que le préjudice réel perpétré par le discours haineux est moins tangible, en le considérant comme une forme de pollution morale qui constitue une atteinte aux biens publics que sont l'inclusion et la dignité personnelle des membres d'une minorité. Cet article examine la conception de Waldron concernant le préjudice causé par le discours haineux en soutenant qu'il n'a pas la spécificité et la gravité que le principe de Mill exige afin de justifier la censure. L'article remet également en question la distinction catégorique entre le discours haineux et des propos « purement offensants » en soutenant que les raisons de Waldron de censurer l'un s'appliquent aussi aux autres. Le résultat est un régime de censure que les libéraux ne devraient pas accepter.

Now, it is open to those who seek to eradicate hate propaganda to argue that liberals overestimate the value of free expression and thus err in demanding a showing of grave harm before allowing the state to silence speech that most persons find particularly unsavory. Indeed, it is possible to argue that there are benefits to be had by eliminating not only hate propaganda but much speech that is hurtful and offensive. While such speech is not normally thought to ruin anyone's life or threaten to turn society upside down, it can make life less pleasant and inhibit feelings of solidarity. Why shouldn't we value a pleasant existence and the desire to cultivate fellow feeling more highly than the goods associated with an expansive conception of free expression?

The only reply to this question has an undeniably ideological character. Liberty of thought and discussion is integral to Mill's conception of human flourishing, and even liberals who reject Mill's perfectionism tend to agree that thinking for oneself and expressing one's thoughts are essential aspects of the free development of human personality. Most liberals agree with Mill that a robust exchange of ideas contributes importantly to social betterment and the workings of a democratic politics. This conception of individual wellbeing and the common good privileges free expression in spite of the unpleasantness and fractiousness that may come of hurt feelings and bruised egos (compare Ash, 2016: 119–28). But persons committed to some non-liberal conception of human flourishing and the common good might very well see the trade-off differently and opt to penalize disfavoured

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forms of expression even when they have no connection to violence, discrimination or social instability.

Liberals who want to defend hate propaganda laws like Canada's are in a different position. They need to find the harm in hate speech in order to justify its suppression. And that harm ought not to be merely *conceivable*, there must be good reason to think that it will come to pass (and sooner rather than later). Moreover, there must be reason to believe that the anticipated harm cannot be averted by means other than legal penalties. If, as in Canada today, there is no evidence linking hate propaganda to personal violence, discrimination or social upheaval, one possibility open to the proponents of censorship is to reconceive the nature of the injury inflicted by the hatemonger. This is precisely what Jeremy Waldron has done in a book titled *The Harm in Hate Speech* (2012). Waldron's account of the harm flowing from hate speech differs in important ways from that offered by the Canadian Supreme Court. Instead of calling attention to the psychological trauma that the targets of hate speech might experience (*Keegstra*) and the potential for personal violence, discrimination predicated on group membership and societal instability (*Keegstra* and *Whatcott*), Waldron focuses on the harm hate speech allegedly does to the "public good of inclusiveness" and the "dignity" of the persons who are targeted by hatemongers (an approach explicitly rejected by the *Whatcott* court; see para, 89–92).

What Waldron calls the public good of inclusiveness originates in the social fact that modern liberal democratic societies contain a diversity of ethnic, racial, and religious groups. It acquires normative force from their shared commitment to live and work together despite their differences. Waldron sums things up this way:

> Each group must accept that society is not *just* for them; but it *is* for them, too, along with all of the others. And each person, each member of each group, should be able to go about his or her business, with the assurance that there will be no need to face hostility, violence, discrimination or exclusion by others. When this assurance is conveyed effectively, it is hardly noticeable; it is something on which everyone can rely, like the cleanness of the air they breathe or the quality of the water they drink from a fountain. This sense of security in the space we all inhabit is a public good, and in a good society it is something that we all contribute to and help sustain in an instinctive and almost unnoticeable way. (2012: 4)

Hate speech is said to undermine this public good not so much through its (possible) connection with discrimination and violence but by its tendency to diminish the sense of security—the sense of inclusion on equal terms—felt by members of groups targeted by hatemongers.

Viewed from the perspective of the targets of hate speech, the hatemonger's assault on the public good of inclusiveness is an affront to

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personal dignity. A person's dignity, Waldron explains, is her social standing, "the fundamentals of basic reputation that entitle them to be treated as equals in the ordinary operations of society" (5). To possess dignity is to be acknowledged as a member of society in good standing and to be considered, along with everyone else, as the proper object of society's protection and concern. It is important that everyone possess dignity understood in this sense, but, as Waldron notes, it is of particular importance that the dignity of vulnerable minorities, "minorities who in the recent past have been hated or despised by others within the society," be upheld (5). He sees hate speech as a calculated assault on personal dignity intended to rob the targeted individuals of their confidence in their social standing and to demean them in the eyes of their fellow citizens.

While liberal in form, Waldron's argument departs from both First Amendment jurisprudence, of which he is highly critical, as well as the substance of Mill's harm principle. The latter, as Sumner convincingly argues, demands a showing of tangible injury, such as violence against persons or their property or the invasion of a right. Also, the principle requires reasonable apprehension of the anticipated harm playing out in the short run. In contrast, Waldron—who it should be noted does not invoke Mill's principle—is concerned with a less tangible, less imminent sort of harm. It is the harm hateful words do to the quality of public life. In his preferred metaphor, hate speech is like a pollutant that degrades the social environment, not all at once but slowly, even imperceptibly, eventually affecting everyone's quality of life as participants in a common social enterprise. His reasons for thinking the ill consequences of hate speech ineluctable are not made clear, however, and we should look skeptically at the pollution metaphor.

The way Waldron construes the harm in hate speech owes a considerable debt to the anti-pornography feminism of Catherine MacKinnon. He observes that for MacKinnon pornography "is world-defining imagery, imagery whose highly visible, more or less permanent, and apparently ineradicable presence makes a massive difference to the environment in which women have to lead their lives" (2012: 74). For Waldron, hate speech, too, is literally "world-defining." Just as pornography is said by MacKinnon to have the power to shape men's—and through them, women's—perceptions of sexuality, sex roles and gender relations, Waldron takes hate speech to have the power to shape the majority's perception of the minority and the minority's perception of itself. Pornography and hate speech are by no means equivalent in his view: commercial pornography is far more pervasive and consequently the greater evil. Nonetheless, the example of pornography serves his argument by drawing attention to the power of words and images to inflict indignity on their targets, depriving them of the assurance that they are members of society in good standing entitled to the same consideration and respect as all other persons.

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Problematically for his argument, however, he fails to acknowledge that MacKinnon's claims regarding the allegedly world-defining effects of pornography are controversial among feminists as well as civil libertarians (compare Cossman, 1997, Dworkin, 1993; McElroy, 1997; Strossen, 2000). As Sumner points out, empirical studies show little support for the thesis that the consumption of pornography increases the risk of violence against women, and MacKinnon's allegation that pornography degrades women is "seriously weakened by the testimony of many other feminists who claim not to find all of this material degrading" (2004: 149). If MacKinnon's critics are right and commercial pornography—despite its status as a major industry—actually constitutes far less of an environmental threat than Waldron alleges, the case he builds against hate propaganda—an amateur affair with no mass audience—is made to appear considerably weaker. Yet such is Waldron's belief in the far-reaching power of words and symbols that even though instances of hate speech may be relatively few ("an isolated incident here, a forlorn Nazi procession there, some ratty racist little leaflet") he thinks they will have a disproportionate effect, because "the public good that is under attack is provided in a general, diffuse and implicit way" and also, it turns out, because the endangered public good is in his view exceedingly fragile (94).

"Nobody knows when [the] heritage of hate is over," Waldron tells us. "Old fears die hard; old nightmares are never entirely put to rest; old antipathies can sometimes be awoken" (53). But that is only part of the problem. He further claims that "hate speech doesn't just seek to undermine the public good of implicit assurance. It also seeks to establish a rival public good as the wolves call to one another across the peace of a decent society (94). The fear is that left unchecked hate speech will embolden all who secretly harbour an antipathy for their fellow citizens. Hence, hate speech laws are not only for the purpose of protecting "the public good of dignity-based assurance," but also to block the emergence of a dark version of the public good inspired by hatred rather than mutual respect (94–95).

This is certainly a worrisome prospect. No one can deny the ugliness of the not-so-distant past in Europe and North America. We know that racism and religious intolerance were at one time openly embraced or at least passively tolerated by the overwhelming majority of persons, even in states that profess allegiance to liberal democratic values. Americans need recall not only the criminal acts of racial violence carried out by shadowy organizations like the Ku Klux Klan, but also the more pervasive spirit of bigotry that late into the twentieth century sustained Jewish quotas in the Ivy League, enforced restrictive covenants that barred resale of a private home to a Jew or a Negro and fed public support for anti-miscegenation laws that criminalized interracial marriage. Up to the mid-twentieth century, Canada, too, allowed its universities to impose Jewish quotas

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and upheld contracts restricting the resale of property on the basis of race and religion.

Still, Waldron offers us no reason to believe that the hateful wolves calling to one another from the margins of society are great in number or that their howling will awaken a bestiality slumbering in the breasts of ordinary people. That quotas for religious minorities on campus, restrictive covenants and anti-miscegenation laws have been repudiated by the overwhelming majority of Americans and Canadians demonstrates an increased tolerance of difference. So, too, does the recent legalization of same-sex marriage in Canada, the United States and twenty other nations in Europe and the Americas (Pew Research Center, 2015). To be sure, we have not banished all fear, suspicion or prejudice, but it would be churlish to deny the progress we have made. Widespread recognition that justice requires an end to discrimination founded on race, religion and sexual orientation should give us a higher degree of confidence in the depth and stability of our commitment to inclusiveness than the pro-censorship argument seems prepared to admit. And while it is certainly plausible to think that even an isolated encounter with hate propaganda will be deeply disturbing to a person sensitized by the historical experiences of her group and mindful of her minority status, it seems rash to conclude that "some ratty racist little leaflet" will shatter her assurance of being included in society on the same terms as everyone else.

We must, of course, avoid a Panglossian optimism. What Waldron calls "the heritage of hate" is real and we ignore it at our peril. Nonetheless, we should keep the danger posed by hate speech in perspective. Grant Waldron his (contestable) claim that hate speech pollutes the social environment. From the perspective of those of us who detest the hatemonger's message, it certainly makes the civic landscape less beautiful. And, to the extent it finds a receptive audience in the majority or disturbs the assurance of the minority, it is surely unhealthy for the body politic. But is there really a danger that the majority will get drunk on the stuff or that the minority will be mortally sickened by it?

We should not underestimate the resiliency of a society committed to norms of inclusiveness and mutual respect. Reading Waldron's book one gets the impression that the persons targeted by hatemongers by and large lack the capacity to defend their own dignity and cannot count on drawing strength from either the affirmation provided by their own social group or the support given them by the liberal state and sympathetic members of society at large. Starting with the fictional vignette that opens the book, which depicts a horrified Muslim father struggling to explain to his young son and daughter the meaning of a vicious anti-Muslim leaflet posted in their neighbourhood, Waldron's account of the harm in hate speech presents us with an emotionally charged portrait of traumatized victims deserving of our sympathy and in dire need of the

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protection of the censor. But the way at least some Muslim organization responded to the surge in anti-Muslim sentiment in the United States post 9/11 tells a different story.

The New York chapter of the Council on American-Islamic Relations, for example, far from retreating from public engagement, urged its members to reach out to government officials, non-governmental organizations, and the members of other faith communities in an effort to marginalize hate speech and combat hate motivated crimes against Muslims (Dado, 2013). Other Arab-American organizations have responded in a similar manner, meeting the rise in anti-Muslim comments posted on social media by promoting a positive image of Islam (Harb, 2015). Hate speech did not confound or silence these groups; it stirred them to action. The American and Canadian Jewish communities have long practised the same vigilance and engaged proactively with other groups and elected officials to combat anti-Semitism. That Muslims and Jews believe it is necessary to organize in self-defense is testimony to the imperfect triumph of liberal tolerance; that they have the confidence to assert their rights is a measure of just how much assurance they have of their social standing and their dignity as citizens.

If Waldron fails to appreciate the resiliency of minority groups, he also underestimates the salutary effects of messages of inclusion and respect issuing from the majority in response to hate speech. Consider the example presented by public reaction to incendiary remarks by David Ahenakew, at one time a prominent leader of Canada's aboriginal peoples. When Ahenakew made virulently anti-Semitic statements at a meeting of the Federation of Saskatchewan Indian Nations in 2002 the public outcry against him was near universal. He was roundly condemned by other Native leaders, national politicians, and the media. Subsequently, he was stripped of every leadership position he occupied in the aboriginal community and expelled from the prestigious Order of Canada. In *On Liberty,* J.S. Mill speaks of the coercive potential of "moral opinion" as a check on abusive speech and conduct. Ahenakew felt the full weight of society's judgment in condemnation of his hateful utterances. He was also indicted under Canada's hate speech law. But as Sumner contends, it is difficult to see the point of his prosecution: "The overwhelming adverse reaction to his remarks would seem to serve by itself as an adequate deterrent, both to him and others of like opinion" (2004: 194).

Liberal critics of hate speech laws often invoke Justice Louis Brandeis's injunction to respond to the speech we find repugnant with more speech, confident that our civic ideals—and our commitment to free speech—will be vindicated in the end (*Whitney v.* California, *1927*). In this vein, liberal champions of freedom of expression urge public education that promotes tolerance and vocal denunciation of hatemongers whenever and wherever they appear among us (compare Braun, 2004; Newman,

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2001). Waldron, however, considers this response to hate speech misconceived. He references sociologist Emile Durkheim on the expressive function of penal law to argue that hate speech laws are needed to establish unequivocally our commitment to the public good of inclusiveness, suggesting that it is through such means, among others, that a society becomes well-ordered (in the Rawlsian sense). Moreover, he contends that the "expressive and disciplinary work of law may be necessary as an ingredient in the change of heart within its racist citizens that a well-ordered society presupposes" (2012: 81).

Law is not the only disciplinary agent available to a well-ordered society, however. It is to be hoped that persons committed to the ideal of an inclusive society will step forward and confront the hatemonger head on. If hate speech is a disease of the body politic, public denunciation of the hatemonger can be regarded as a healthy immune response in a tolerant society. Contrary to the caricature Waldron draws, the injunction to confront the hatemonger is not an invitation to "a great debate in which Nazis and liberals… engage one another honestly and with respect for each other's points of view" (2012: 95). When we engage the hatemonger as private citizens, we do not give credence to his views or seek to convert him to ours. Rather, as historian Pierre Vidal-Naquet argues in regard to the Holocaust denier, "we do not 'debate' him; we demonstrate the mechanisms of his lies and falsifications" as a lesson to our fellow citizens (1992: 76).

To be sure, we cannot take this healthy immune response for granted. It must be carefully nurtured and guarded against countervailing tendencies. Ironically, one of the unintended consequences of hate propaganda laws might just be that they weaken the citizenry's resolve to combat intolerance. Canadian constitutional scholar Joseph Magnet warns us that criminalizing hate speech perversely provides private citizens with a disincentive to confront the hatemonger on their own, leaving it instead for the police and the courts to deal with the problem on society's behalf. Such laws, he writes, "are a quick fix that makes people feel better because they perceive, falsely, that something is being done about a visible, irritating problem." He fears that this putative solution is in reality a "cruel illusion" that "will cripple our political capacity to take serious action against intolerance" (1994: 250). It would indeed be ironic if laws promoted as necessary to protect the social environment ended up contributing to the degradation of that environment by relieving ordinary citizens of the felt responsibility to speak out against the purveyors of hate.

What response, then, should the state make to hate speech? Waldron is correct in observing that laws serve an expressive function, but it does not follow that the state speaks loudest or most forcefully against intolerance by enacting penal laws or building protections against hate speech into human rights codes. If the object is to educate young people about the public good of inclusiveness and instill in them the appropriate civic norms, public

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schools seem a better vehicle than courts of law or other tribunals (compare Macedo, 2000). If the object is to reassure the members of minority groups that they, too, are equal citizens in good standing, surely enforcement of laws barring discrimination speak as loudly or more loudly than the prosecution of hatemongers already subject to Mill's "moral coercion." And let us not forget that public office, as Teddy Roosevelt once said of the presidency, is a bully pulpit. Elected officials can join private citizens in denouncing the hatemonger and condemning his ugly, divisive message (compare Brettschneider, 2012).

Waldron doesn't have much to say about civic education or the bully pulpit, but he thinks we are foolish to put our faith in anti-discrimination laws. That's because these laws offer effective protection to minorities only if the majority will abide by them: "In no society is the state able to offer these guarantees [against discrimination] on its own account without a complementary assurance that ordinary citizens will play their part in the self-application of the laws" (2012: 98). What is required, then, is that the majority conforms voluntarily, and be known to conform voluntarily, to laws protective of minorities. But is there reason to believe that we must criminalize hate speech in order to prevent normally law-abiding citizens from adopting discriminatory attitudes? Waldron's insistence on a connection between criminal laws penalizing hate speech and the general public's conformity to laws barring discrimination only makes sense if we assume that hate speech poses a serious risk of a contagion of hatred in the general population. To make this assumption is to treat the worst case scenario as though it were a foregone conclusion. We should demand evidence of a genuine threat before surrendering to our fears of the worst that could happen.

From a civil libertarian perspective the danger is that Waldron sets the evidentiary bar too low. The idea that hate speech pollutes the social environment, not all at once but imperceptibly over time, slowly corroding the public good of inclusiveness and eating away at the assurance of personal dignity, disassociates the harm in hate speech from its immediate consequences. In effect, it creates an irrebuttable presumption of harm even in cases where no tangible injury results or is likely to result in the foreseeable future. The danger of setting the bar this low become readily apparent when we consider how difficult it can be to distinguish hate speech from speech that is merely offensive.

Offense, as Waldron acknowledges, is subjective. We say we are offended when what is said about us by others hurts our feelings or wounds our pride (2012: 107). Statements disparaging our appearance or making fun of our conduct are commonly experienced as offensive. Often, though, what gives rise to offense are not statements denigrating some aspect of our person or ridiculing our personal foibles but rather statements that are disrespectful of our deeply held religious or moral

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convictions. There are those who worry that it is but a short distance between expressing disrespect and inciting hatred. This explains why some members of the Muslim community in Ontario perceived Salman Rushdie's novel *The Satanic Verses* and Leon Uris's *The Haj* as hate propaganda (Braun, 2004: 97, 101). It also explains why some critics of the Danish newspaper *Jyllands-Posten*, outraged by its decision to publish irreverent cartoons of the prophet Mohammed, accused the paper's editors of inciting hatred against Muslims (Modood et al., 2006).

Waldron himself acknowledges that it will sometimes be difficult to draw the line between speech that is merely offensive, which he agrees must be tolerated, and hate speech. This difficulty does not faze him.

> Some people believe that no position can be valid in these matters unless it is presented with rule-like clarity, uncontroversially administrable, requiring nothing in the way of further moral judgment or careful thought and discretion. I do not belong to that school. I belong to a school of thought that accepts that the tasks assigned to courts and administrators in matters of fundamental rights (rights to free expression, rights to dignity) will often be delicate and challenging, often involve balancing different goods and essaying difficult value judgments. (2012: 115–16)

We can agree with Waldron that decision rules ought not to be straightjackets; nonetheless, the idea of giving public officials broad discretion when it comes to the protection of fundamental rights is bound to disturb anyone who recognizes that judges and administrators are political creatures. "Rule-like clarity" is often needed to keep them from imposing personal or partisan judgments, especially when the issue before them causes tempers to run hot and the political stakes are high. To speak of balancing rights (without a rule) in this context calls for an Olympian detachment that many judges and administrators might not be able to summon (compare Braun, 2004: 117–19).

Recall in this context that some minority groups perceive hateful intent in materials not commonly thought of as hate propaganda. It is perfectly understandable why they do so. A Muslim already feeling anxious on account of Islam being associated with terrorism, not only by extremist hatemongers but by (some) mainstream politicians, might well conclude that *any* disparagement of her religion contributes to its demonization. It is hardly surprising, then, that even a serious literary work like Rushdie's novel comes under attack. That the book was not pulled off library shelves in Ontario or withdrawn from sale in bookshops should not, however, be taken to mean that the difference between hate propaganda and material that insults or offends without promoting hatred was clear to public officials. In fact there is no bright line distinguishing hate speech from offensive speech, and it is not difficult to imagine a different

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outcome in the controversy over *The Satanic Verses* had the Muslim community in Ontario been better organized and able to bring greater pressure to bear on the government. Stefan Braun complains that hate propaganda laws fuel a perverse identity politics. Groups that are to one degree or another socially insecure seek public recognition and the delegitimation of their rivals by having the state censor expression they find hostile (2004: 123–27; compare Ash, 2016: 159; Whitaker, 1999). In these contests the distinction between the hateful and the offensive is rendered obscure.

A recent controversy on the campus of York University illustrates the problem. A major donor to the university, joined by a number of Jewish students on campus, complained about a mural hanging in the student center. The mural, which had been painted by a student, depicts a young man seen from behind. He wears a kerchief in the colours of the Palestinian flag. His hands are behind his back and he is holding a stone. In the background a bulldozer stands before a house. The mural has obvious political meaning and was likely intended as a protest against Israeli occupation of the West Bank. Those who objected to the mural insisted that it was hate speech and demanded that it be taken down. They alleged that Jewish students were made to feel anxious and insecure every time they passed by the mural, depriving them of the assurance of dignity Waldron rightly considers so important. In reply, defenders of the painting claimed that it was protected political speech and accused those who wanted it removed of seeking to suppress expression supportive of the Palestinian cause. To the mural's defenders the allegation of hate speech was a cynical ploy to silence Israel's critics. To the mural's critics, for whom anti-Zionism is the new anti-Semitism, the painting was an emblem of an age-old hatred (Ha, 2016; Yakabuski, 2016).

The mural was not removed. University officials found that it was political in character and, although profoundly disturbing to some, did not amount to illicit hate speech. But this finding did not appease the donor, who withdrew his financial support, nor the Jewish students who felt victimized by the mural's display in the student centre. The incident reinforced the idea already prevalent in the local Jewish community that York is a hostile environment for Jews. Were those who complained about the mural mistaken in believing it to be hate propaganda or was the university wrong to have dismissed their complaint concluding that the painting was offensive but not hateful?

What the controversy shows is that the hard and fast distinction between hate speech and offensive speech on which hate propaganda laws depend is largely fanciful. Hate speech is simply a particularly egregious variety of offensive speech, and whether or when one slips over into the other is a purely subjective determination. The ultimate finding is, of course, made by whoever wields the power of censorship. By default, that which ends up being censored is hate speech while that which is allowed to be expressed

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despite its perceived hostility toward a vulnerable minority group is "merely" offensive. This allows us to understand the identity politics Braun speaks of as something other than a Machiavellian tactic to silence one's rivals. We may concede that the Jewish students who complained about the mural genuinely experienced it as hateful, while at the same time absolving the mural's defenders of malign intentions.

Regarding hate speech as a particularly egregious variety of offensive speech allows us to see that the harms Waldron attributes to hate propaganda are also associated with less extreme messages. Indeed, speech ordinarily thought of as being "merely offensive" could very well prove to be more environmentally hazardous than the sorts of messages that are overtly hateful.[1] American conservatives, for example, are fond of referring to the nation's "Judeo-Christian heritage." The way this is said usually leaves little doubt that the emphasis is laid on the word *Christian*. Indeed, it is not uncommon to hear conservative politicians say that America is a "Christian nation" ("Most Tea Partiers Call America," 2010; Green, 2015). Comments of this sort are offensive to Jewish and Muslim Americans as well as other non-Christian religious minorities. When repeated by politicians, including candidates seeking the highest office in the land, this way of describing the nation seems calculated to remind non-Christians of their minority status and implies that they are not fully equal to the Christian majority. When at the same time Islam is described from the pulpit as an infidel religion and Jews are said to be blameworthy for having rejected the divinity of Jesus, this sense of Muslim and Jewish inferiority is reinforced. Statements of this sort, which come from respectable sources and have far wider circulation than the ravings of extremists, seem far more likely than hate propaganda to attenuate the majority's support for an inclusive society while heightening the insecurity felt by minority groups."

There is no getting around this problem. The big three religions all make exclusive and mutually contradictory claims to the truth, which, as Waldron himself observes, makes giving offense unavoidable (2012: 127). The best one can hope for is that the devout will agree to tolerate one another despite the offense taken at one another's sincerely held religious beliefs. This tolerance is one of the great achievements of liberal thought and practice. Yet even a successful regime of religious tolerance does not and cannot completely insulate religious minorities against the potentially deleterious effects of religious antagonisms. Religious difference remains a prominent social marker in the United States and other liberal democracies. So long as the majority of Americans continue to think of their country as a Christian nation, non-Christians in the population have reason to be anxious about their social standing (Feldman, 1988: 282–86).

It would be best if citizens and politicians alike refrained from attributing an exclusive religious identity to the political nation, embracing a

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secular politics for a multi-faith society. The second-best solution to the problem, which appears to have been adopted in the United States, is to drain virtually all content from the public use of religious rhetoric and symbols (like the national Christmas tree) in an attempt to render these things as innocuous as possible. Of course, from the minority's point of view, the incorporation of majoritarian religious symbols into ostensibly secular public ceremonies and displays may well appear only marginally less ominous than a full-blown religious establishment (compare Feldman, 1988: 256–65).

The United States hardly needs a national Christmas tree. But the political imperative that results in one reflects the persistence of cultural markers in American political life. Social diversity implies difference, and the differences separating majority and minority groups generate unavoidable tensions that have long marked the fault lines in American politics (Kelley, 1979). A similar dynamic can be found in all culturally diverse societies. Authoritarian regimes do what they can to suppress these antagonisms by force. Liberal democracies allow them to play out, but hope to keep them contained within reasonable bounds. Hate propaganda laws are an effort to keep a lid on things by shutting down the most extreme attacks on difference; however, such laws do not reach the more pervasive suspicion of difference woven into commonly held beliefs expressed in quotidian language.

In sum, if the goal is to safeguard the public good of inclusiveness and assure the dignity of vulnerable minorities against the potentially corrosive effects of subtle environmental pollutants, hate propaganda laws inevitably fall short. To be confident of achieving the goal, we would need to outlaw less extreme varieties of offensive speech rooted in the ineliminable differences among culturally distinct groups. The degree of censorship required to sanitize ordinary discourse would be draconian, to say the least.

Recent years have seen a rise in anti-immigrant sentiment in Europe and North America and the re-emergence of a harshly nativist rhetoric in politics. The most notorious example of this in the United States was the presidential candidacy of Donald Trump, who characterized undocumented Mexican immigrants as drug lords and rapists and advocated a ban on the admission of Muslims to the United States in connection with the country's military campaign against Islamist terrorists (Kohn, 2015; Schleifer, 2016). Laws targeting extreme hate propaganda are not likely to curb political statements of this sort, most certainly not in the United States where the First Amendment is understood to afford political speech the highest degree of protection. The uncomfortable truth is that electoral politics tend to be divisive, even in inclusive liberal democracies. Henry Adams, scion of presidents, was exaggerating only slightly when he wrote that "politics, as a practice, whatever its professions, has always been the systematic organization of hatred" (1931: 7). Civility and polite discourse are perhaps all too often thrown under a bus because appeals to the electorate's fears and

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animosities is thought (tragically, with good reason) to be an effective means of mobilizing one's supporters.

Still, we should not allow those who appeal to the worst in human nature to dictate our response. The more polarized the society, the more intense the mutual antipathies that find their expression in politics, the greater the need to engage one's adversaries in speech. Words can be hurtful. They can antagonize, they can wound. But words also inform and educate. They can dispel prejudice and reveal unanticipated affinities. We need strong laws to protect us from violence and discrimination, but laws that protect us from hurtful words tend to silence us as well as our antagonists, because they close down rather than open conversations and because they teach good citizens to call the police rather than do the hard work of combating hateful ideas. Ultimately, politicians of Trump's stripe must be called to account by the citizens they hope to lead whose repudiation of an appeal to prejudice is at the same time an affirmation of the nation's commitment to a tolerant and inclusive society. Even the strictest laws regulating speech will not safeguard the public good of inclusiveness or the dignity of minorities if this commitment is lacking.

The necessity of challenging offensive political speech by calling the speaker to account will be familiar to anyone who has engaged discursively in the rough and tumble of democratic politics. With genuine hate speech, as with intemperate or ill-considered political speech, our most effective response consists in speaking out in defense of an inclusive society. Admittedly, if few speak out this remedy will fail. But in that event the norm of public inclusiveness has already fallen into desuetude. If the norm still has public support, as it will if our democratic society is reasonably healthy, the chorus of voices denouncing hate and intolerance will assure beleaguered minorities that their dignity is respected. President Obama put this point very well in a 2012 speech to the United Nations: "the strongest weapon against hate speech is not repression, it is more speech—the voices of tolerance that rally against bigotry and blasphemy, and lift up the values of understanding and mutual respect" (quoted in Ash, 2016: 68–69).

The low tolerance for hate speech exhibited by the pro-censorship argument might be thought to reflect a political sensibility of a particular sort. For want of a better word we can describe it as a conservative sensibility. Conservatives typically worry more than liberals do about the moralized sentiments and affective ties that nurture social cohesion. And typically, conservatives worry more than liberals do about the fragility of the social bond that sustains a civilized existence. Consequently, they are more likely than liberals to endorse morals legislation and similar paternalistic measures intended to protect citizens from the socially pernicious effects of bad examples and dangerous ideas. Advocates of hate speech legislation in North America often self-identify as being on the left of the

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political spectrum, but arguably the spirit of any such legislation is inherently conservative. It arises from a concern that the civic attitudes which sustain an inclusive society are fragile and easily shattered, that the members of groups only lately admitted to full civic status on par with the majority are especially vulnerable to hate speech, incapable of defending themselves against its ill-effects and consequently in need of the state's special protection, and that the majority's commitment to egalitarian norms is shallow and in danger of being subverted by hatemongers who dare speak aloud what others may conceal in the privacy of their own thoughts. Don Herzog has written that what unites the various shades of conservatism is their suspicion of democracy (1998). Pro-censorship arguments like Waldron's trade in this suspicion, implicitly calling into question the capacity of democratic citizens to remain law-abiding in the face of the hatemonger's incitement to turn on the most vulnerable in their midst.

Another aspect of the conservative sensibility is a certain variety of statism. Conservatives are more inclined than liberals to assign to the state a responsibility to police public morals. On Waldron's account of the harm in hate speech, hate propaganda may be construed as an affront to public morals insofar as it constitutes an assault on two important civic norms: public inclusiveness and personal dignity. Inasmuch as Waldron does not think it important to demonstrate that this assault has had any success, we may conclude that it is his belief in the alleged *tendency* of hate speech to subvert these norms that matters. In this respect his pro-censorship argument recalls the US Supreme Court's "bad tendency test" announced in *Gitlow v.* New York (*1925*). There the court upheld the government's suppression of ideas deemed politically subversive even though no immediate danger of violence was shown to exist. The bad tendency test made it only too easy for the state to censor disfavoured speech and was subsequently abandoned by the court. Waldron's argument suggests, however, that its legacy is not yet put to rest (compare Heinrichs, 2002).

In contrast to the conservative sensibility of the pro-censorship argument, we may speak of a liberal sensibility, one that puts more faith in the good sense and resiliency of democratic citizens. It accepts that inclusiveness is an important public good and that the dignity of every citizen must be protected; however, it is leery of using censorship to safeguard these things. Where there is reason to believe that hate speech will lead to violence or discrimination, Mill's harm principle can be invoked to shut it down. Even indirect incitement may be penalized without offending the liberal sensibility, provided there is contextual evidence that under the prevailing circumstances violence or discriminatory conduct is likely to result. But where the harm in hate speech is perceived to be a subtle degradation of the social environment, the most viable remedy compatible with liberalism's robust commitment to free expression is for people of good will to denounce the hateful message, strenuously and with conviction.

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This is the responsibility of both public officials and ordinary citizens. The virtue of this remedy derives not only from its effect upon hatemongers, who will be made to confront just how aberrant their views are, but more importantly from its public affirmation of the normative structure that Waldron is rightly eager to have us preserve.

There is, of course, a certain danger in making this response to hate speech. It arises because society, too, acting independently of the state, has the power to censor expression. There is no assurance that well-meaning citizens will always acknowledge, much less respect, the fuzzy boundary between speech that promotes hatred, which at the extreme becomes subject to the coercive potential of public opinion identified by Mill, and less offensive speech that, while still hurtful, does not inflict an injury deserving moral censure. Perhaps we would be wise to position our responses to offensive speech on a continuum. At one end lies a mild rebuke of the sort occasioned by the remarks of a thoughtless person in whom we perceive no malice. Our rebuke is intended to instruct this person in the values of an inclusive society. At the other end lies the sort of harsh denunciation intended to stigmatize and ostracize true hatemongers, extremists whose antipathy for the values of an inclusive society places them beyond the pale. Admittedly, some persons might be tempted to "go nuclear" for tactical reasons, denouncing in the harshest possible language the speech of their political adversaries, as might have happened in the affair of the mural at York University; however, we can reasonably hope that in a free and culturally diverse society, even one marked by deep disagreements, a general commitment to mutual tolerance will prevail, making it unlikely that the degree of unanimity required to make public opinion genuinely coercive will be possible only in truly egregious cases, like that of a Keegstra or an Ahenakew. That at any rate is the liberal wager.

## Endnotes

1 A similar point is made by Skipper (1993) in response to Dyzenhaus (1992), who argued that Mill's harm principle can be used to defend the censorship of pornography on the grounds that it perpetuates a culture of female inequality, which was seen as a grave harm by the author of *The Subjection of Women*. Skipper counters that popular romances, a non-pornographic literary genre produced for a female audience and often written by women, do even more to perpetuate a culture of female inequality and thus would also need to be censored.

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