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Lecture 3
LIBEL AND LEGITIMACY

1. Restricting free expression

Obviously statutory provisions of the kind I am talking about—for example, Parts 3 and 3A of the Public Order Act in the United Kingdom, or section 61 of the Human Rights Act in New Zealand, or section 130 of the German criminal code—are designed to stop people from printing, publishing, distributing, and posting up things that they would like to say and that they would like others to read or hear. In a straightforward sense, they make the public expression of ideas less free than it would otherwise be. Some defenders of hate speech restrictions toy with the idea that, since hate speech tends to silence minorities or exclude them from the political process, the net effect of censoring it may be to empower more in the way of expression than it denies.[1] Perhaps that is a persuasive line to take; I don't want to rule it out; but I believe many countries would uphold their hate speech laws even if that wasn't the case—i.e. even if the harm done to minorities was not primarily their exclusion from public discourse.

So let's not flinch from the underlying concern: laws of the kind we are discussing make the public expression of ideas less free than it would otherwise be. And this matters to individuals. Ed Baker observes that "racist hate speech embodies the speaker's … view of the world and, to that extent, expresses her values."[2] Often what racists or Islamophobes are punished for expressing in public are the very thing, out of all the messages a person could convey, which matter most to them. For them, other aspects of political expression pale into insignificance compared with their leaflets libeling Muslims as terrorists or their public portrayals of people of other races as apes or gibbons. It is not exactly true that *they themselves* are silenced—they can say what they like as they like on innumerable other topics of public concern. But it seems to matter to them that they express racist ideas in a hateful form; and to that extent we have to say, with

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[1] See, for example, Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy,* 44 WAKE FOREST L. REV. 497 (2009) 499-501: "Hate speakers seek to intimidate targeted groups from participating in the deliberative process. Diminished political participation because of safety concerns, in turn, stymies policy and legislative debates." Frank Michelman has a extremely helpful and complex discussion of this point in the middle of his 1992 article, "Universities, Racist Speech and Democracy in America."

[2] C. Edwin Baker, *Autonomy and Hate Speech*, in EXTREME SPEECH AND DEMOCRACY (Ivan Hare and James Weinstein eds., 2009) 139, at 143.

Professor Baker and also with Professor Fried that their autonomy is compromised.[3]

Still, the fact that hateful expression lies at the valued core of free speech so far as the racist is concerned does not by itself show that it shouldn't be restricted, any more than this is shown by the high value someone may place on posting child pornography on the internet. There are all sorts of exceptions to the free speech principle. There are all sorts of other expressions of autonomy, central to people's idiosyncratic values (ranging from the use of narcotics to cruelty to animals) that are also legitimately restricted. Think of how we regulate religious activity, which is at least as central to worshippers' autonomy as hateful expressions of racism are to the racists' autonomy.[4]

2. Content-discrimination

Still it is not enough to say that. The restriction of autonomy involved here confronts a central pillar of American-style free speech doctrine[5]—the principle that an exception to free speech may not be based on the content of what is said or published or on the distance between what is said or published, on the one hand, and, on the other hand, some official orthodoxy that everyone in society is supposed to subscribe to in public. Obviously a restriction on hate speech or on group defamation is a restriction on speech on account of its content. It is the content that explains the restriction.

Other countries don't have this as a formal doctrine; they certainly don't use it in the byzantine way that it has been used by the American courts.[6] Still in our interpretive exercise, we should not shy away from engaging with something like this principle, even if it is not defined quite so formalistically.

For not only does the argument I am making confront the content-based doctrine; it also confronts what seem to be the most compelling reasons behind the doctrine. In the view of Geoffrey Stone, "[b]y definition, content-based restrictions distort public debate in a content-differential manner. … Such a law mutilates 'the

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[3] See also C. Edwin Baker, *Autonomy and Informational Privacy, or Gossip: The Central Meaning of the First Amendment*, 21 SOCIAL PHILOSOPHY & POLICY 215 (2004) at 225-6. See also Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. Chi. L. Rev. 225 (1992) at 233.

[4] Cites to *Smith* and to the Santeria case

[5] Robert Post, *Racist Speech, Democracy, and the First Amendment* 32 WM. & MARY L. REV. 267 (1991) at 278-9: "I agree, of course, that the question of regulating racist speech ought not to be settled simply by reference to present doctrine. But it is equally important that the question ought not to be settled without serious engagement with the values embodied in that doctrine."

[6] For example, in *RAV v City of St. Paul*, 505 US 377 (1992). For a very helpful discussion of the analytic antinomies surrounding this distinction, see R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333 (2006).

thinking process of the community.'"[7] Now, words like "distort" and "mutilate" perhaps beg the question, privileging what public debate would be like without intervention. But why should we do that? Some people draw an analogy with free markets in the economic sphere. Left to themselves, free markets may generate efficient outcomes by processes that economists say they understand. And analogously, we may say (though without any analogous explanation), in the long run the free marketplace of ideas, if it is left to its own devices, will generate the acceptance of truth. Actually this is more of a superstition than analogy. Economists understand why economic markets are capable of producing some good things and not others; they may produce efficiency, but they may not produce distributive justice or they may undermine distributive justice. In the case of the marketplace of ideas, is truth the analogue of efficiency or is it the analogue of justice?

Professor Stone assures me that he does not base his description of the "distorting" consequences of content-regulation on any belief in the marketplace theory. He says it is based on a generalized suspicion of majoritarian government. That distrust is what he says the First Amendment is all about. I shall say something about this at the very end of today's lecture.

Stone is surely right to point out that restrictions on group defamation or hate speech are calculated to modify the character of the public debate. Laws of the kind we are considering are designed to *have an effect on* public debate, in circumstances where it is reasonable to believe that without some sort of restriction public debate will have effects on people's lives that the government has an obligation to be concerned about. We enact and enforce restrictions on the economic market for this sort of reason all the time, prohibiting certain transactions and regulating others, and we do this in other respects in the marketplace of ideas, too, in the restriction of child pornography for example.

3. Ronald Dworkin's argument about legitimacy

Let's turn now to a different set of objections. There are a number of arguments in the literature that link the protection of free expression to the flourishing of self-government in a democracy. Some say little more than that, though they say it sonorously and at great length.[8] In a few of these arguments, however, the position is advanced beyond a general concern for the democratic process. It is sometimes said that a free and unrestricted public discourse is a *sine qua non* for political

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[7] Geoffrey R. Stone *Content-Neutral Restrictions* 54 U. CHI. L. REV. 46 at 55 (1987), citing Alexander Meiklejohn, Political Freedom 27 (1960).

[8] Alexander MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE: "the principle of the freedom of speech springs form the necessities of the program of self-government".

legitimacy in a democracy.[9] Robert Post makes this argument.[10] Some make the point even sharper than that and suggest that the political legitimacy of certain specific legal provisions and institutional arrangements may be imperiled by the enactment and enforcement of hate speech laws.

The most powerful argument of this kind is presented by Ronald Dworkin, in a "Foreword" he contributed to a large, recent, and valuable volume entitled *Extreme Speech and Democracy*, edited by James Weinstein and Ivan Hare.[11] According to Professor Dworkin, freedom for hate speech or group defamation is the price we pay for enforcing the laws that the haters and defamers oppose (for example, laws forbidding discrimination). Here's how the argument goes.

Professor Dworkin agrees that it is important for the law to protect people, particularly vulnerable minorities, from discrimination, from "unfairness and inequality in employment or education or housing … for example."[12] He is as committed to these laws as any proponent of racial equality. But, like them, he acknowledges that if we adopt such laws, often it will have to be over the opposition of a few people who favor discrimination. Now, we usually say that it is enough that such laws be supported by a majority of voters or elected representatives i, provided that the opponents of the bills are not disenfranchised from that process. But actually, says Dworkin, that is not all that is required:

> Fair democracy requires … that each citizen have not just a vote but a voice: a majority decision is not fair unless everyone has had a fair opportunity to express his or her attitudes or opinions or fears or tastes or presuppositions or prejudices or ideals, not just in the hope of influencing others (though that hope is crucially important), but also just to confirm his or her standing as a responsible agent in, rather than a passive victim of, collective action.[13]

Free expression, in other words, is part of the price we pay for political legitimacy: "The majority has no right to impose its will on someone who is forbidden to raise a voice in protest … before the decision is taken."[14] If we want *legitimate* laws against violence or discrimination, we must let their opponents speak. And *then* we can legitimize those laws by voting.

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[9] Cite to James Weinstein's paper in H&W, at 28 and 38; also intro.

[10] Post, *Racist Speech, Democracy, and the First Amendment* , op. cit.

[11] Ronald Dworkin, Foreword, in EXTREME SPEECH AND DEMOCRACY (Ivan Hare and James Weinstein eds., 2009), pp. v-ix. Mention INDEX ON CENSORSHIP citation also.

[12] Dworkin, "Foreword," in H&W, p. viii.

[13] Ibid., p. vii.

[14] Idem.

Now, some of the opponents of anti-discrimination laws will have no desire to express their opposition hatefully. But some may: for them, defaming the groups that these laws are supposed to protect is the essence of their opposition. Dworkin's position is that it doesn't matter how foul and vicious the hatemonger's contribution is. He must be allowed his say. Otherwise no legitimacy will attach to the laws that have to be enacted over his opposition. It doesn't even matter that the hatemonger's speech is not couched as a formal contribution to political debate: a community's legislation and policy, says Dworkin, are determined as much by its moral and cultural environment, the mix of people's opinions and prejudices, as by stump political speeches. It is as unfair to impose a collective decision on someone who has not been allowed to contribute to that moral environment, by expressing his social convictions or prejudices, as on someone whose political pamphlets against the decision were destroyed but the police.[15] Whether it is scrawled on the walls, smeared on a leaflet, painted up on a banner, spat out onto the internet, or illuminated by the glare of a burning cross, it has to be allowed to make its presence felt in the maelstrom of messages that populate the marketplace of ideas,

So there's the gist of the argument. We want to protect people with laws against discrimination and violence, and it is natural to want to legislate also against the causes of discrimination and violence. I should mention that Professor Dworkin has his doubts about some of the causal claims made by defenders of hate speech laws: "Many of these claims are inflated," he says, "and some are absurd."[16] But leave that aside as a separate line of attack. Dworkin's position is that even if the defenders of hate speech laws are right about the causes of violence and discrimination, there is only so much we can do about those causes without forfeiting legitimacy for the laws we most care about. Perhaps we can legislate against incitement.

> But we must not try to intervene further upstream, by forbidding any expression of the attitudes or prejudices that we think nourish … inequality, because if we intervene too soon in the process through which collective opinion is formed, we spoil the democratic justification we have for insisting that everyone obey these laws, even those who hate and resent them.[17]

The structure of the position is interesting. Dworkin notices that arguments about hate speech often involve two sorts of laws, not one. On the one hand there are the hate speech laws themselves—or the proposals that people would like to see enacted—regulations restricting expressions of racial or religious hatred, group

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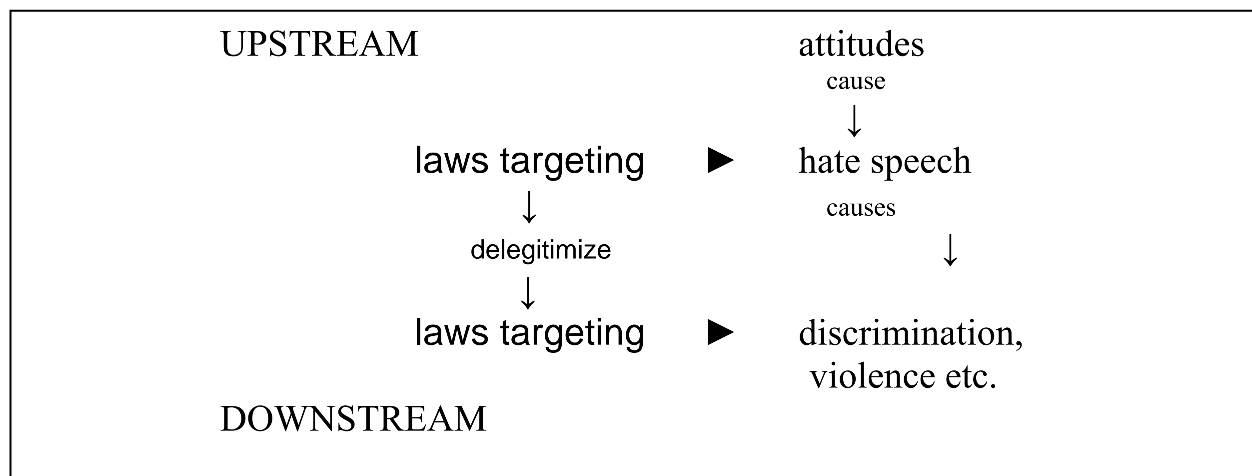
[15] Ibid., p. viii, paraphrasing Dworkin.

[16] Ibid., p. vi. Cite also to Dworkin versus Catherine MacKinnon in FREEDOM'S LAW.

[17] Dworkin, "Foreword," in H&W, p. viii

defamation, and so on. On the other hand, there are other laws in place protecting the people who are supposedly also protected by hate speech laws—I mean laws against discrimination, laws against violence, and so on. Following Dworkin's metaphor, I am going to call these *upstream laws* and *downstream laws*.



Those who support the upstream laws often say that they are necessary in order to address the causes of downstream laws—if we leave hate speech alone, then we are leaving alone the poison that leads to violence and discrimination. Dworkin turns the tables on this argument by saying that if you interfere coercively upstream then you undermine political legitimacy downstream.

4. Legitimacy: A Difference of Degree

So: how to respond? Well, there is a question about what spoiling the legitimacy of these laws amounts to. In social science, legitimacy often means little more than popular support. Dworkin means it, however, as a normative property—either the existence of a political obligation to obey the laws or the appropriateness of using force to uphold them. Whichever of these is meant, there's a question of how literally we should take the claim that legitimacy is spoiled by the enforcement of hate speech laws. For example, I know that Dworkin doesn't mean that racists are entitled to rise up in revolution against a society that enforces hate speech regulation: it is not a loss of legitimacy in that drastic sense.

At worst it is a loss of legitimacy in relation *to these particular laws*. But even then, taken literally, the position seems counterintuitive. In Britain, there are laws forbidding the expression of racial hatred.[18] There are also laws forbidding racial discrimination, not to mention laws forbidding racial and ethnic violence and intimidation, laws protecting mosques and synagogues from desecration; these are

[18] Public Order Act 1986, Parts 3 and 3A.

the downstream laws, the laws whose legitimacy Dworkin believes is hostage to the enforcement of hate speech regulation. Should we really believe that in Britain citizens have no obligation to obey these downstream laws? Or, should we really believe that the enforcement of these downstream laws is morally wrong and that the use of force to uphold them is just like any other illegitimate use of force?

So: a wealthy landlord discriminates against English families of South Asian descent in a way that is prohibited by the Race Relations Act . Do we really want to say that he has no obligation to obey the anti-discrimination law and that no action should be taken against him, at least so long as the statute book also contains provisions banning him from publishing virulent anti-Pakistani views? Some skinheads beat up a Muslim minicab driver in the wake of the 7/7 atrocities. Is it wrong for the police to pursue, arrest, and indict these assailants because Britain has religious hate speech laws which deprive downstream laws forbidding this sort of assault of their legitimacy. Must they stand by and not intervene, because any intervention would be wrong. On a literal account, that's what "deprived of legitimacy" means.

And it is not just Britain. Almost every advanced democracy has hate speech laws, which, according to Dworkin, spoil the legitimacy of any anti-discrimination laws that they have. It would seem that the only advanced democracy entitled to have and enforce such laws is the United States. Can that be right? That is American exceptionalism with a vengeance!

I don't think Dworkin really means us to take the phrase "spoils the legitimacy" of the downstream laws in this literal sense. Any argument will look silly if, as they say in England, "it is pushed to an extreme."[19] So let's consider some more moderate possibilities. One possibility is that the enforcement of hate speech laws undermines the legitimacy of some downstream laws and not others: perhaps it undermines the legitimacy of laws forbidding discrimination but not the legitimacy of laws forbidding racial violence. They after all have independent and more general support. (And police intervention to stop violence or rescue people from attack may not need the sort of legitimation that the majoritarian political process is supposed to provide.) But this position will be hard for Dworkin to maintain in light of his more holistic observations about the importance for legitimacy of speech which is just part of the cultural environment, though not intended as a contribution to formal discussion of any law in particular law. And anyway it still leaves us stuck with the unpalatable conclusion so far as anti-discrimination laws are concerned.

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[19] Cf. JS MILL, ON LIBERTY, Ch. 2, p. 26: "Strange it is, that men should admit the validity of the arguments for free discussion, but object to their being "pushed to an extreme;" not seeing that unless the reasons are good for an extreme case, they are not good for any case."

A second possibility (compatible with the first) is that the legitimacy of any given law is itself a matter of degree and that, on the moderate version of Dworkin's argument, the enforcement of hate speech laws *diminishes* the legitimacy of other laws without destroying it altogether.

A third possibility (also compatible with the other two) is that legitimacy is relative to persons. Robert Post has suggested a version of this: "If the state were to forbid the expression of a particular idea, the government would become, *with respect to individuals holding that idea*, heteronomous and nondemocratic."[20] In Dworkin's argument one might say the downstream law becomes legitimately unenforceable against the person silenced by the upstream law even though it may be legitimately enforceable against others. But this third possibility gets tangled up in issues about generality. Hate speech laws are presented in quite general terms: they forbid *anyone* from hateful defamation of racial, ethnic, and religious groups. Even if they only have to be enforced against a few isolated extremists; they have (and are intended to have) a chilling effect on everyone's speech. To the extent that this is so, it may be hard to identify the basis for *in personam* illegitimacy of the type that the third moderate position suggests.

The second moderate position seems the most plausible: legitimacy is not an all-or-nothing matter; the existence of hate speech laws diminishes the legitimacy of downstream laws, but does not eliminate it all together. It is all a matter of degree.[21]

However, if we are going to recognize differences of degree, we should recognize them on the other side of the equation as well. Let me explain. On a given issue—say the desirability of an antidiscrimination law—an individual, X, will have a range of views: (1) He may oppose it because he thinks he will be worse off. (2) He may oppose it because he thinks it will generate perverse economic incentives, undermining economic efficiency. (3) He may oppose it because he distrusts the bureaucracy necessary to administer it. (4) He may oppose it because he denies that the intended beneficiaries of the law are worthy of the protection that it offers them. Let us focus particularly on (4). It may be expressed in various ways: (4a) X may simply express his dissent from the broad abstract principle that governments must show equal concern and respect to all members of the community; (4b) X may expound some racial theory which he thinks shows the inferiority, by certain measures, of certain lines of human descent; (4c) X may express the view that the citizens who are intended to be protected by the anti-discrimination law are no better than animals; (4d) X may say in a leaflet or on the

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[20] Post, *Racist Speech, Democracy, and the First Amendment* , op. cit., at 290 (my emphasis).

[21] Cf. RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? (2008), p. 97.

radio that these citizens are no better than the sort of animals we would normally seek to exterminate (like rats or cockroaches).

Out of all these various views and expressions, laws against hate speech and group defamation—of the kind we are familiar with in actually existing democracies—are almost certain to restrict (4d), quite likely to restrict (4c) and maybe they will restrict some versions of (4b), depending on how hatefully they are expressed.

On the other hand, most such laws bend over backwards to ensure that there is a lawful way of expressing something like the propositional content of views that become objectionable when expressed as vituperation. They try to define a legitimate mode of roughly equivalent expression, a sort of safe haven for the moderate expression of the gist of the view whose hateful or hate-inciting expression is prohibited. So,[22] The most generous such provision I have seen is in the Australian Racial Hatred Act 1995 (that's a federal statute), which says that its basic ban on actions that insult, humiliate or intimidate a group of people done because of the race, colour or national or ethnic origin, "does not render unlawful anything said or done reasonably and in good faith: in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest." The purpose of these qualifications is precisely to limit the application of the restriction to the bottom end of something like a (4a)-(4d) type of spectrum.

Now if we accept the basic framework of Dworkin's position, we may want to say that a law that prohibited the expression of (4a) and (4b) as well as (4c) and (4d) would have a worse effect on downstream legitimacy than a law which merely forbade something like (4d). It would—as I say—be a matter of degree. And if we had a law that was specifically tailored to prohibit only expression at the viciously vituperative end of this spectrum, it might be an open question whether it had anything more than a minimal effect on legitimacy.

Part of our estimation of the effect on legitimacy would surely also revolve around the reasonableness and importance of the objectives being sought by the restrictive upstream laws. We see this all the time with regard to *non*-content-based restrictions on speech (laws restricting time, place and manner of political demonstrations, for example). If they are arbitrary or motivated by only very minor considerations of public order, we might say that they gravely impair the legitimacy of collective decisions on the matters that the demonstrators were

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[22] Cite to Australian federal Racial Hatred statute. See also the section 18(1)(a) of the Public Order Act 1986 (UK), which prohibits the display of "any written material which is threatening, abusive or insulting" if its display is associated with an intention "to stir up racial hatred," but says that no offense is committed if the same material is not presented in a threatening, abusive or insulting manner or if the person concerned "did not intend … the written material, to be, and was not aware that it might be, threatening, abusive or insulting."

wanting to address. But if the motivation is based on serious considerations of security, we might be more understanding. So, similarly, in the case of hate speech laws. A motivation oriented purely to protect people's feelings against offense is one thing. But a restriction on hate speech oriented to protecting the basic social standing—the elementary dignity, as I have put it—of members of vulnerable groups, and to maintaining the assurance they need in order to go about their lives in a secure and dignified manner—that may seem like a much more compelling objective. And complaints that attempts to secure it damage the legitimacy of other laws may be much less credible as a result.

4. Time and settlement

The next thing I want to say is difficult, and I'm not at all sure about it. So I am going to appeal to the patience and consideration of my audience. Let me begin with a couple of reminders.

The concern for dignity and reputation that I have been expressing in these lectures engages the basics of justice and rights, not the contestable elements like (e.g.) theories of economic equality. If the proposal were to ban people from expressing contemptible views about welfare recipients or democratic socialism, then I think there would be a case to be made along the lines of Dworkin's argument—to the effect that such suppression would put in question the legitimacy of our pursuit of policies based on premises that people were being fined or put in jail for denying. But we are, as I said, talking about the fundamentals of justice, not the contestable elements. By the fundamentals of justice, I mean things like elementary racial equality, the basic equality of the sexes, the dignity of the human person, freedom from violence and intimidation, and so on. These matters are foundational in the sense that they represent relatively settled points or premises of modern social and legal organization. I don't mean that there is unanimity about them—the hatemongers show *that*. Still these matters are more or less settled in our laws and constitution and it is reasonable now for us to treat them as foundations for an awful lot else that we do.

Maybe there was a time when we had to have a great national debate about *race*, for example—about whether there were different kinds of human being, inferior and superior lines of human descent, ranked in hierarchies of capability, responsibility, and authority.[23] But I think it is fatuous to suggest that we are in the throes of such a debate now—a vital and ongoing debate of a sort that requires us to endure the ugly invective of racial defamation as a contribution in our continuing of a more or less open question. There is a sense in which the debate

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[23] Cite to Rashdall, also to IVAN HANNAFORD, RACE: THE HISTORY OF AN IDEA IN THE WEST (Woodrow Wilson Center Press, 1966).

about race is over—won; finished. There are outlying dissenters; but we are moving forward as a society as though this were no longer a mater of serious or considerable contestation.

If anything like this is true, then there is something odd about the Dworkin legitimacy argument. The impression he gives is that the discourse to which racist hatemongers offer their "contributions" is a living element of public debate, on which we divide temporarily into majorities and minorities, but in respect to which no majoritarian laws can be legitimate unless there is some provision for this important debate to continue, so that the losers (the racist and the bigots) have a chance to persuade the majority of their position on these fundamentals the next time around. One can see what Dworkin means; but I wonder if you share my sense of how *weird* his position is. It seems to assume that debates are timeless and that considerations of political legitimacy relative to public debate must be understood as necessarily impervious to progress. Maybe you don't share my sense of the weird artificiality of this position.

I understand the delicacy of any claim that a debate is over and finished and that therefore attempts to throw in question a position that most of us have accepted should be suppressed. To clarify: this idea of a debate being *over*, is used only with reference to this question of how seriously we should regard the Dworkinian alarms about political legitimacy. It is with regard to that and that only, that I introduce this idea of certain debates being <u>over</u> into the discussion.

I certainly don't mean to say that a question can be off-limits once the debate is "over" in the sense I have defined. There will still be discussions of race—of the kind initiated in the Bell Curve controversy, for example.[24] There may well be some proponents of philosophical racism, who express their weird and outlying views in the measured terms that the exceptions to the rules about race hate are intended to permit.

I am mindful too of John Stuart Mill's point about the importance of sustaining a "lively apprehension" of the truths on which our social system is organized, even when certain debates are to all intents and purposes settled. Most of us, however, part company with Mill when he seems to suggest that it might be appropriate to cultivate racism, for instance, in order to enliven our egalitarian convictions.[25] I mean that most of us would agree with Mill when he says

> [a]s mankind improve[s], the number of doctrines which are no longer disputed … will be constantly on the increase: and the well-being of mankind may almost be measured by the number and gravity of the truths

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[24] Murray versus Flynn etc.

[25] MILL, ON LIBERTY, Ch. 2, pp. 48-55.

> which have reached the point of being uncontested. The cessation, on one question after another, of serious controversy, is … as salutary in the case of true opinions, as it is dangerous and noxious when the opinions are erroneous.[26]

We can accept that without necessarily accepting his claim that this brings with it a certain cost – namely, "[t]he loss of so important an aid to the … living apprehension of a truth, as is afforded by the necessity of … defending it against opponents." Mill concedes that this is not sufficient to outweigh the benefit of the universal recognition of some truth, but he says it is "no trifling drawback."[27] He even suggests that if we didn't have local racists to keep our egalitarianism alive and jumping, we might have to invent them. Most people I think are very chary of that rather daft suggestion by Mill, particularly when the effect of manufacturing or empowering a "dissentient champion"[28] is not only on the liveliness of the debate but also (and destructively) on the dignity, security and assurance of vulnerable members of society.

Let me emphasize again that the argument of this section is developed, not as a free-standing position, but as a response to Dworkin's argument about legitimacy. I think we are now past the stage where we are in need of such a robust debate about matters like race that we ought to bear the costs of what amount to attacks on the dignity and reputation of minority groups—or, more importantly, *require individuals and families within those groups* to bear the costs of such humiliating attacks on their dignity and social standing—in the interests of public discourse and political legitimacy. I believe we are well past the point where we would sacrifice the legitimacy of our anti-discrimination laws or the laws prohibiting racial violence by not permitting people to defame one another in these terms.

5. The *Owens* case in Saskatoon

This distinction between debates that are over and debates that are not is illustrated by a recent Canadian decision. In 1997 in Saskatchewan, a corrections officer called Hugh Owens published and offered for sale in the *Saskatoon Star Phoenix* newspaper a bumper sticker designed to proclaim what he believed to be the Christian message concerning concerning what appears to be gay marriage and perhaps homosexual relationships in general. He said that the ad was "a Christian response" to Gay Pride Week. After a complaint by three gay men, who felt that

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[26] Ibid., p. 53

[27] Idem.

[28] Ibid., p. 54.

OTTAWA CITIZEN · NEWS · WEDNESDAY, JUNE 20, 2001

PAID ADVERTISEMENT

ROMANS 1
LEVITICUS 18: 22
LEVITICUS 20: 13
1 CORINTHIANS 6: 9-10
The New International Version

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This message can be purchased in bumper sticker form. Please call 306-584-2611.

The Saskatchewan Human Rights Commission has ruled that an advertisement, above, placed by Regina resident Hugh Owens in the Saskatoon StarPhoenix, exposed gay men to hatred.

Bible: Decision raises questions about freedom of speech

Continued from page A1

One biblical reference from Leviticus says a man who "lies with a man" ...

... sermons and the media. Yesterday, he added that he expects this decision will be cited many times in future decisions.

During the hearing over the ...

Owens, who said he plans to appeal the ruling as a threat to religious freedom and freedom of speech.

Roger Hutchinson, a professor of ethics at the University of Toronto's ...

Job: Adrift in a sea of seekers

Continued from page A1

"I came here to get a feel for what was available out there. I don't believe it."

Mr. McAllister was but one of many adrift in a sea of job-seekers who visited the Corel Centre yesterday.

Those in line had hopes the fair would resemble the January event, when companies crowded onto the Corel Centre rink, vying for attention with with flashy booths and eye-catching banners. The employment picture then was so good that Alcatel chose to lease space in the Corel Centre to set up a permanent recruiting office, which opened during Senators games.

At least 10,000 tech job layoffs in Ottawa gave yesterday's career fair a different look.

Advertisements advised the job prospects to be prepared for interviews, but none appeared to be conducted yesterday.

the advertisement belittled them, and subjected them to public hatred, Owens was hauled before a one-person board of inquiry, set up by the Saskatchewan Human Rights Commission in Saskatoon. (I should explain that Canada operates what is in my view a silly arrangement whereby some proceedings for hate speech are initiated, in response to private complaints, by specialist Human Rights Tribunals which seem to have the power to summon citizens to appear before them and issue injunctions and penalties. In many other countries, these laws are administered much more carefully, often with a requirement that prosecutions not proceed without the specific authorization of the Attorney-General in his or her non-partisan capacity.)[29] And he and the newspaper were ordered to pay $1500 to the complainants. A court in Saskatoon upheld the decision,[30] but when Owens appealed to the Saskatchewan Court of Appeals, they reversed it.[31] And what they said is very interesting.

Although the Appeals Court recognized that "part of the context which must inform the meaning of Mr. Owens' advertisement is the long history of discrimination against gay, lesbian, bisexual and trans-identified people in this country and elsewhere," it also said this (and I am going to quote it at some length):

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[29] For example, section 27 (1) of the U.K.'s Public Order Act 1986 insists that "[n]o proceedings for an offence under this Part may be instituted in England and Wales except by or with the consent of the Attorney General."

[30] Cite.

[31] Owens v. Saskatchewan Human Rights Commission, [2006] 279 Sask. R. 161 (Sask. Ct. App.).

> it is significant that the advertisement in issue here was published … in the middle of an ongoing national debate about how Canadian legal and constitutional regimes should … accommodate sexual identities. … Parliament would not pass legislation to make government programs and benefits available on an equal basis to gay and lesbian couples until three years after the advertisement appeared. …When Mr. Owens' message was published the judicial sanctioning of same-sex marriage in Saskatchewan was still seven years in the future and its sanctioning by the Supreme Court of Canada was eight years in the future. This does not mean that a newly won right to be free from discrimination should be accorded less vigorous protection than similar rights based on more historically established grounds…. But, for purposes of applying a provision like [this], it is important to consider Mr. Owens' advertisement in the context of the time and circumstances in which it was published. That environment featured an active debate and discussion about the place of sexual identity in Canadian society. Seen in this broader context, Mr. Owens' advertisement tends to take on the character of a position advanced in a continuing public policy debate rather than … a message of hatred or ill will… Both the Board of Inquiry and the Chambers judge erred by failing to give any consideration to this wider context.[32]

Notice that Owens' speech was not protected simply: it was not wrong simply because he cited bible passages. If someone had set up an equivalent bumper sticker with a citation of Genesis 9:18-29 and an equals sign and a depiction of slavery or something like that, the fact that it was a Bible quote would not help. Equally, had Owens produced a bumper sticker citing the same passages with the message conveyed in a bumper sticker in Queensland, Australia: "Under God's law the only 'rights' gays have is the right to die"[33] it might well have been liable to penalty, and properly so. Our commitment to the principle of human dignity has advanced beyond the point where that sort of vituperation is tolerable. For, whatever the state of the on-going debate about gay marriage and the accommodation of sexual identities, we have I think committed ourselves as a society—and Canada has too—to the proposition that the basic dignity and social standing of individuals, their basic entitlement to recognition and respect in the sense defined by *Keegstra*, is unimpaired by whatever we think about people's sexual activity and about civil recognition of various types of relationship.

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[32] Ibid., Paragraphs 66-8.

[33] A Queensland bumper sticker that led to a conviction under hate speech legislation: see http://www.somebodythinkofthechildren.com/anti-gay-bumper-sticker-free-speech-hate-speech/

I am conscious that this may seem an inadequate position to those who are impatient with the prolongation of the debate about gay marriage. It may seem like a grudging sort of toleration: we respect the person, even while we disagree—and are permitted to express disagreement—about the legal accommodation of their sexuality and relationships. But I am not presenting this as a general theory of toleration or of the civil rights of gays and lesbians. It is presented only as an account of when prosecution for hate speech may or may not be appropriate, and—like everything I said in the previous section—it is developed as a response to the Dworkin position that everything must be left free and completely up for grabs. It illustrates the Dworkin position that there may be a serious loss of political legitimacy if real debates are closed down too quickly; but I believe it also illuminates by contrast the point that I have made that some such debates—about the basis of individual dignity, for example—must be treated as essentially over, at least so far as the implications of the Dworkin position are concerned.

7. Islamophobia.

So: everything I have said is conditioned by a number of important distinctions: (i) a distinction between the basics and the contestable details of social justice and individual identity, so far as the restriction of hate speech is concerned; (ii) a distinction between hateful and moderate modes of expressing essentially the same message, which most hate speech statutes admit; (iii) a distinction between the legitimacy implications of regulating speech (for the sake of dignity and assurance) when the speech "contributes" to a debate about fundamentals that is essentially over and the legitimacy implications of regulating speech that contributes to a debate that in a real sense is alive and on-going; (iv) a distinction between speech that undermines the social enterprise of securing dignity and assurance and speech that merely offends; and finally (v) a distinction between attacks on a person and attacks on a position that they hold or the content of a set of beliefs they identify with or a lifestyle that they are wedded to.

Let me add one word about that last distinction—the distinction between attacks on a person and attacks on a position that they hold or the content of a set of beliefs they identify with. I am going to use a different example.

In many people's minds, there is a connection between Islam, as a religion, and jihadist terrorism. Indeed there is a robust debate going on inside the Islamic *umma* about how substantial or inevitable this connection is. And there is a similar debate going on in the world at large. Like the debate about gay marriage, this too is not settled. To that debate, I suspect that Mark Steyn's infamous piece in Maclean's Magazine in Canada, "the Future Belongs to Islam,"[34] and maybe even

[34] Mark Steyn, *The Future Belongs to Islam*, MACLEANS October 20, 2006.

the Danish cartoons (portraying the prophet Mohammed as a bomb-throwing terrorist)[35] make some sort of twisted contribution; and I believe they should be tolerated as such.

I don't mean that they are admirable. In my view there is something foul in the self-righteousness with which Western liberals have clamored for the publication and republication of the Danish cartoons in country after country and forum after forum, including the Harvard Salient in February 2006. Often the best they could say for this was that they were upholding their right to publish them. But a right does not give the right-bearer a reason to exercise the right one way or another, nor should it insulate him against moral criticism.[36] My view is that the exercise of this right was fatuous, unnecessary and offensive; but as I have now said several times, offensiveness by itself is not a good reason for legal regulation .

On the other hand, where we are concerned with law and prosecutions, it is also important to distinguish an attack on religious tenets and even an attack on the founder of a religion from an attack on the dignity of the believers. It is important not to let one's critique of a religious or ecclesiastical or clerical position roll over into the denigration of the believers' basic social standing, committed as they are to a given faith, church, and religious practice in their ordinary lives. They are not to be defamed, even if their religious beliefs are fair game.

We find this distinction embodied in statutes prohibiting religious hatred, e.g. section 29J of Public Order Act in the U.K. Section 29C says that "[a] person who publishes or distributes written material which is threatening is guilty of an offence if he intends thereby to stir up religious hatred." But section 29J insists that this shall not "be read … in a way which prohibits or restricts … expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents."

No doubt this fails to give Muslim communities the protection for their faith that they want from religious hate speech laws – namely protection for Islam or punishment for defaming its founder—just as the decision in the *Owens* case in Canada fails to give the gay community what they want in the way of protection against vilification. I have used these examples nevertheless to illustrate these distinctions which I think necessarily accompany any regulation based on the considerations that I have emphasized.

Some will say that these are hard lines to draw. And so they are. But I do not infer from that that we should therefore give up the position. Legislative policy is often complicated and requires nuanced drafting and careful administration, and

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[35] Originally published in the Danish newspaper JYLLANDS-POSTEN in September 2005.

[36] I argued this a long time ago in Waldron, *A Right to do Wrong*, 92 ETHICS 21 (1981), reprinted in WALDRON, LIBERAL RIGHTS, Ch. 3.

outside the United States the world has accumulated some experience of how to draft these regulations and how to administer these distinctions. Some people believe that no position can be valid in these matters of constitutional concern 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 right (rights to free expression, rights to dignity) will often be delicate and challenging, often involves balancing different goods and essaying difficult value-judgments. I belong to that school, which in other contexts is associated with the work of Ronald Dworkin: the moral reading of the Constitution. And I don't think people should defect from this school of thought just because they perceive some advantage in doing so for their position in the hate speech debate.

8. Distrust of government

I am conscious that I have not even come close to addressing all the arguments against hate speech legislation.[37] For example, I haven't said anything in these lectures to address the mistrust of government which, if Geoffrey Stone is right, underlies all First Amendment concerns and explains why many American legal scholars are so opposed to hate speech laws. Let me say something about that now.

As I understand it, the idea is that government interference is always likely to be motivated by officials' lust for power or their vanity or their misguided insecurity or their undue responsiveness to majoritarian prejudice, anger or panic. They may not always get it wrong, but there is a standing danger that they will.

Why this is felt particularly in the area of speech (as opposed to government actions generally) and indeed in the even more particularized area of content-based restriction on speech, I am not quite sure. There is something to it, I guess, when the best explanation of some of the prosecutions under the 1798 Sedition Act is the wounded vanity of high officials or when the best explanation of some of the twentieth century prosecutions—beginning with the World War I examples and culminating with the 1950 decision about the application of Smith Act in *Dennis v United States*—has more to do with the unpopularity of a view held by a minority (members of the Communist Party, for example) than with any real-world danger that it poses to the state. But why would anyone think this was true of hate speech legislation, or laws prohibiting group defamation? Why is *this* an area where we should be particularly mistrustful of our law-makers?

The worry about majoritarianism seems particularly strange. No doubt there are cases where majorities legislate for their own interests to the disadvantage of

[37] There is a good review in Weinstein's excellent and moderate book.

vulnerable minorities: the legacy of segregation laws and anti-immigration laws reminds us of that. But hate speech laws represent almost exactly the opposite: a legislative majority bending over backwards to ensure that vulnerable minorities are protected against hatred and discrimination that might be otherwise endemic in society.

Ronald Dworkin observed a few months ago that "Waldron disapproves of judicial review of legislative decisions. … So it's not surprising that he opposes constitutional restrictions on hate speech [laws]. "[38] It's not quite as simple as that. Many countries that regulate hate speech also have strong judicial review: Germany and Canada are examples. But in a broader sense Dworkin is right. I have long believed that American constitutional jurisprudence exaggerates the likelihood that majoritarian legislation will simply promote the interests of the majority at the expense of vulnerable minorities, who therefore need protection by the courts. And I have written about this incessantly, some would say incorrigibly.

But hate speech is an area where, against all the odds, *majorities prove us wrong*. In every advanced democracy where they are given the opportunity, majorities legislate to put this sort of protection in place because they care about the plight of minority communities. And by and large they are administered responsibly. Certainly they do not seem to have been transformed into vehicles for the promotion of majority interest in the way that Stone's general distrust of government interference would suggest.

You may say, "Well that's because you're focusing on the wrong minority. The relevant minority here is not the community of Africana-Americans or Muslims or the gay community. The real minority disadvantaged by hate speech prohibitions are the unpopular racists and bigots and virulent Islamophobes whose beliefs are detested by those who make these laws. Attacking *those* unpopular groups is just as much an instance of the tyranny of the majority as an attack on Communists or atheists." I am afraid I have no patience at all for that recharacterization. It certainly doesn't affect the point that hate speech laws really are enacted for the benefit of vulnerable racial, ethnic and religious minorities, to uphold their reputation and their dignity. It just introduces an additional minority into the picture. And it is a desperate maneuver: one might as well say that DWI laws represent an attack on the discrete minority of drinking drivers. In both cases, we have an account of a serious social harm that certain activities, if they are left unregulated are likely to cause. In both cases we have a minority of potential victims of that harm to consider and a minority of potential offenders. We can play word games with "majority" and "minority" until the end of time, but the fact

[38] Dworkin, "Comments on Jeremy Waldron on Anthony Lewis," communication by Dworkin to Robert Silvers, editor of the NYRB, passed on to me by Silvers. Cite to JW Core of Case against Judicial Review, Yale LJ.

remains: hate speech laws do not involve putting the interests of the majority above those of vulnerable groups.

A more respectable concern is that even if hate speech laws represent legislative majorities going out of their way to protect vulnerable minorities, there is no way of ensuring that an exception made for this sort of legislation won't be a Trojan horse for other majoritarian speech restrictions that are less benign. And I agree: it's hard to see how the exception could be defined or cabined in our constitutional law. "Group libel" was one possible category, but as we saw on Monday, many American constitutionalists have done their bets to make that unusable. It's like we have gone down a blind alley in our First Amendment jurisprudence, committing ourselves to a particular vision of what acceptable exceptions must be like—non-content-based, oriented to clear and present danger of crime or violence, and so on—and there's nowhere to turn and no way back that wouldn't unravel the whole scheme and make it open season on speech of every kind. It's about as good an example of path-dependency as you could wish for.

Other societies are not in this predicament. They began quite early on with the conviction that speech of this sort—defaming vulnerable minorities and inciting hatred against them—had to be regulated if any speech did; they have a much more sensible and explicit rubric for developing limitations to rights than we have (I mean the idea of "restrictions imposed by law that are demonstrably necessary in a free and democratic society");[39] they have been able to draw on each others' experience in drafting and formulating these laws; and they were bolstered in this enterprise by a sense of their international obligations, which include an obligation to ensure that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[40]

I said at the beginning that it was not my intention to make a constitutional argument. I can offer you no way out of the First Amendment labyrinth. I have taken some American arguments on this matter seriously—I hope you think I have taken them seriously—but my main aim has been to offer an interpretation of the enactment and upholding of these laws in other countries and of the impulse to enact and uphold them here too, to the extent that that exists. My method has been Dworkinian interpretation—let's make these laws and the impulse to enact them

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[39] § 10(2) of the European Convention on Human Rights says that the right of free expression "may be subject to such … conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others…" The Canadian Constitution says this in §1 about all the rights and freedoms set out in the Charter: they may be subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[40] Article 20(2) of the International Covenant on Civil and Political Rights. See also Article 4 of the International Convention for the Elimination of all Forms of Racial Discrimination.

the best that they can be; let’s try to make sense of the reasons behind them; and the limitations and exceptions that they themselves embody.

I am not saying that we should blindly imitate such laws. But in much of the discussion that I hear in this country, the impression is given that if we were to enact hate speech laws we would have to reinvent the wheel—and how on earth would we do it? and where would we start? how would we phrase it? and what groups would we privilege and how would we control it?—and we recoil from the assignment on that ground alone, quite apart from our substantive reasons for opposition. While we have been adding new *culs-de-sac* to our First Amendment jurisprudence, other countries have been working away quietly on this and doing quite well. Even if we don’t propose to follow them , we should have a better understanding of what they are doing so that we can give an intelligent not just a kneejerk explanation of our position.