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Critical Exchange

## Understanding and regulating hate speech: A symposium on Jeremy Waldron's *The Harm in Hate Speech*

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The idea for this symposium began with discussions between Tariq Modood and Simon Thompson about the recent extensions of the United Kingdom's laws against the incitement of hatred. Since 2008, the United Kingdom has had in place a set of offences of incitement to hatred on the grounds of colour, race, nationality, ethnic or national origins, religion and sexual orientation. Modood had already written about the *Satanic Verses* affair and Danish cartoons controversy. Thompson had more recently become interested in these matters when seeking to defend the Racial and Religious Hatred Act of 2006 by arguing that the harms of hate speech could be regarded as harms of misrecognition.

The publication of Jeremy Waldron's book *The Harm in Hate Speech* in 2012 then prompted the idea for a symposium specifically on Waldron's argument, and more generally about the legitimacy of criminalizing hate speech. Seeking other perspectives, Modood and Thompson invited two other people to offer their own responses to Waldron's book. Julian Rivers' long established interest in the relationship between religion and law made him an obvious choice. Modood and Thompson also wanted to know how Karen Zivi might apply her performative account of the nature of rights-claims making to the case of hate speech. The results, published here, are four rather different but complementary perspectives on Waldron's argument for the regulation of hate speech.

While Modood and Thompson are broadly sympathetic to Waldron's thesis, Rivers and Zivi are rather more sceptical, although in rather different ways. Modood begins by arguing that hatred should be partly defined by reference to the alarm and distress that its victims experience. By analysing three specific cases of hate speech, he then suggests that it is not always easy to distinguish between the expression of hatred of people and the criticism of their beliefs. Sometimes, indeed, such hatred can be expressed precisely by means of such criticism. Thompson's suggestion is



that, if Waldron is right to argue that a sense of ‘assurance’ is a valuable public good, then positive measures of public recognition will need to be taken to ensure that all citizens can enjoy that sense. Building on Waldron’s argument, he also contends that hate speech is best understood as undermining the good of assurance by contributing to a climate of hatred in which harm to some individuals is more likely to occur.

Rivers begins by wondering what interests should be balanced when the law seeks to determine the necessary limits to freedom of speech. He suggests that, if assurance of the equal standing of all citizens is placed on one side of the scales, an idea of speech as *parrhesia* – open, frank and courageous speech – should be placed on the other. For Rivers, such speech is only possible if a line is drawn between what a person is and what they think. Given this distinction, he believes that beliefs can be criticized without the believer being disrespected. Zivi begins her contribution by suggesting that, like her, Waldron has a performative account of speech: by saying things we also do things, and thus to express hatred is to contribute to a climate in which some individuals feel welcome and others do not. However, against Waldron’s tacit assumption that the intentions and effects of hate speech are stable and predictable, she wants to argue that such speech can also produce unexpected effects, and can be reappropriated by others in unexpected ways. For instance, while hate speech directed against HIV-positive people hurt them, it angered and energized them at the same time. Developing this argument, Zivi suggests that we need to deepen our understanding of hate speech by considering the structures that produce both vulnerability and hatred.

We would like to thank Jeremy Waldron for his participation in the symposium at the Centre for the Study of Ethnicity and Citizenship, University of Bristol, at which early versions of three of these contributions were presented.

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## Frank speech in a non-discriminating society

On reading Jeremy Waldron’s elegant and persuasive argument for legal restrictions on hate speech it is hard not to feel a little smug. Those benighted Americans who send offensive e-mails to anyone with the temerity to question their shibboleth of free speech (p. 10)! How nice to be a European, whose conception of a well-ordered society includes laws that assure to each person their status as an equal member of society in good standing, regardless of any marker of collective identity. How nice, also, to be a European constitutional lawyer, who agrees with the view that the



structure of fundamental rights includes the candid balancing of interests, rather than attempting to justify necessary limits on free speech by dint of definitional exclusions or plain fudge.<sup>1</sup>

But what, exactly, are we balancing when we seek to evaluate a particular instance of hate speech? One side emerges clearly from Waldron's discussion. We need to make a judgement about the extent to which the item of speech undermines the public assurance we wish to give to each person that they are an equal member of society in good standing. We seek to prevent speech that contributes to a public culture of stereotyping, hostility and exclusion. What is on the other side? The answer, 'freedom', or even 'freedom of speech', is inadequate. Freedom in an undifferentiated sense can certainly establish a presumption against legal regulation, which in turn can generate an obligation publicly to justify any restriction, but it cannot by itself fix the weight of the interest in freedom in a given case. Or, rather, it forces us onto the horns of a dilemma: either the item of speech in question falls within the scope of constitutional protection, and therefore cannot be subject to legal restriction, or we define the scope of freedom sufficiently narrowly to remove constitutional protection altogether.

The language and judicial practice of balancing seeks to avoid dilemmas such as these by bringing the reasons for restricting speech into relationship with the reasons for allowing it. To do that, we need to have some understanding of why freedom is valuable, and which uses of that freedom, in which contexts, merit greater or lesser protection in the light of the burdens they impose. In short, we need some idea of what 'speech' in a well-ordered society looks like.

The book offers us some clues, but no single answer. We glean that good speech might well give offence;<sup>2</sup> good speech is an act of self-disclosure; good speech exposes the propositional content of its underlying ideas; good speech reflects human sociability; and that there is a particular value in speech, which seeks genuinely to persuade rather than merely offend (pp. 130, 163–164, 190–191, 218–220, 230).<sup>3</sup>

These ideas can helpfully be held together in the Greek word *parrhesia*. *Parrhesia* appears in both classical and biblical Greek, and stands for open, frank and courageous speech. In lectures given in 1983, Michel Foucault states:

So you see, the parrhesiastes is someone who takes a risk. Of course, this risk is not always a risk of life. When, for example, you see a friend doing something wrong and you risk incurring his anger by telling him he is wrong, you are acting as a parrhesiastes. In such a case, you do not risk your life, but you may hurt him by your remarks, and your friendship may consequently suffer for it. If, in a political debate, an orator risks losing his popularity because his opinions are contrary to the majority's opinion, or his opinions may usher in a political scandal, he uses parrhesia. Parrhesia, then, is linked to courage in the face of danger: it demands the courage to speak the truth in spite of some danger (Foucault, 1983).



Foucault's understanding is dominated by classical usage, and has strongly agonistic overtones. Speech of this nature is in tension with the desire to create a society with a public culture of belonging. However, as the political theologian Oliver O'Donovan has suggested, liberal society reflects a more Christianised conception of *parrhesia* (O'Donovan, 1996, pp. 268–271). In early Christian understanding, the element of danger and hostile reaction is certainly present in contexts of public proclamation and witness,<sup>4</sup> but *parrhesia* is also used to refer to the freedom with which believers can now enter the presence of God and each other, the blessings of speech rendered risk-free.<sup>5</sup> The pellucidity of one's reasons and motivations, honesty about oneself, the willingness to be known, understood and criticised, are now secure within the ecclesial community. This conception bridges the desire for belonging, as it makes the assurance of security a condition for the possibility of uninhibited speech. We might say that it represents an ideal in which freedom and belonging may co-exist.

A well-ordered society, then, is one that combines, or – to use the language of European constitutionalism – balances in the most optimal fashion, a commitment both to assuring the other that he or she is a member in good standing with me and everyone else, and a commitment to frank speech, to speaking with openness to the other about them and myself, precisely because we have that mutual security.

The combination of openness and security suggests that in a well-ordered society there is a very important line between affirmation of the person and the appraisal of their beliefs and actions, just as we need to tread a careful line in our own self-perception between critical self-evaluation and the loss of self-esteem. A line needs to be drawn between who one is and what one thinks and does. Frankness of speech suggests that there is no belief (mine or yours) that is immune from challenge as to its correctness, just as there is no action (mine or yours) that is immune from challenge as to its ethical quality. But this openness to challenge must be combined with a concern to avoid victimisation, hostility and abuse.

Waldron is right that criminal law prohibitions on hate speech are both in general, and specifically in certain difficult contexts, very careful to tread this line. The fact that 'group libel' is subject to criminal prosecution rather than civil action means that there is a filter of prosecutorial discretion. There is no prior restraint by way of injunction. And particularly as hate speech laws in recent years have expanded to cover more complex protected characteristics, the British legislature has been at pains to draw the line as clearly as it can. As well as s. 29J of the Public Order Act 1986, which, as Waldron (2012, p. 12) notes, ensures that there is freedom for religious criticism, s. 29JA states that in the context of sexual orientation hate speech:

In this Part, for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred.<sup>6</sup>

The protected characteristics of religion and sexual orientation are particularly troublesome here. For they share a quality of being complex amalgams of identity, belief and behaviour (Stychin, 2009, 729). Any single instance of critical speech may cover, or be construed to cover, both an attack on the person and an appraisal of ideas and actions. But in these two sections of the Public Order Act we see the line being drawn: while individuals are to be protected from hateful speech, there is no belief or behaviour that cannot be questioned.<sup>7</sup>

The problem is that this careful delineation of the boundaries, this legislative balance in criminal hate speech law between the values of a well-ordered society, is only one part of a much wider body of law, which has to hold the balance in a very different place. To take an obvious example, it is perfectly acceptable to debate the appropriate levels of immigration in general public and political discourse, but if one suggested that the levels of immigration should be reduced while conducting a job interview with an ethnic minority applicant, the discriminatory implication would be hard to resist. Restrictions on speech-based discrimination and harassment in the workplace or marketplace are far more extensive than those contained in criminal hate speech law. And rightly so.<sup>8</sup>

Waldron (2012, p. 117) notes that he is not talking about speech restrictions in the context of employment or the provision of goods and services. But he expresses some puzzlement as to why the felt need to prevent the emergence of a 'hostile environment' in such contexts does not extend to American society more widely. However, such an extension is problematic, at least without careful qualification. The problem is that protections necessary in these contexts give legal credence to a broad conception of 'identity', which expands beyond those physical features of myself over which I have no power, to embrace matters of belief and behaviour, which are personally significant to me.<sup>9</sup> When combined with the perceived need to avoid 'discrimination' in an undifferentiated sense, this can lead to new forms of censorship and self-censorship in public life.

The routes by which more restrictive standards for speech can leach into public life are varied. Perhaps the most egregious is the idea that the mere expression of disagreement can be discriminatory and wrongful. For example, one UN Special Rapporteur sought to defend the defamation of religion resolutions, which Waldron (2012, pp. 124–126) rightly criticises by reference to the prevention of 'ideological discrimination'.<sup>10</sup>

Another route is the discretion given to police to arrest and charge for 'threatening, abusive or insulting behaviour' under s. 5 Public Order Act 1986. Police practice can be informed by concerns about 'discriminatory behaviour' without regard for the protections included in hate speech law.<sup>11</sup> Concerns such as these have led to the very recent, and successful, campaign to amend the section by removing the word 'insulting'.<sup>12</sup> There is a risk that the new duty on public sector bodies to promote equality may be used to justify refusing to collaborate with private groups, which entertain 'discriminatory opinions'.<sup>13</sup> Charity Commission guidance allows religious charities to



be ‘discriminatory’ (in an unspecified sense), but they must at least be open and clear about this regrettable feature of their practice.<sup>14</sup> Or sometimes, employers simply take action to impose internal standards on their employees even in relation to activity outside of the workplace. A housing manager was recently – and unlawfully – disciplined and demoted for stating on a private facebook page that he thought that same-sex marriage (surely a matter of legitimate political contestation) was ‘an equality too far’.<sup>15</sup>

The plea is for balance and differentiation – one is tempted to say, for discrimination. We reconcile our commitment to assuring to each person their status as a member in good standing with society with our commitment to frank speech by drawing lines between acceptable and unacceptable speech. Those lines need to be contextually variable. If the American challenge is to bring public hate speech under control, the European one seems increasingly to be to preserve a public culture of respectful but rigorous critique. Perhaps there is less to be smug about on this side of the Atlantic after all.

## Notes

- 1 For a classic account, see Alexy (2002). In an early case, the European Court of Human Rights stated that, ‘the search for ... balance is inherent in the whole of the Convention’: *Sporrong & Lönnroth v Sweden* (1983) 5 E.H.R.R. 35 at 52.
- 2 ‘Religious freedom means nothing if it is not freedom to offend: that is clear’.
- 3 Referring to Locke and Shaftesbury’s idea of an ‘amicable collision’.
- 4 Most notably, Acts 4:13.
- 5 For example Acts 4:31–32; Ephesians 3:12; Hebrews 10:19. The value of *parrhesia* features significantly in the work of the eloquent John Chrysostom (c. 347–407).
- 6 As inserted by the Criminal Justice and Immigration Act 2008.
- 7 However, it should be noted that in one of the more prominent recent cases, *Norwood v DPP* [2003] Crim. L.R. 888, the conviction was for causing alarm or distress (that is a normal public order offence) in a way that was religiously aggravated.
- 8 Even here, British legislation modifies the normal standards by removing harassment on grounds of religion or belief, and sexual orientation, from the scope of equality law protections in the provision of services, disposal of premises and the terms on which members and guests access associational privileges. See Equality Act 2010, ss. 29(8), 33(6) and 103(2).
- 9 For purposes of equality law, sexual orientation includes sexual practice: *R (Amicus) v Secretary of State for Trade and Industry* [2007] I.C.R. 1176; the refusal to fly on business trips is also *prima facie* protected as ‘religion or belief’ when it is an expression of a commitment to environmentalism: *Grainger plc v Nicholson* [2010] I.C.R. 360.
- 10 Report of the Special Rapporteur, Doudou Diène, A/HRC/6/6 (21 August 2007) at para. 28.
- 11 The reach of this provision is demonstrated by *Hammond v DPP* [2004] EWHC 69 (Admin). Hammond was an elderly street preacher who was convicted for holding a placard stating ‘Jesus Gives Peace, Jesus is Alive, Stop Immorality, Stop Homosexuality, Stop Lesbianism, Jesus is Lord’.
- 12 Crime and Courts Act 2013, s. 57.
- 13 Equality Act 2010, s. 149. See discussion in Rivers (2012).
- 14 Charity Commission, *Supplementary Guidance ‘The Advancement of Religion for the Public Benefit’* (December 2008), para E3.
- 15 *Smith v Trafford Housing Trust* [2013] I.R.L.R. 86.



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## Doing things with hate speech

There is so much that I agree with in Jeremy Waldron's *The Harm in Hate Speech*. I want to live in a world where daughters feel welcomed in a community and fathers feel emotionally and physically secure. I think people should have the 'opportunity to live their lives, raise their families, and practice their trades or vocations' regardless of their race, gender, religion, sexual orientation or ethnicity (p. 16). I am persuaded that expressions of hate, whether written or verbal, contribute to environments that make these goals extraordinarily difficult, if not impossible, for many to achieve. And I agree that promoting the public good of inclusiveness and protecting individual dignity are significant and worthy social commitments to which the law may have much to contribute. So why then do I hesitate to agree with Waldron's suggestion that achieving these goals requires the legal prohibition of public displays of hate speech? Why do I find myself, at the end of a supremely reasonable and thorough argument, so ambivalent about the idea of legal efforts to censor 'publications which express profound disrespect, hatred, and vilification for the members of minority groups' (p. 27)?

It is not because I believe in an absolute right to freedom of speech; I do not believe in absolute rights of any kind.<sup>1</sup> Nor do I believe that speech, hateful or otherwise, is so clearly distinguishable from action as to be unarguably within the ambit of the First Amendment. I have no quarrel, in other words, with Waldron's contention that our utterances can and often do injure, that speech is action, and hate speech a form of violence. Nor with his contention that the violence of hate speech is

not simply psychic or emotional; it is physical and economic as well. And yet, I am not ready to concede that hate speech codes of the kind adopted by our European counterparts are necessarily the way to address the insecurities faced by members of what Waldron calls ‘vulnerable minorities’.

As I will suggest here, my ambivalence is rooted, in part, in a concern with what is missing or obscured by Waldron’s account, a concern that arises from a different conception of linguistic performativity or speech activity than the one so central to Waldron’s argument. Whereas Waldron presents utterances as having a clear message and a very specific outcome, attributable to a speaker whose intent and command over language and its effects are robust, I see speech as an activity, the origins and outcomes of which are far less clear. From the perspective of this latter understanding of linguistic performativity, briefly sketched below, blind spots appear in Waldron’s argument that have implications for the philosophical or moral persuasiveness of a defense of hate speech codes. Waldron’s account of the workings of hate speech acts, I argue, obscures both the conditions of their resistance and of their making, overlooking the important opportunities that exist for political contestation while failing to acknowledge the structural conditions that often generate hate in the first place. Bringing these back into the picture requires not only rethinking the way words work and wound but also adopting a more robust account of the role that context plays in informing what we can do with words.<sup>2</sup>

To illuminate the difference between Waldron’s reading of hate speech and my own, I begin by highlighting the theory of language on which his defense of hate speech seems to turn. Despite being central to both his understanding of how hate speech works and what the law can do to address its harms, this theory is only cursorily explicated in the book. Nonetheless, it is there in his depiction of the harms of hate speech, and starts from the premise that speech acts and words are deeds. Waldron is working, in other words, with a form of speech act theory or linguistic performativity that acknowledges that we do things both *in* and *through* our speaking. While this insight is attributable to J.L. Austin (1975), it comes to the reader of Waldron’s work mainly via Catherine MacKinnon’s account of pornography. The result is a depiction of hate speech as ‘world-defining’ (p. 74), and the world it defines is not to Waldron’s liking. On his account, hate speech creates the very world it is often taken to represent, a world in which some individuals are welcome and others not, in which some are considered worthy of the equal treatment due to human beings and others are considered to be less than human. Hate speech does this not only by conveying a specific message, but also through the production of particular kinds of individuals and communities. It produces wounded minorities, empowered haters and exhausted allies as well as communities of the disenfranchised and communities of hate. In the very act of displaying a message on a window or posting it to the internet, Waldron suggests, hate speech abuses vulnerable individuals, undermining their sense of self. It saps the energies of allies leaving them resigned, if not immune, to routine expressions of hate, and it



emboldens haters to feel powerful, righteousness and in solidarity with many others. Likening hate speech to pollution, Waldron reminds us that it is both an object (that is a set of words, a perspective) and a doing (that is an activity that encompasses more than just the making of sounds) that is socially and individually destructive. Hate speech may remind us of the ‘living nightmares’ of our history or recent past (p. 4), but it also creates them anew. It both represents and enacts this violence by denying certain individuals their social standing, reputation and dignity, ultimately rendering precarious their psychological, physical and economic well-being.

The value of Waldron’s conceptualization of hate speech should not be underestimated. In moving hate speech from the realm of pure speech and into the realm of speech activity, Waldron skirts some of the seemingly intractable First Amendment debates while shedding light on the fact that there is much more at stake in the uttering of hate than hurt feelings. Though Waldron does not use the terms, he is suggesting that publically displayed speech that degrades and demeans contributes to what Phillippe Bourgois (2009) calls symbolic and normative violence. In the former case, as hate speech becomes inerasable, already vulnerable individuals internalize its message to such an extent that they blame themselves for the harm they experience and fundamentally alter the way they see and carry themselves as well as relate to the world around them: the haters’ vision of the world becomes the reality. In the latter form of violence, which occurs concurrently, the constant enactment of hate comes to seem a normal, even natural and inevitable, part of the social fabric, common sense and acceptable behavior, something that cannot be changed and must simply be tolerated by society as a whole.

These insights notwithstanding, we should pause to consider if Waldron has captured everything there is to know about what hate speech does and to reflect on what it might mean if the answer to that question is no. Such consideration begins with conceptualizing speech activity, particularly hate speech of the kind Waldron finds so distasteful, as something other than an explicit performative or a successful illocution. That is, we need to recognize that a hate speech act may do what it says (that is function as an explicit performative) and do that successfully, achieving expected and intended outcomes by properly meeting a set of felicity conditions (that is succeed in wounding via its public display), and yet, it may do much more.<sup>3</sup> We can agree with Waldron, as I do, that words can result in injury and be injurious in their very utterance, and yet acknowledge that hate speech acts enact and produce something other than harm. Utterances can fail, they can go awry, they can be misinterpreted or reappropriated, put to use in contexts and for purposes that were never intended or imagined, and bring into existence new ways of being and doing. Judith Butler (1997) identifies this as the ‘insurrectionary’ potential of language, potential that exists even for something like hate speech.

Take the example of hate speech in the context of the early years of the American AIDS epidemic. HIV-positive individuals, particularly gay men, faced ubiquitous displays of hate, often in signs saying that HIV-positive individuals deserved to die,



that AIDS was God's punishment for sin and that 'gay is not okay'. Hate speech acts also occurred at the intersection of the verbal and the written, in the Senatorial speeches that became part of the Congressional Record and in the news reports and editorials that reiterated similar sentiments by quoting everyday citizens. Such speech acts certainly conveyed and reinforced a message that demeaned and degraded HIV-positive individuals and represented them as unwelcome in the larger community and unworthy of equal treatment, whether that entailed access to public facilities, necessary medical treatment or simple compassion. That these speech acts, which Deborah Gould calls acts of 'social annihilation and nonrecognition', were abusive and caused pain and desperation for a group of already marginalized citizens of the United States is beyond debate (Gould, 2009, p. 57). And if the story ended there, such an account would certainly lend support to Waldron's argument: if hate speech had been legally prohibited, members of the gay community and people living with AIDS (PWAs) would not have felt so alone, ashamed or blameworthy, and perhaps the AIDS crisis itself could have been lessened.

And yet, these were not the only effects nor were they the only understandings of the acts of hate themselves, which occurred. Hate speech injured *and* angered. It wore HIV-positive individuals and their allies down *and* energized them to act. It created a community of empowered haters and threatened PWAs *and* it created new solidarities among members of marginalized and dominant groups while simultaneously demanding and performing the possibility of new configurations of the 'dominant' society itself. Perhaps the most visible and obvious form of insurrectionary speech was the reappropriation or reclaiming of the pink triangle. Once a symbol meant to mark deviance and difference, to enact degradation and abjection, the pink triangle became, and still serves as, both a symbol and an enactment of solidarity and pride. To wear the pink triangle in the 1980s and 1990s, like wearing the HIV-positive t-shirt in South Africa today, identified one as a PWA or an ally, creating a new kind of community in which distinctions between those infected and those affected by the disease were blurred. At the same time, wearing the triangle proudly in public was part of a process of reconstructing the normal, the acceptable, the dignified: it challenged entrenched norms while performing new ones. That such activities and effects were spurred on by, if not created through, hate speech is something we lose sight of if we accept Waldron's account as exhaustive. His emphasis on repeatedly reinjured individuals and their beleaguered allies, so powerful and important to his defense of legal prohibition of hate speech, erases the powerful political actors and new modes of inclusion that can come into being in its presence.

I am not suggesting that we 'need' hate speech in order to produce such new political subjects or more inclusive democratic communities. Nor do I think that Waldron is unaware of the acts of resistance that populate the history of hate speech in the United States and elsewhere. What I am arguing is that the seamlessness between word and deed, word and effect, central to Waldron's criticism of hate



speech and defense of its legal limitation, misleads. Hate speech displays do not simply send clear messages and enact undeniable harms nor do laws prohibiting hate speech necessarily speak a community's commitment to inclusiveness or provide for the kind of individual or group protection Waldron suggests is necessary to human dignity.

If Simone de Beauvoir's account of the human condition is correct, no law can rid our lives and our interactions with others of the relations of inequality and subordination that hurt. Indeed, she describes the struggle to live lives of dignity, to partake in human freedom, as one that is 'unceasingly begun, unceasingly abolished' (Beauvoir, 1989, p. 140).<sup>4</sup> And if thinkers from Jean-Jacques Rousseau to Hannah Arendt and Michel Foucault are correct, human freedom, and aspects of what Waldron calls dignity, come only in and through the engagement, often unavoidably conflictual and injurious, that we have with others in the public realm. To seek a means to avoid such engagements, then, may actually undermine the values Waldron holds so dear while diminishing the importance of and possibilities for political engagement.

If a recognition of these risks and the possibility of a robust political response to hate speech is erased from or occluded by Waldron's account, so too is an acknowledgment that the forces and sources of harm are far greater and far less individualized than he suggests. Missing, in other words, is an acknowledgement of the structural forces that create the conditions of vulnerability and hate Waldron wishes to contain. To return to the AIDS epidemic briefly, consider what rendered gay men and PWAs so vulnerable to homophobic and anti-AIDS hate speech in the 1980s. The historical discourses and practices of sexuality – the funding of particular kinds of sex education, policies that placed control of school boards in the hands of localities, decades of religious teachings about sinful sexuality, the economic interests of textbook companies, even government concerns about aid to foreign countries – that produced and reinforced the distinction between normal and deviant sexual practices, between respectable and sinful behavior, certainly informed the context that made it likely that those already marginalized could be further harmed. So too did choices made by the government to finance, direct or reject particular medical research, the decisions made by media outlets to cover certain issues and ignore others, the economic interests of pharmaceutical companies, and, again, the geo-political concerns and priorities of the US government. Vulnerability to harm and injury itself are never the simple result of individual or even group intent. Forces far more diffuse and injurious than the posting of expressions of hate pollute the social environment; enormously complex conglomerations of economic ideals, political institutions and social policies are integral to what Paul Farmer (1996) identifies as the structural violence that causes suffering. Unfortunately, these factors disappear from Waldron's account of hate speech, drawing our attention away from the larger factors that contribute to an environment in which human dignity is threatened or destroyed.



Are there aspects of my argument, then, that reiterate points made by those who argue that vulnerable individuals just need to toughen up? Does it share affinities with those who raise concerns about slippery slopes or legal legitimacy? It certainly seems like it. Does this mean that my Americanness is showing? Perhaps. But if what I share with opponents of hate speech codes is an awareness that implementing such laws comes with significant costs to our society, where I diverge is in seeing these costs as possibilities rather than as certainties, as aspects of what can happen rather than as the totality of the effects of legal prohibition. This means, then, that I am not opposed to all hate speech codes simply because I think their implementation might shut down possibilities for political activity and obscure structural violence. In the end, perhaps I am back where I started – agreeing with Waldron in large measure. Like Waldron, I would argue that value of legal prohibition needs to be balanced against the costs and that this balance, indeed these very costs and benefits, can only be determined by considering the specificities of context – local and global – in which the hate occurs. I have yet to determine where that balance lies, and I not sure Waldron has either. Perhaps this speaks to the frustration and the necessity, perhaps even the beauty, of politics serving as a complement to legality, that is, to the fact that human dignity and inclusiveness need to be fought for on multiple fronts, whether we like it or not.

## Notes

- 1 Elsewhere I argue that rights are not things that we have and use instrumentally the way we might have and use a shovel to dig a hole or have and use our fingers to type an essay. Instead, I suggest that rights ought to be understood as political performatives that get their meaning and their power in and through the practice of claims-making (Zivi, 2012).
- 2 To be fair, Waldron does admit, late in the book, that he is ‘not saying that such harm *obviously* calls for a social or a legislative response’ (p. 171). Adoption of legal prohibitions depends, he acknowledges, on the circumstances, whatever these may be.
- 3 This account draws heavily on the work of J.L. Austin (1975), particularly on what I take to be a fairly permeable boundary between illocutionary and perlocutionary utterances (Zivi, 2012).
- 4 Beauvoir’s (1989) conception of human freedom, which has been translated as ‘transcendence’, is quite distinct from a traditionally liberal account. Unfortunately a more extensive discussion of this is beyond the scope of this response.

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## Where's the harm in hate speech?

In *The Harm in Hate Speech*, Jeremy Waldron makes what to my mind is a powerful and persuasive argument for the regulation of hate speech. I would suggest that at the heart of his argument is a contrast between what he calls the public good of 'assurance' and a public bad, which I shall call a 'climate of hatred'.<sup>1</sup> In terms of this contrast, Waldron's claim is that hate speech should be regulated as it undermines assurance, which he defines as 'a shared sense of the basic elements of each person's status, dignity, and reputation as a citizen or member of society in good standing' (p. 47). To put it the other way round, his contention is that the criminalization of hate speech is justified because it contributes to a climate of hatred. Thus, in answer to the question posed by the title of my contribution – where's the harm in hate speech? – the answer is that it's all around us, like the air that we breathe – an all-pervasive milieu in which everyone must live, from which no one can escape. As a friendly critic, who accepts the principal lineaments of Waldron's important and challenging argument, I want to make two different points that I hope will help clarify and strengthen it. The first concerns the necessary conditions of assurance, while the second concerns the nature of the obligations, which individuals might have to secure this good.

With regard to the first point, Waldron argues that there are two conditions necessary for assurance to exist: (1) everyone must enjoy 'the fundamentals of justice' including 'the right to justice and elementary security' (p. 252, n. 24), and (2) the public environment of society must be free of enduring signs of hatred. He is happy to acknowledge that, while these are two necessary conditions of assurance, they may not be jointly sufficient. Taking up this point, I shall suggest that (at least) one other condition is necessary, too.

To begin with, I want to ask what might be missing from a society in which only the first two conditions hold. In such a society, the public realm is unlikely to be



completely unmarked by the cultures of all of its constituent groups. In practice, every public realm bears the impression of at least one of its cultural communities – and in nearly all cases this will be that of the majority (Kymlicka, 1995, p. 115; Parekh, 2000, p. 202). In the United Kingdom today, for example, the working week and the working year both reflect a Christian calendar. In these circumstances, it is very unlikely that all citizens will feel equally welcome in this society. The cultural majority is likely to feel much more at home than the various cultural minorities. It also follows, I believe, that members of the majority will feel more certain of their good standing than members of the minorities. Finding that the public realm is shaped in the image of the majority will inevitably affect minorities' sense of their standing in their society. As Bhikhu Parekh puts it, the existence of a 'monocultural public realm' will signal to minorities that their cultures 'are largely seen as marginal and worth practising only in the relative privacy of the family and communal associations' (2000, p. 204). In short, a lack of cultural recognition will inevitably undermine minorities' sense of assurance that they are regarded as equal members of society.

This suggests, I think, that the guaranteeing of the fundamentals of justice, together with the criminalization of hate speech, will not be enough to assure everyone of their status as equal members of society. More will need to be done in order to guarantee that cultural minorities can feel as confident as the cultural majority that they are accepted as legitimate members of their society. To continue with the example just mentioned, I would propose that the United Kingdom should revise its public calendar in order to incorporate a range of religious holidays. Thus in 2013 Christians might choose December 25 for Christmas, Muslims a day on or around August 8 for Eid al-Fitr, Hindus November 3 for Diwali and Jews September 14 for Yom Kippur. (If atheists were also given a choice, they might go for February 12 to celebrate Charles Darwin's birthday.) I would suggest that this way of revising the pattern of public holidays could be a justifiable way of showing appropriate public recognition to at least some of the many minority communities in the United Kingdom.<sup>2</sup>

I am well aware that Waldron has certain serious concerns about what he calls 'the politics of identity' (pp. 131–136), and it may be thought that my proposal here is a manifestation of such a politics. I believe, however, that this proposal is not vulnerable to the charges that he rightly lays at the door of some forms of identity politics. It would not support the efforts of an identity group to 'claim more by way of influence and protection for their interests and opinions than they are entitled to' (p. 131), and it would not imply that the accommodation demanded is 'politically non-negotiable' (p. 133). It certainly would not claim that certain religious groups have a *right* to have their special holidays publicly recognized.

My conclusion, then, is that in certain (likely) circumstances, the state should not only criminalize hate speech and guarantee the fundamentals of justice, but should also seek to ensure that its basic institutions are sensitive to its citizens' diverse cultural values. To be specific, I believe that in some circumstances certain groups



should also enjoy public recognition as a form of acknowledgement of their legitimate place in their political community.

The second issue that I would like to raise concerns the account that Waldron offers about the relationship between the harm of hate speech and the duties that individuals have to cease and desist from causing that harm. I think his argument here can be presented as a set of three propositions:

1. Individual acts of hate speech contribute to a climate of hatred.
2. In this climate, the public good of 'assurance' is undermined.
3. The purpose of hate speech regulation is to enforce the individual duty not to undermine that good (by contributing to that climate) (pp. 60, 90, 93–94, 101).

This way of justifying hate speech regulation is appealing as it may be able to get around the familiar objection that, as the harmful consequences of particular acts of hate speech are at best highly uncertain, no restrictions on freedom of expression to prevent those acts could be justified. Taken together, Propositions 1 and 2 suggest that hate speech harms indirectly by contributing to a climate in which harms are more likely to occur.

As it stands, however, Waldron's argument moves too quickly from the premise that individual acts of hate speech contribute to a climate of hatred to the conclusion that individuals have legally enforceable duties not to engage in such speech in order not to contribute to such a climate. To see why I think this is so, I want to suggest that a climate of hatred is a species of what has been called a 'collective harm'. Shelly Kagan describes the nature of this sort of harm thus:

A certain number of people – perhaps a large number of people – have the ability to perform an act of a given kind. And if a large enough group of people do perform the act in question then the results will be bad overall. However – and this is the crucial point – in the relevant cases it seems that it makes no difference to the outcome what any given *individual* does. (2011, p. 107)

This description of a collective harm presents a problem for anyone wanting to argue that this harm should be prevented by imposing duties on those individuals who have contributed to it. If, *ex hypothesi*, each individual's act makes no difference, for what could he or she be held responsible? In the present case, if each individual's act of hate speech has no consequences, it can have no *harmful* consequences, and in this case there is no reason to say that the act is wrong and should be criminalized.

I would suggest that, in order to solve this problem, it is necessary to introduce the idea of a collective duty into Waldron's argument. This can be done by inserting a new Proposition – 2.1 – between Propositions 2 and 3, and then by lightly rewriting Proposition 3. In its revised form, then, the argument would go like this:

1. Individual acts of hate speech contribute to a climate of hatred.
2. In this climate, the public good of 'assurance' is undermined.



- 2.1. There is a collective duty to cease and desist from doing this harm.
3. This collective duty can best be discharged by distributing it between all of the relevant individuals as a set of derivative individual duties not to engage in hate speech.

This may appear to be a rather casuistic argument. As Waldron and I get to the same conclusion – there is an individual duty not to incite hatred – it may be argued that my objection to his account, and my proposed and more complex alternative, is at best over-elaborate. But I think that my version of his account does identify what in other cases could be an important difference. Consider, for example, the case of climate change. This may also be regarded as a collective harm: one car driver does no harm to the environment, but millions do (see Feinberg, 1985, p. 228). In this particular case, it is not obvious that the best way to prevent or limit this harm is to assign to each individual polluter a duty not to do their ‘bit’ of the harm. It may be that the best way to discharge the collective responsibility to end the harm is for all of the relevant individuals to engage in collective action together – by, for example, supporting the creation of a global regulatory agency charged with tackling climate change.<sup>3</sup>

To return to the case of hate speech, my conclusion is that, by inserting the idea of collective duty into the argument, the result is a more robust defence of hate speech regulation. In my revised version of Waldron’s argument, as hate speech contributes to a climate of hatred in which harms to others are more likely to occur, hate speakers have a collective duty to stop contributing to that climate, and this duty is best discharged by each speaker taking on an individual duty to stop inciting hatred. This is, of course, a very compressed version of what would need to be a much longer argument if it were to be wholly persuasive. But I hope that at least it suggests how Waldron’s argument can be further refined in order to better defend it against those who argue – or sometimes simply assume – that all acts of hate speech are protected by the right to freedom of expression.

## Notes

- 1 Waldron suggests that hate speech ‘defiles’, ‘poisons’, ‘pollutes’ or ‘undermines’ (pp. 3, 16, 59) the ‘public, ‘social’ or ‘visible’ environment (pp. 3, 10, 37).
- 2 Other contributors to this symposium provided other good examples of this sort of reasonable accommodation: Jeremy’s example was New York City’s Alternate Side Parking Suspensions for various religious holidays (see <http://www.nyc.gov/html/dot/html/motorist/scriintro.shtml#cal>), and Julian’s was the United Kingdom’s Fireworks Regulations 2004, which allow fireworks to be set off later than usual, not only on Bonfire Night, but also for the Chinese New Year and Diwali (see [http://www.legislation.gov.uk/ukxi/2004/1836/pdfs/ukxi\\_20041836\\_en.pdf](http://www.legislation.gov.uk/ukxi/2004/1836/pdfs/ukxi_20041836_en.pdf)).
- 3 Christian Baatz summarizes one version of this argument thus: ‘when faced with a commons problem and no collective agreement in place ... individuals have a duty to work towards such a collective agreement, that is towards the establishment of institutional mechanisms governing access to the commons’ (2012, p. 6).





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## Hate speech: The feelings and beliefs of the hated

Jeremy Waldron has argued that certain ‘reputational attacks amount to assaults upon the *dignity* of the persons affected – “dignity” in the sense of their recognition as social equals and as bearers of human rights and constitutional entitlements’ (pp. 58–59). He believes that this justifies legislation against hate speech. I think this is broadly right, but that dignity or recognition as social equals requires paying more attention to group subjectivities than Waldron consistently holds, and this has implications for understanding hate and laws protecting the dignity of members of vulnerable groups.

Waldron seems to have two positions in relation to laws and the hurt that some groups may experience. On the one hand he says that ‘I accept the point, which many critics make, that offense is not something the law should seek to protect people against’ (p. 15) and that ‘[p]rotecting people’s feelings against offense is not an appropriate objective for the law’ (p. 106). On the other hand, he also writes, ‘[t]he idea, then, that it might be unlawful to wound people’s feelings is not an incoherent one, and we know how to recognise legal principles whose aim is to protect people from this sort of harm’ (p. 111). Even if unsure on this point, Waldron is sure that protecting people’s feelings against offense has nothing to do with his dignitarian rationale. Feelings of hurt, distress, anger, fear and so on are not definitive and may only sometimes be symptoms of indignity:

That someone’s feelings are hurt is more or less definitive of offense, but it is not definitive of indignity. Shock, distress, or wounded feelings may or may not be symptomatic of indignity... (p. 108)



I would like to push Waldron away from the above ambivalence and to draw the line between offence and hate in a different place. I think we do need to sometimes prevent the giving of offense; or, to put it another way, that our defining of hate cannot be independent of the feelings and beliefs of the hated. The feelings referred to in the last quote are not merely symptoms, they are part of the experience of being hated, and so they are or should be part of what hate speech laws are trying to prevent. This has not always been recognised in law but has gradually come to be so in some countries, especially in liberal democracies.<sup>1</sup>

Up to about the 1980s, incitement to hatred was understood as focused on stopping the ‘stirring up of hatred’ and on public order, but since then laws have increasingly focused not just on acts or agents of hate but *also* on the feelings of the victims. Britain’s way of dealing with incitement to racial and religious hatred has its own distinctive history, yet is an example of what I mean. Before the existence of any race relations legislation in Britain hateful speech could be dealt with only under common law powers relating to breach of the peace or under the Public Order Act 1936: in effect this meant that public disorder had to be imminent. Section 6 of the Race Relations Act 1965 broadened this offence by not restricting the criteria to those of outcome but including the intentions of the speaker or writer in question: intending to stir up racial hatred, regardless of the measure of success, became an offence. This in effect meant (and this is how the courts interpreted the few cases that came before them) that stirring up racial hatred could not be construed as an action with an immediate outcome but as something that, if not challenged, undermined the official commitment to racial equality and led to racial conflict – this is very much along the lines of an understanding of hate speech protection that Waldron offers. The British offence, however, was further amended by the Race Relations Act 1976 and later incorporated in Section 5, Public Order Act 1986 and Sections 28 and 31, Crime and Disorder Act 1998/2001:

any writing, sign or other visible representation which is threatening, *abusive or insulting*, within the hearing or sight of a person likely to be caused harassment, *alarm or distress* thereby (my italics).

Moreover, it is considered racially or religiously aggravated if it is ‘motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group’.<sup>2</sup> The offence having been earlier disconnected from any strict likelihood of the breach of the peace, it no longer depends on the speaker’s/author’s intentions or interpretation of his speech/text but on what a person may reasonably conclude is the likely effect on one or more racial groups, especially the group(s) referred to in the speech/text. If the group is likely to feel that as a group it is being rubbished, that old wounds are being reopened, enmities rekindled, images of domination invoked, then it can legitimately argue that the level of hate is being increased even if that is not the intention of the author and even if no specific act of violence is imminent. The Commission for Racial Equality, almost from its inception

in the late 1970s, was of the view that such legislation is necessary to avoid the feelings of humiliation, indignity and insecurity that minority groups would experience if subject to the unchecked use of inflammatory language.

Waldron, then, conceives of hate and allied offences too narrowly relative to contemporary UK law, with the result that the feelings of the victim are made secondary and contingent, whereas they are part of what hate is about. Hate speech is not only about feelings but includes what Waldron refers to as indignity; but feelings are part of what the law is and should rightly be trying to prevent. The feelings are not incidental, they are crucial.

I share Waldron's view that the law should protect people not beliefs. Michael Ignatieff (1989, 1990) gave a version of this argument at the time of *The Satanic Verses* affair when he said that he supported legislation against people shouting 'You filthy Muslim' to Muslims, but people should be free to say what they like about Islam in any manner of their choosing – presumably including in a 'threatening, abusive or insulting' manner. My view is that people can be hated because they are perceived to be members of a group, but sometimes a group can be hated through attacks upon its beliefs, and this combination is especially relevant to our times. I would like to spell out what I mean through three images concerning Muslims and Islam.

In *Norwood v Director of Public Prosecutions (DPP) 2003*, the Divisional Court upheld the conviction against Norwood, arguing that displaying a British National Party poster bearing the words 'Islam out of Britain' and 'Protect the British People' accompanied by a picture of the 9/11 attack on the Twin Towers amounted to an offence of causing alarm or distress. The High Court argued that evidence of actual alarm or distress was not necessary if it was determined that 'any right thinking member of society' is likely to be caused harassment, alarm or distress. It concluded, therefore, that the poster was racially insulting and additionally, religiously aggravated. I expect this judgement sits well with Waldron's argument. It should be clear that this poster is not very religious. The word 'Islam' is there, as well as the general knowledge that the perpetrators of the attack on the Twin Towers in New York were religiously motivated, acted in the name of Islam and they saw their action as on behalf of and for the sake of the liberation of Muslims from US imperial and financial power. Yet religion is backgrounded.

Contrast this with the most famous cartoon in the series depicting the Prophet Muhammad by the Danish newspaper *Jyllands Posten* in 2005, which triggered off what is known as 'the Danish Cartoon affair'. The image I have in mind is the bust of a dark-haired, bearded man wearing a large turban with an Islamic declaration and from which is protruding a lit fuse. The suggestion is that this is the Prophet and he blows people up (the cartoon is often referred to as 'the turban bomb'). As far as I know this image has not been banned anywhere, but some people argue that it should be (a recent example being the US political scientist, Erik Bleich (2012)). I believe the picture is offensive because it racialises Muslims: it is not really

a comment on Muhammad, rather he is drawn to stand for Muslims in general (see the debate on the Danish Cartoons in Modood *et al.*, 2006, and Levey and Modood, 2009). This is similar to how a cartoon of Moses with a large nose and holding the Ten Commandments under one arm and moneybags under the other, or something similar, might be used to make a comment about Jews in general and not just about one religious figure. The racist cartoon, however, centred as it is on the Prophet, has a religious dimension missing in the Norwood poster. The religious dimension is not incidental to it being hated: it hurts or humiliates *by* referring to something Islamic. Expressing hatred by evoking and negatively characterising the religion of the hated. And it is has the effect it does because of what the Prophet means to so many Muslims. For many Muslims what is most hurtful is not racialising but *using the Prophet* to attack Muslims. The key point is that anti-Muslim images (or discourses) can be and typically are simultaneously racialising and trying to hurt *through* attacking Muslim feelings and beliefs – *through* attacking what we might call ‘the Muslim spot’.

My third image is also connected with the Danish Cartoons affair. It was not part of the *Jyllands Posten* set but was included in the portfolio that some radical Danish Muslims took with them to Arab capitals to rouse anger against the Danish government (Modood *et al.*, 2006, p. 25). In fact the cartoon has a French provenance and portrays a pig in an Arab male headdress with ‘Mohamed’ (in English and Arabic) written on its side, writing in a book on which is written ‘Koran’ (in English and Arabic). There is some anecdotal evidence to suggest that this is the picture that triggered the violent response in the Arab world and led Arab governments to initiate boycotts of Danish goods, thereby both making the controversy violent and making the Danish government respond more sympathetically to the feelings of Danish Muslim protestors. While the meaning of the Norwood poster and the turban-bomb cartoon was fairly clear, what is the meaning of this picture, which not only is not about terrorism but does not seem to be evidently about any specific event or action? It is perhaps not that unusual for a ‘racial’ group or a minority to be portrayed in bestial terms. Black people for example have often been depicted as apes. The idea of such a depiction is that black people are less intelligent, less civilised, indeed, less human and more ape-like. In the cartoon I am discussing the idea is *not* that there is something piggy-like about Muslims’ appearance (certainly not their colour) or behaviour. So, why a pig? There can only be one answer. Because of the status of a pig in Islam, namely that it is considered a pollutant and thus to be avoided and not to be consumed. Why is the pig signified to be the Prophet? Because the artist knows that this will hurt Muslims. While the choice of the image foregrounds religion more clearly than the Twin Towers poster or the turban-bomb, it has no message or purpose other than hate. While the other two images could be said to have something like a political message or argument – something to do with the undesirability of terrorism or (some) Muslims being a security threat that needed to be acted against – the third image seems to be devoid of such content and seems to be pure hate. It seems to have no purpose other



than to hurt Muslims. And it succeeds. I have asked a number of Muslims which image do they think is more hurtful to Muslims, the turban-bomb or the pig-prophet, and each has instantly and without hesitation chosen the latter. When after the symposium at which these papers were delivered I posed the same question to Jeremy Waldron, he conceded that the pig-prophet was probably more hurtful to more Muslims but noted that the turban-bomb came closer to his concept of 'hate speech'. I take this to be evidence of a flaw in a concept of hate speech, which cannot properly capture the more hurtful and less ambiguous case of a hate-motivated cartoon.<sup>3</sup>

The flaw, I think, is based on two things that I have been trying to show. First, certain *feelings* in members of the target group are *standardly* relevant to hate speech and are part of what speech laws and other hate speech measures are trying to prevent. If the victim group feels attacked then we have a *prima facie* case of hate. Second, hate speech can be directed at or at least utilise the beliefs of the victim groups, so that the liberal claim that the law should protect people not belief is right, but sometimes when people are hatefully attacked or racialised through their beliefs or as people who hold certain beliefs, then the matter is not so simple. In protecting people in such cases, one will be stopping others from attacking them *through their beliefs*. In such cases if one ignores their beliefs then one cannot identify the hate and so *a fortiori* one cannot protect the hated.

## Notes

- 1 For Western Europe protecting Jews from Holocaust deniers was the catalyst.
- 2 Following '9/11' an Anti-terrorism, Crime and Security Act was quickly passed and extended the phrase 'racially aggravated' to 'racially or religiously aggravated'.
- 3 I have in a number of places argued Salman Rushdie's novel, *The Satanic Verses*, taking into account what Islam means to some Muslims, the social, political and international contexts of anti-Muslim hostility and the vulnerabilities of Muslims, is more hurtful than many things that some liberals are willing to outlaw such as the Norwood poster or the turban-bomb (most recently in Modood 2013, with Sachs 2013 arguing the opposite).

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