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2009 OLIVER WENDELL HOLMES LECTURES

DIGNITY AND DEFAMATION: THE VISIBILITY OF HATE

*Jeremy Waldron*

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## 2009 OLIVER WENDELL HOLMES LECTURES

### DIGNITY AND DEFAMATION: THE VISIBILITY OF HATE

*Jeremy Waldron\**

*In his three 2009 Holmes Lectures published here, Professor Waldron seeks to describe and defend laws forbidding group defamation — what we commonly refer to as “hate speech” — as affirming the basic dignity of each member of society. Part I defends the characterization of hate speech as group defamation. It argues that hate speech impugns its victims’ standing as equal members of society. Part II describes hate speech regulation as the protection of a fragile public good: the assurance offered by each member of society to all of its members that they can live free of fear, discrimination, violence, and the like. Part III defends the views articulated in Parts I and II from various criticisms, particularly those of Professor Ronald Dworkin. Dworkin argues that forbidding hate speech may result in a loss of democratic legitimacy for other laws. But Professor Waldron argues that with sufficient safeguards the loss is vanishingly small, and well worth the concomitant gains. As well, prohibitions on hate speech should only extend to issues that are “settled,” such as race, rather than issues that are currently controversial, which should further allay concerns that hate speech regulation will foreclose freedom or democratic debate.*

#### INTRODUCTION

About two years ago, I published a short piece in the *New York Review of Books*, reviewing a book by Anthony Lewis called *Freedom for the Thought that We Hate*.<sup>1</sup> In it, I expressed some misgivings about the arguments commonly used in America to condemn what we call hate speech legislation — legislation of the sort you will find in England, Canada, France, Denmark, Germany, New Zealand, and in some of the states of Australia, prohibiting statements “by which a group of people are threatened, insulted or degraded on account of

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\* University Professor, New York University. I am most grateful to Timothy Garton Ash, Rebecca Brown, Winfried Brugger, Ronald Dworkin, David Dyzenhaus, Noah Feldman, James Fleming, Charles Fried, Sanford Kadish, Frances Kamm, George Kateb, Henning Koch, Christine Korsgaard, David Kretzmer, Mattias Kumm, Rae Langton, Charles Lawrence, Anthony Lewis, Catherine MacKinnon, John Manning, Jane Mansbridge, Leighton McDonald, Frank Michelman, Martha Minow, Peter Molnar, Glyn Morgan, Liam Murphy, Thomas Nagel, Gerald Neuman, Robert Post, Michael Rosen, Nancy Rosenblum, Michael Sandel, Carol Sanger, T.M. Scanlon, Robert Silvers, Joseph Singer, Geoff Stone, Mark Tushnet, Roberto Unger, Ajume Wingo, and the late C. Edwin Baker for their criticisms, suggestions, and (in some cases) encouragement.

<sup>1</sup> Jeremy Waldron, *Free Speech & the Menace of Hysteria*, N.Y. REV. BOOKS, May 29, 2008, <http://www.nybooks.com/articles/21452> (reviewing ANTHONY LEWIS, *FREEDOM FOR THE THOUGHT THAT WE HATE* (2007)).

their race, colour, national or ethnic origin . . .”<sup>2</sup> I said that I thought there was perhaps more to be said in favor of this legislation than Anthony Lewis had suggested. But I did not make any very strong assertion. I said: “It is not clear to me that the Europeans are mistaken when they say that a liberal democracy must take affirmative responsibility for protecting the atmosphere of mutual respect against certain forms of vicious attack.”<sup>3</sup> And I ended the piece with a reminder that:

[T]he issue is not just *our* learning to tolerate thought that *we* hate — we the First Amendment lawyers, for example. . . . Maybe we should admire some [ACLU] lawyer who says he hates what the racist says but defends to the death his right to say it, but . . . [t]he [real] question is about the direct targets of the abuse. Can their lives be led, can their children be brought up, can their hopes be maintained and their worst fears dispelled, in a social environment polluted by these materials? Those are the concerns that need to be answered when we defend the use of the First Amendment to strike down laws prohibiting the publication of racial hatred.<sup>4</sup>

I thought that sounded very measured and moderate. Until I opened my inbox a few weeks after the piece was published to find an email whose subject line screamed, “YOU ARE A TOTALITARIAN ASSHOLE.” “You are the type of human excrement that should be dealt with IF the laws that you propose ever become reality. We do not [sic] a strong state to support worthless little subsidized parasites like you.”<sup>5</sup> The email left me a little bruised, so I decided that in the lectures on which this Article is based — lectures dedicated to the memory of Oliver Wendell Holmes, who himself at one time or another took both sides on most free speech issues — I would take the opportunity to explain myself.

My purpose is not to make a case for the constitutional acceptability of hate speech laws in the United States. I think that is now more or less an impossibility (though not, as I shall argue, for good reasons). I will refer to the American debate occasionally, mostly suggesting ways in which it might be enriched by more thoughtful consideration of alternative positions. Mostly, what I want to do is offer a characterization of the laws we find in Europe and in the other advanced democracies of the world, and also as we have found them in America from time to time. It is important to remember that opposition to hate speech regulation in this country is by no means unanimous. Apart

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<sup>2</sup> This is the language used in section 266b(1) of the Danish Penal Code. See THE PRINCIPAL DANISH CRIMINAL ACTS 64 (Malene Frese Jensen, Vagn Greve, Gitte Hoyer, & Martin Spencer eds., DJOF Publ’g 3d ed. 2006).

<sup>3</sup> Waldron, *supra* note 1.

<sup>4</sup> *Id.* (emphasis added) (footnote omitted).

<sup>5</sup> Email from Mike Hardesty to author (July 2, 2008, 14:51 EST) (on file with the Harvard Law School Library).

from the legal academy, which is divided on the matter, there is division among our lawmakers. There were state and municipal laws to be struck down in *R.A.V. v. City of St. Paul*,<sup>6</sup> in *Virginia v. Black*,<sup>7</sup> and in *Collin v. Smith*,<sup>8</sup> and there was a state law to be upheld in *Beauharnais v. Illinois*.<sup>9</sup> Not everyone in America is happy with the constitutional untouchability of race leaflets in Chicago, Nazi banners in Skokie, and burning crosses in Minnesota. There has been an honorable impulse among some lawmakers in America to deal with this problem, and what we have always needed — before rushing to constitutional outrage on behalf of the First Amendment — is to understand that impulse. Outside the United States, we know that legislation of this kind is common and widely accepted (though it is certainly not uncontroversial). For us, that gives rise to a question about what the European or Canadian or New Zealand legislators think they are doing with these laws. Why have most liberal democracies undertaken to prohibit these manifestations of hatred, these visible defamations of social groups? How do they understand this legislation, how do they defend it, and how do they position it in relation to concerns — which they also profess — about freedom of expression?

In Part III, I will focus on one very powerful American argument against legislation of this kind: an argument made by Professor Ronald Dworkin and others about the effect that restrictions on free expression may have on the legitimacy of other laws that we want to be in a position to enforce.<sup>10</sup> I think that critique can be answered, though not without difficulty. In Parts I and II, however, my argument will be less defensive. In Part II, I will consider what people ought to be able to draw from the visible environment of their society so far as dignity, security, and assurance are concerned, as they lead their lives and go about their business. I shall argue that hate speech regulation can be understood as the protection of a certain sort of precious public good: a visible assurance offered by society to all of its members that they will not be subject to abuse, defamation, humiliation, discrimination, and violence on grounds of race, ethnicity, religion, gender, and in some cases sexual orientation. I will not try to make the case that hate speech laws actually reduce discrimination, violence, and so on, or that they make it more likely that hatemongers will give up their bigotry and become good, tolerant citizens. I hope that will happen, and hate speech laws may work as part of a broader campaign for equality and

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<sup>6</sup> 505 U.S. 377 (1992).

<sup>7</sup> 538 U.S. 343 (2003).

<sup>8</sup> 578 F.2d 1197 (7th Cir. 1978).

<sup>9</sup> 343 U.S. 250 (1952).

<sup>10</sup> Ronald Dworkin, *Foreword* to *EXTREME SPEECH AND DEMOCRACY*, at v, viii–ix (Ivan Hare & James Weinstein eds., 2009).

toleration. But I am going to argue that the most important aim of these laws is more immediate. The aim is simply to diminish the presence of visible hatred in society and thus benefit members of vulnerable minorities by protecting the public commitment to their equal standing in society against public denigration. In Part I of the Article, I will sketch some background for this aim, arguing that it helps to view hate speech laws as protecting vulnerable minorities against the evil of *group defamation*. These days we tend to think of defamation as a tort. But I will argue in Part I that historically the law of criminal libel has been used to support and express a collective commitment on the part of society to uphold the fundamentals of people's reputations as members of society in good standing — vindicating, as I shall say, the rudiments of their civic *dignity* as a necessary ingredient of public order.

### I. WHY CALL HATE SPEECH “GROUP LIBEL”?

What we call a thing tells us something about our attitude towards it, how we see it as a problem, what our response to it might be, what difficulties our response to it might bring to light. So it is with the phenomenon that we call in America “hate speech,” which can cover things as diverse as cross-burnings, racial epithets, insults to religion, bestial and other offensive depictions of vulnerable minorities in leaflets, posters, or on the internet, broad-brush ascriptions of criminality or dangerousness, calls to unite against the members of a hated group, and neo-Nazi marching in American suburbs with swastikas and placards saying “Hitler should have finished the job.”

#### A. *The Connotations of “Hate Speech”*

When we call these phenomena “hate speech,” we bring to the fore a number of connotations that are not entirely neutral. If we say we are interested in restrictions on hate *speech*, we convey the idea that the law is proposing to interfere with the spoken word, with conversation, and perhaps with vocabulary, with our use of racial or ethnic slurs or epithets — stammered out, as Justice Jackson once put it, “when the spirits are high and the flagons are low.”<sup>11</sup> Speech, in the sense of the spoken word, can certainly be wounding.<sup>12</sup> But I believe that the expressions of hatred that should concern us include most prominently those that are printed, published, pasted up, or posted, or in some other form become part of the visible environment in which our lives have to be lived. No doubt a speech can resonate long after

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<sup>11</sup> *Kunz v. New York*, 340 U.S. 290, 299 (1951) (Jackson, J., dissenting).

<sup>12</sup> See, e.g., Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 455.

the spoken word has died away, but to my mind it is the enduring presence of the published word that is particularly damaging.

The kind of speech we say we are interested in regulating is *hate* speech, and that word “hate” can be distracting too. It suggests we are interested in looking at and regulating the passions and emotions that lie behind a particular speech act.<sup>13</sup> The word “hate” emphasizes the subjective attitudes of the person expressing the views or publishing the message in question. It sounds as though it locates the problem as an attitudinal one and focuses on what motivates the speech in question.<sup>14</sup> (It is like the phrase “hate crimes” in this respect, and people may be excused for thinking that the controversy over hate crimes — over the use of mental elements like motivation as an aggravating factor in criminal law — is directly relevant to the controversy over racial expression.)<sup>15</sup> The word “hate” suggests — I think misleadingly — that the task of legislation that restricts hate speech is to try to change people’s attitudes or control their thoughts.

The restrictions on hate speech that interest me are not restrictions on thinking; they are restrictions on more tangible forms of communication. The issue is publication and the harm done to individuals and groups through the disfiguring of our social environment by visible, public, and semi-permanent announcements to the effect that in the opinion of one group in the community, members of another group are not worthy of equal citizenship.

### B. *The Terminology of “Group Libel” and “Group Defamation”*

In many countries, a different term or set of terms is used by jurists: “group libel” or “group defamation.” Sometimes this is how the legislation describes itself; it is the terminology used, for example, in section 130 of Germany’s Penal Code, prohibiting “attacks on human dignity by insulting, maliciously maligning, or *defaming* part of the

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<sup>13</sup> It can also bog us down in a futile attempt to define “hate.” Hatred is not an easy idea to define; Robert Post has a valiant stab at defining “hate” in *Hate Speech*, in *EXTREME SPEECH AND DEMOCRACY*, *supra* note 10, at 123, because he thinks the crucial issues are determining when “otherwise appropriate emotions become so ‘extreme’ as to deserve legal suppression,” *id.* at 123, and “distinguish[ing] hatred from ordinary dislike or disagreement,” *id.* at 125.

<sup>14</sup> Actually, if “hatred” is relevant at all, it is relevant (in many of the statutory formulations) as the purpose of the offending speech, not as its motivation. The International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 999 U.N.T.S. 171, requires signatory states to prohibit “advocacy of national, racial or religious hatred,” *id.* at art. 20(2), while the British Public Order Act, 1986, c. 64, § 18(1), states that “[a] person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if . . . (a) he intends thereby to stir up racial hatred, or (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.”

<sup>15</sup> See, e.g., Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 *STAN. L. REV.* 1081 (2004).

population.”<sup>16</sup> In other countries, “group libel” and “group defamation” are terms used in judicial doctrine and among lawyers to describe restrictions of the kind we would call hate speech restrictions.

The term “group libel” also used to be common in the United States, and it was alluded to by the Supreme Court in characterizing a state law that was upheld in 1952 in *Beauharnais v. Illinois*.<sup>17</sup> “Just a little more than a decade ago,” wrote Harry Kalven in 1964, “we were all concerned with devising legal controls for the libeling of groups.”<sup>18</sup> Five years before *Beauharnais*, some scholars at Columbia tried to crystallize debate by publishing a model group libel statute in the *Columbia Law Review*.<sup>19</sup> It is worth remembering, too, that — as its name suggests — the Jewish Anti-Defamation League took as its original mission “to stop, by appeals to reason and conscience, and if necessary by appeals to law, the *defamation* of the Jewish people.”<sup>20</sup>

### C. Civil Versus Criminal Libel

James Weinstein says that the idea of group libel is constructed by analogy with the tort of defamation; but, as he notes, this analogy is an oversimplification.<sup>21</sup> Libel may be best known today as a tort, but in the past it has often been understood also as a criminal offense. Criminal libel laws came in various flavors. I suppose the best known are the laws against *sedition* libel — of which, for us, the most notorious example is the Sedition Act, passed by Congress in 1798, making it a criminal offense to publish “false, scandalous, and malicious writing” bringing the president or Congress into disrepute or “to excite against them . . . the hatred of the good people of the United States.”<sup>22</sup> This spectacularly ill-considered piece of legislation has given criminal libel a bad name in the United States ever since.

Or consider *blasphemous* libel. William Blackstone observed that “*blasphemy* against the Almighty, . . . denying his being or providence; or . . . contumelious reproaches of our saviour Christ . . . [is an offense] punishable at common law by fine and imprisonment, or other infamous corporal punishment: for christianity is part of the laws of Eng-

<sup>16</sup> Strafgesetzbuch [StGB] [Penal Code] § 130, ¶ 1, sentence 2. In France, article 29 of the Law on the Freedom of the Press of 29 July 1881 also prohibits group defamation.

<sup>17</sup> 343 U.S. 250, 253–54 (1952); see also Joseph Tanenhaus, *Group Libel*, 35 CORNELL L.Q. 261 (1950) (for a general discussion of this concept).

<sup>18</sup> HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 7 (1965).

<sup>19</sup> Note, *Statutory Prohibition of Group Defamation*, 47 COLUM. L. REV. 595 (1947).

<sup>20</sup> STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION 326 (Sandra Coliver ed., 1992) (emphasis added) (internal quotation mark omitted).

<sup>21</sup> James Weinstein, *Extreme Speech, Public Order and Democracy*, in *EXTREME SPEECH AND DEMOCRACY*, *supra* note 10, at 23, 58–59.

<sup>22</sup> Alien and Sedition Acts of 1798, ch. 74, § 2, 1 Stat. 596 (expired 1801).

land.”<sup>23</sup> Blasphemous libel was held to be a common law offense in the United Kingdom as late as 1977, when a private prosecution was brought successfully by Mary Whitehouse against the publishers of *Gay News* for a poem that described necrophiliac acts performed upon the body of Jesus after his crucifixion.<sup>24</sup> In 1823, a man was jailed for three months in Massachusetts for publishing an essay in the *Boston Investigator* that denied the existence of God, affirmed the finality of death, and declared that “the whole story concerning [Jesus Christ] is as much a fable and a fiction as that of the god Prometheus.”<sup>25</sup> There was also obscene libel — an offense that covered the publication of virtually any obscene matter. Edmond Curl was found guilty in England in 1727 in respect of a book called *Venus in the Cloister*, about lesbian love in a convent.<sup>26</sup>

Notice that, in these senses of libel, we are not really dealing with offenses that have a whole lot to do with defaming people. Some of the prosecutions under the Sedition Act involved defamation of those in power.<sup>27</sup> But others involved general subversion of government. In *United States v. Crandell*,<sup>28</sup> an indictment was laid against Reuben Crandell for “publishing libels tending to excite sedition among the slaves.”<sup>29</sup> Often the term just goes back to the neutral meaning of the Latin *libellus*, a “little book.” For much of its history “libel” could be used to refer to any published pamphlet, without conveying any judgment about its content.<sup>30</sup>

When we do focus on defamation, what is consistently emphasized is the distinction between calumnies that are put about in *spoken* form, as speech, through gossip, rumor, or oral denunciation, and those that have the more enduring presence of something published “by writing,

<sup>23</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*59.

<sup>24</sup> See Corinna Adam, *Protecting Our Lord*, NEW STATESMAN, July 15, 1977, at 74, available at <http://www.newstatesman.com/200602130044>. *Gay News* was fined 1000 pounds and its publisher was given a nine-month suspended prison sentence. When a challenge was brought under the European Convention on Human Rights, the European Commission of Human Rights found that prohibitions on blasphemous libel could constitute a reasonable restriction on free speech. See *Gay News Ltd. v. United Kingdom*, 5 Eur. H.R. Rep. 123 (1982).

<sup>25</sup> *Commonwealth v. Kneeland*, 20 Pick. 206, 207 (Mass. 1838). The Blackstone position on blasphemous libel was also adopted explicitly by a judge in Pennsylvania in 1824: “Christianity,” he said, “general Christianity, is, and always has been, a part of the common law of *Pennsylvania*.” *Updegraph v. Commonwealth*, 11 Serg. & Rawle. 394, 400 (Pa. 1824).

<sup>26</sup> *R. v. Curl*, (1727) 93 Eng. Rep. 849 (K.B.). See also Colin Manchester, *A History of the Crime of Obscene Libel*, 12 J. LEGAL HIST. 36, 38–40 (1991).

<sup>27</sup> See *United States v. Haswell*, 26 F. Cas. 218 (C.C.D. Vt. 1800) (No. 15,324); *Lyon’s Case*, 15 F. Cas. 1183 (C.C.D. Vt. 1798) (No. 8646). I discussed these cases in Waldron, *supra* note 1.

<sup>28</sup> 25 F. Cas. 684 (C.C.D.C. 1836) (No. 14,885).

<sup>29</sup> *Id.* at 685.

<sup>30</sup> See THE COMPACT OXFORD ENGLISH DICTIONARY 880 (2d ed. 1991) (listing the first definition of “libel” as “[a] little book; a short treatise or writing”).

printing, effigy, picture, or other fixed representation to the eye.”<sup>31</sup> “What gives the sting to the writing,” said a New York court in 1931, “is its permanence of form. The spoken word dissolves, but the written one abides and ‘perpetuates the scandal.’”<sup>32</sup> I believe this distinction is helpful for our inquiry. Much of what we call hate speech regulation is not directed at the immediate flare-up of insult and offense. The concept of “group libel” addresses the possibility of racial or religious defamation becoming established as a visible feature of the environment — part of what you can see in real space (or virtual space) as you look around you.<sup>33</sup>

Until recently, many countries had laws of criminal libel touching ordinary individuals. The New Zealand Crimes Act used to specify a year’s imprisonment as the penalty for any “matter published, without lawful justification or excuse . . . designed to insult *any* person or likely to injure his reputation by exposing him to hatred, contempt, or ridicule . . . .”<sup>34</sup> Now why, you may ask, would the criminal law concern itself with defamation at all, when there was no public issue of sedition or obscenity or blasphemy? Why not leave it to private law?

One possibility is that certain forms of defamation might be seen as an attack on public order. It was a matter of keeping the peace, avoiding brawls and so on, in the context of egregious libel flowing over into fighting words. But public order is a complicated idea, and preventing fighting or violence from breaking out — that very narrow sense of *keeping the peace* — is only one of its dimensions. Public order might also comprise society’s interest in maintaining among us a proper sense of one another’s social or legal *status*. In an aristocratic society, this meant securing the dignity of great men or high officials with laws of

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<sup>31</sup> PHILIP WITTENBERG, DANGEROUS WORDS: A GUIDE TO THE LAW OF LIBEL 7 (1947) (quoting a California statute that, in its current version, defines libel as something published “by writing, printing, picture, effigy, or other fixed representation to the eye,” CAL. CIV. CODE § 45 (West 2007)). The phrase seems to come originally from *Odgers on Libel*. See *Staub v. Van Benthuysen*, 36 La. Ann. 467, 468–69 (La. 1884) (“A libel is any publication whether in writing, printing, picture, effigy, or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.”) (citing ODGERS, LIBEL AND SLANDER 7, 20 (1st ed. 1881)).

<sup>32</sup> *Ostrowe v. Lee*, 175 N.E. 505, 506 (N.Y. 1931) (quoting *Harman v. Delany*, (1729) 94 Eng. Rep. 743 (K.B.) (“Words published in writing are actionable, which would not be so from a bare speaking of the same words, because a libel disperses and perpetuates the scandal.”)).

<sup>33</sup> In the case of *R. v. Curl*, (1727) 93 Eng. Rep. 849 (K.B.), this was crucial to an understanding of why this obscenity was a matter for the temporal courts rather than for a spiritual tribunal set up by a bishop. “The Spiritual Courts punish only personal spiritual defamation by words; if it is reduced to writing, it is a temporal offence. . . . This is surely worse than *Sir Charles Sedley’s case*, who only exposed himself to the people then present, who might choose whether they would look upon him or not; whereas this book goes all over the kingdom.” *Id.* at 850–51.

<sup>34</sup> Crimes Act 1961, 1961 S.N.Z. No. 43, § 211 (N.Z.), *repealed by* Defamation Act 1992, § 56(2), 1992 S.N.Z. No. 105 (emphasis added).

*scandalum magnatum*,<sup>35</sup> to protect nobles and great men from outrageous imputations on their breeding, their status, their honor, or their office. The United States abolished titles of nobility in 1787, but it did not necessarily abolish that sort of concern for status.<sup>36</sup> A democratic republic might equally be concerned with upholding and vindicating important aspects of legal and social status — only now it would be the elementary dignity of even its non-officials as citizens — and with protecting that status (as a matter of public order) from being undermined by various forms of obloquy. And *that* is what I think is the concern of laws regarding group defamation. They are set up to vindicate public order, not just by pre-empting violence, but by upholding against attack a shared, public sense of the basic elements of each person's status, dignity, and reputation as a citizen or member of society in good standing — particularly against attacks predicated upon the characteristics of some particular social group.

*D. Can a Group Be Libeled?: Beauharnais v. Illinois*

Earlier I mentioned that the characterization of hate speech as group libel is not unknown in the United States. In 1952, what we would call a hate speech law (dating from 1917) was described and upheld by the Supreme Court as a law of criminal libel.<sup>37</sup> The petitioner was one Joseph Beauharnais, President, Founder, and Director of the White Circle League of America, who had distributed a leaflet on Chicago street corners urging people to protect the white race from being “mongrelized” and terrorized by the “rapes, robberies, knives, guns and marijuana of the negro.”<sup>38</sup> The leaflet had as its headline: “Preserve and Protect White Neighborhoods! From the Constant and Continuous Invasion, Harassment and Encroachment by the Negroes.”<sup>39</sup> It said: “WE ARE NOT AGAINST THE NEGRO! WE ARE FOR THE WHITE PEOPLE! We must awaken and protect our white families and neighborhoods before it is too late.”<sup>40</sup> But, it stated, “The white people of Chicago MUST take advantage of this opportunity to become UNITED. If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not

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<sup>35</sup> For a discussion of *scandalum magnatum*, see John C. Lassiter, *Defamation of Peers: The Rise and Decline of the Action for Scandalum Magnatum, 1497–1773*, 22 AM. J. LEGAL HIST. 216 (1978); and Edward Veitch, *Scandalum Magnatum Is Alive and Well in Canada?*, 11 NAT'L J. CONST. L. 169 (1999).

<sup>36</sup> See Jeremy Waldron, *Dignity and Rank*, 48 EUR. J. SOCIOLOGY 201 (2007); James Q. Whitman, “*Human Dignity*” in *Europe and the United States: The Social Foundations*, in EUROPEAN AND U.S. CONSTITUTIONALISM 108 (Georg Nolte ed., 2005).

<sup>37</sup> *Beauharnais v. Illinois*, 343 U.S. 250, 253–57 (1952).

<sup>38</sup> *Id.* at 252.

<sup>39</sup> *Id.* at 276 (appendix to opinion of Black, J., dissenting).

<sup>40</sup> *Id.*

unite us, then the aggressions[,] . . . rapes, robberies, knives, guns and marijuana of the negro, SURELY WILL.”<sup>41</sup> The leaflet provided a tear-off application form, which, if submitted with a dollar, would enable the sender to become a member of the White Circle League of America (provided he promised to try and secure other members as well).<sup>42</sup>

On March 6, 1950, Beauharnais was charged under an Illinois statute prohibiting the publication or exhibition of any writing or picture portraying the “depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion.”<sup>43</sup> He was convicted by a jury and fined a sum of \$200.<sup>44</sup> His conviction was upheld on appeal in Illinois and upheld too by a 5-4 majority of the U.S. Supreme Court.

Justice Frankfurter, writing for the U.S. Supreme Court, accepted the Supreme Court of Illinois’s description of the statute as “a form of criminal libel law.”<sup>45</sup> Frankfurter thought characterizing Beauharnais’s leaflet as criminal libel placed it beyond the protection of the First Amendment: “[l]ibelous utterances,” he wrote, are not “within the area of constitutionally protected speech.”<sup>46</sup> But he did not rest the decision on a purely formal characterization. He noted that, as a matter of public order, the state might have a reasonable ground for being concerned about this type of libel:

Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community.<sup>47</sup>

That put it mildly. Justice Douglas, even in dissent, noted that the Nazis were an example of “how evil a conspiracy could be which was

<sup>41</sup> *Id.*

<sup>42</sup> *See id.*

<sup>43</sup> *Id.* at 250 (majority opinion) (internal quotation mark omitted).

<sup>44</sup> *Id.* at 251.

<sup>45</sup> *Id.* at 253 (quoting *People v. Beauharnais*, 97 N.E.2d 343, 346 (Ill. 1951)) (internal quotation mark omitted).

<sup>46</sup> *Id.* at 266.

<sup>47</sup> *Id.* at 258–59 (footnote omitted). Professor Nadine Strossen cautions that before we get too enthusiastic about the ordinance upheld in *Beauharnais*, we should remember that prior to its use against this white supremacist group, it “was ‘a weapon for harassment of the Jehovah’s Witnesses,’ who were then ‘a minority . . . very much more in need of protection than most.’” Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 520 (quoting Joseph Tanenhaus, *Group Libel*, 35 CORNELL L.Q. 261, 279–80 (1950)) (alteration in original). In fact, the Jehovah’s Witnesses were prosecuted for what a federal court described as “bitter and virulent attacks upon the Roman Catholic Church” and “accusations which in substance and effect were charges of treasonable disloyalty.” *Bevins v. Prindable*, 39 F. Supp. 708, 710 (E.D. Ill. 1941).

aimed at destroying a race by exposing it to contempt, derision, and obloquy.”<sup>48</sup> Justice Douglas also wrote that he “would be willing to concede that such conduct directed at a race or group in this country could be made an indictable offense.”<sup>49</sup> Like two of the other three dissenters, he had no problem with the idea that group libel laws enacted to protect the public peace were compatible with the First Amendment.<sup>50</sup> Only Justice Black disputed Frankfurter’s premise outright, and for him the problem was the “group” aspect of group libel:

[A]s “constitutionally recognized[,]” [criminal libel] has provided for punishment of false, malicious, scurrilous charges against individuals, not against huge groups. This limited scope of the law of criminal libel is of no small importance. It has confined state punishment of speech and expression to the narrowest of areas involving nothing more than purely private feuds.<sup>51</sup>

I think this was a mistake. And I would like to consider Justice Black’s objection in detail, before addressing a different criticism that could be made after 1964 — namely, that the decision in *New York Times Co. v. Sullivan*<sup>52</sup> has removed the whole category of libel from the list of exceptions to First Amendment protection.<sup>53</sup>

In my view, Justice Black’s claim that criminal libel provides only for the “punishment of false, malicious, scurrilous charges against individuals,”<sup>54</sup> not for the punishment of similar charges against large groups, is misleading for a number of reasons. To begin with, it neglects an important difference between the concern for personalized reputation in civil cases and a broader social concern for the *fundamentals* of anyone’s reputation or civic dignity as a member of society in good standing. Unlike civil libel, criminal libel has traditionally been concerned not with the intricate detail of each person’s reputation and its movement up or down the scale of social estimation, but with its foundation. Indeed, it has sometimes been argued that the civil law of libel and the criminal law of libel work together, to cover the field as it were. In the case of a civil action for libel, there must be a defaming of a particular person, or of a group so confined that the

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<sup>48</sup> *Beauharnais*, 343 U.S. at 284 (Douglas, J., dissenting).

<sup>49</sup> *Id.*

<sup>50</sup> Justice Reed in his dissent assumed “the constitutional power of a state to pass group libel laws to protect the public peace.” *Id.* at 283 (Reed, J., dissenting). His objection was based on the vagueness of the terms of the ordinance. *Id.* Justice Jackson noted that “[m]ore than forty State Constitutions, while extending broad protections to speech and press, reserve a responsibility for their abuse and implicitly or explicitly recognize validity of criminal libel laws.” *Id.* at 292 (Jackson, J., dissenting).

<sup>51</sup> *Id.* at 271–72 (Black, J., dissenting).

<sup>52</sup> 376 U.S. 254 (1964).

<sup>53</sup> See *infra* section I.G, p. 1614–15.

<sup>54</sup> *Beauharnais*, 343 U.S. at 272 (Black, J., dissenting).

allegation descends to particulars. But — so the argument goes — this does not mean that the law is unconcerned with defamation on a broader front, only that the problem now becomes the concern of the criminal law.

Certainly that is what one would conclude from a public order perspective.<sup>55</sup> Consider the eighteenth-century English case, *R. v. Osborne*.<sup>56</sup> Osborne was charged with publishing a pamphlet entitled “A true and surprizing Relation of a Murder and Cruelty that was committed by the Jews lately arrived from *Portugal*; shewing how they burnt a Woman and a new born Infant the latter End of *February*, because the Infant was begotten by a Christian.”<sup>57</sup> There was an objection at the trial that “the Charge was so general that no particular Persons could pretend to be injured by it.”<sup>58</sup> But the court responded:

This is not by way of Information for a Libel that is the Foundation of this Complaint, but for a Breach of the Peace, in inciting a Mob to the Distruction of a whole Set of People; and tho’ it is too general to make it fall within the Description of a Libel, yet it will be pernicious to suffer such scandalous Reflections to go unpunished.<sup>59</sup>

Other reports of the same case say that it was decided as a matter of criminal libel, but agreed that the public order dimension was key to that characterization.<sup>60</sup> We find the same approach taken in an American case from 1868. *Palmer v. City of Concord*<sup>61</sup> concerned accusations of cowardice made against a company of soldiers who had been engaged in the Civil War. The Supreme Judicial Court of New Hampshire said this:

As these charges were made against a body of men, without specifying individuals, it may be that no individual soldier could have maintained a private action therefor. But the question whether the publication might not afford ground for a public prosecution is entirely different. . . . *Indictments* for libel are sustained principally because the publication of a libel tends to a breach of the peace, and thus to the disturbance of society at large. It is obvious that a libellous attack on a body of men, though no individuals be pointed out, may tend as much, or more, to create public disturbances as an attack on one individual.<sup>62</sup>

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<sup>55</sup> See Tanenhaus, *supra* note 17, at 266 (“Since criminal libel is indictable at common law because it tends so to inflame men as to result in a breach of the peace, there is no rational basis for the exclusion of group defamers from liability to prosecution in common law jurisdictions.”).

<sup>56</sup> (1732) 25 Eng. Rep. 584.

<sup>57</sup> *Id.* at 584–85.

<sup>58</sup> *Id.* at 585.

<sup>59</sup> *Id.*

<sup>60</sup> For an acceptance of this case as group libel, see *Anonymous*, (1732) 94 Eng. Rep. 406 (K.B.) and *R. v. Osborn*, (1732) 94 Eng. Rep. 425 (K.B.). For an ambiguous account of the same case, see *In re Bedford Charity*, (1819) 36 Eng. Rep. 696, 717.

<sup>61</sup> 48 N.H. 211 (1868).

<sup>62</sup> *Id.* at 215 (emphasis added).

That seems to me a viable, or at least arguable, position. But Justice Black's dissent in *Beauharnais* takes the point in exactly the wrong direction with its perverse implication that the very large *number* of people defamed in the White Circle League's leaflet meant that the leaflet could not be subject to any sort of regulation at all, because it enjoyed constitutional protection in a way that the defamation of a single person would not.

*E. Ways of Assaulting Group Reputation*

How does one libel a group? What aspects of group reputation are we trying to protect with laws against racial or religious defamation? The first thing to note is that it is not the group as such that we are ultimately concerned about — as one might be concerned about a community, a nation, or a culture (as distinct from its members). The concern in the end is individualistic. But, as I have already said, group defamation laws do not concern themselves with particularized individual reputation. They look instead to the basics of social standing and to the association that is made — in the hate speech, in the libel, in the defamatory pamphlet or poster — between the denigration of that basic standing and some characteristic associated more or less ascriptively with the group or class. I do not mean that group membership is in and of itself a liability. But group defamation sets out to *make* it a liability by denigrating group-defining characteristics or associating them with bigoted factual claims that are fundamentally defamatory. A prohibition on group defamation, then, is a way of blocking that enterprise.

So, let me count the ways in which a group might be libeled. In the first instance, the association of defamation with an ascriptive group characteristic might take the form of a factual claim. That was important in the *Beauharnais* pamphlet, with its imputation that “rapes, robberies, knives, guns and marijuana” were somehow typical of “the negro.”<sup>63</sup> And it is likely to be important, too, in broad-brush descriptions of Arab-Americans and Muslims as supporters of terrorism.

Secondly, group libel often involves characterizations that deliberately set out to denigrate people — characterizations that probably fall on the *opinion* rather than *fact* side of the distinction sometimes made in American defamation law. A common example in racist speech is the characterization of minority members as animals. I remember seeing a racist agitator sentenced to a short prison term in England in the late 1970s for festooning the streets of Leamington Spa

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<sup>63</sup> *Beauharnais v. Illinois*, 343 U.S. 250, 276 (1952) (appendix to opinion of Black, J., dissenting); see *supra* pp. 1605–06.

with posters depicting Britons of African ancestry as apes.<sup>64</sup> After his conviction by the jury, he was sentenced by a crusty old English judge, who (one might have imagined) would have little sympathy for this newfangled hate speech legislation. But the judge gave the defendant a stern lecture to the effect that we cannot run a multiracial society under modern conditions if people are free to denigrate their fellow citizens in bestial terms. There was some shouting from the gallery as the defendant was taken away. The case made a deep impression on me.

Thirdly, there are libels that go even beyond opinion but which denigrate by embodying notices or instructions which can only be understood as degrading those to whom they are addressed. Thus, for example, a group and its members can be libeled by signage associating group membership with prohibition or exclusion: “No blacks allowed.” In 1944, Ontario’s Racial Discrimination Act<sup>65</sup> prohibited the publication or display of “any notice, sign . . . or other representation indicating . . . an intention to discriminate against any . . . class of persons . . . because of the race or creed of such . . . class of persons.”<sup>66</sup> That was quite apart from the prohibition on discrimination itself. I was interested to learn that in the early days of the Jewish Anti-Defamation League in the United States, one of the League’s aims was to put a stop to the poisoning of the social environment by published declarations of racial and religious exclusion. When the ADL campaigned for legislation preventing stores and hotels from refusing to do business with Jews, it was not just the discrimination they wanted to counter, it was the *signage*: “Christians only.” What concerned the ADL was the danger that anti-Semitic signage would become an established feature of the landscape and that Jews would have to lead their lives in a community whose public aspect was permanently disfigured in this way.<sup>67</sup>

Singly or together, these reputational attacks amount to assaults upon the *dignity* of the persons affected — *dignity*, in the sense of these persons’ basic social standing, of the basis of their recognition as social equals, and of their status as bearers of human rights and constitutional entitlements. The moral imperative of respect for human dignity is increasingly understood as a crucial foundation of basic rights

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<sup>64</sup> I discussed this incident at the beginning of Jeremy Waldron, *Boutique Faith*, LONDON REV. BOOKS, July 20, 2006, at 22, 22 (reviewing JOHN DURHAM PETERS, *COURTING THE ABYSS: FREE SPEECH AND THE LIBERAL TRADITION* (2005)).

<sup>65</sup> 1944 S.O., ch. 51-1 (Ont.).

<sup>66</sup> *Id.*

<sup>67</sup> See Evan P. Schultz, *Group Rights, American Jews, and the Failure of Group Libel Laws, 1913–1952*, 66 BROOK. L. REV. 71, 95–96 (2000).

and equality.<sup>68</sup> The Universal Declaration of Human Rights begins its preamble with the strong assertion that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,”<sup>69</sup> and the International Covenant on Civil and Political Rights follows up on that by stating that the rights it protects “derive from the inherent dignity of the human person.”<sup>70</sup> Legal and political theorists are finding that *dignity* provides a useful and compelling perspective on the foundations of constitutional rights,<sup>71</sup> and also on the foundations of ideals such as democracy and the rule of law.<sup>72</sup> As well as these broad ideals, dignity is also increasingly appealed to on particular issues in legal controversy — on the death penalty (where its use is well known),<sup>73</sup> on antidiscrimination law,<sup>74</sup> on issues relating to abortion,<sup>75</sup> and — as we shall see — in scholarly controversies on this matter of hate speech.<sup>76</sup>

Dignity is a complex idea, with philosophical as well as political and legal resonances. In the sense I am using the term, *dignity* is not just a Kantian philosophical conception of the immeasurable worth of humans considered as moral agents.<sup>77</sup> It is a matter of status — one’s

<sup>68</sup> There is an excellent discussion and critique of the legal concept of human dignity in Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655 (2008).

<sup>69</sup> Universal Declaration of Human Rights, Preamble, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

<sup>70</sup> International Covenant on Civil and Political Rights, Preamble, adopted Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>71</sup> See, for example, the fine discussion in Gerald L. Neuman, *Human Dignity in United States Constitutional Law*, in ZUR AUTONOMIE DES INDIVIDUUMS: LIBER AMICORUM SPIROS SIMITIS 249 (Dieter Simon & Manfred Weiss eds., 2000).

<sup>72</sup> I pursued the theme of the relation between dignity and the rule of law in my 2009 Tanner Lectures at Berkeley. See Jeremy Waldron, *Dignity, Rank, and Rights*, in 29 THE TANNER LECTURES ON HUMAN VALUES (Suzan Young ed., forthcoming 2010), available at <http://ssrn.com/abstract=1461220>; see also Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 28, 36 (2008).

<sup>73</sup> See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972); see also HUGO ADAM BEDAU, *KILLING AS PUNISHMENT: REFLECTIONS ON THE DEATH PENALTY IN AMERICA* 110–41 (2004) (arguing for a dignitarian interpretation of the Eighth Amendment).

<sup>74</sup> See, e.g., Denise G. Réaume, *Discrimination and Dignity*, 63 LA. L. REV. 645 (2003).

<sup>75</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846–53 (1992) (plurality opinion); see also Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409 (2009); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694 (2008).

<sup>76</sup> See generally, e.g., STEVEN J. HEYMAN, *FREE SPEECH AND HUMAN DIGNITY* (2008); Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497 (2009). For an expression of concern about the use of “dignity” in this connection, see Guy E. Carmi, *Dignity — The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, 9 U. PA. J. CONST. L. 957 (2007).

<sup>77</sup> See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 42–43 (Mary Gregor trans. & ed., Cambridge Univ. Press 1998) (1785).

status as a member of society in good standing. It validates the legal position of the ordinary individual both as an equal and (paradoxically) as the possessor of a very high-ranking status.<sup>78</sup> And it generates demands for recognition and treatment that accord with that status. Philosophically we may say that dignity is inherent in the human person — and so it is. No law or social practice can take it away. But as a social and legal status, dignity has to be nourished and maintained by society and the law, and this — as I argue in Part II — is a costly and difficult business and something in which we are all required to play a part. At the very least, we are required in our public dealings not to act in a way that undermines one another's dignity in this socio-legal sense — and that is the obligation that is being enforced when we enact and administer laws against group libel.

*F. The Emphasis on Dignity Rather than Offense*

This brings me to an important distinction. There is a big difference between protecting individual dignity from *defamation* (based on some denigration of group characteristics) and protecting people from *offense*, even when the offense goes to the heart of what they regard as the identity of their group. The argument I want to make is not concerned with offense. It is concerned with what happens to the standing of persons and groups in society, not with any element of their distress unconnected with that.

This distinction is particularly important for understanding laws prohibiting hate speech against religious minorities.<sup>79</sup> Consider, for example, worries about expressions of Islamophobia. The group of all Muslims in society, the group of all followers of Islam, is a group of people committed to the one God, to his Prophet, Mohammed, and to the holy writings of the Koran. On the account that I am developing, individual Muslims are entitled to protection against defamation, including group defamation *as Muslims*. A published allegation, for example, that all Muslims are terrorists or are properly suspected of involvement with terrorism would rightly fall foul of well-drafted hate speech legislation. But that does not mean that the law should aim to protect the founders of the religion, or the reputation of God as Muslims understand Him, or the creedal beliefs of the group.<sup>80</sup> The civic

<sup>78</sup> See Waldron, *supra* note 36, at 215–19.

<sup>79</sup> See, for example, Public Order Act, 1986, c. 64, Part 3A (Eng.), *amended by* Racial and Religious Hatred Act, 2006, c. 1 (Eng.), which prohibits the publication of threatening material intended to stir up religious hatred. I discuss this provision further in Part III.

<sup>80</sup> Earlier I mentioned the 1977 prosecution in England of *Gay News* for blasphemous libel against Jesus. See *supra* note 24 and accompanying text. It is no part of my argument that hate speech law should support this sort of prosecution. That example was offered simply to illustrate the diversity of historic uses of “libel” in the law.

dignity of the members of a group stands separately from the status of their beliefs, however offensive an attack upon the Prophet or even upon the Koran may seem.<sup>81</sup> The specific concern about group libel does not encompass these things.

In general, a dignitarian rationale for laws against group defamation differs from an approach based on the *offense* that may be taken by the members of a group against some criticism or attack. If space permitted, I would want to rehearse arguments I made a long time ago, in relation to the work of John Stuart Mill and in relation to the Salman Rushdie affair (*The Satanic Verses*) that being disturbed by a shocking attack on one's views, even one's deepest and most cherished religious convictions, is not something people have an interest in being protected against.<sup>82</sup> For the purposes of the present Article, let me just say this: it is an advantage of the "group libel" formulation that it conveys this distinction. Libel and defamation generally are never organized to protect people from being offended: they are organized to protect the dignity and reputation of the persons themselves, not to impose an aura of untouchability around their convictions.

I do not deny that the distinction is a delicate one. And I do not mean to convey indifference to the subjective or felt aspect of assaults on dignity. Civic dignity is not just decoration; it is sustained and upheld for a purpose. It is an important part of my argument in Part II that the social upholding of individual dignity furnishes the basis of a general assurance of decent treatment and respect as people live their lives and go about their business in public. And an assault on individual dignity is bound to be experienced as wounding and distressing; unless we understand that distress we do not understand what is wrong with group defamation and why it is appropriate to prohibit it by law.

Not only that, but in anyone's reaction to any particular incident of hate speech, there are going to be a whole lot of factors all mixed up. The phenomenology of this sort of assault is complex and tangled.<sup>83</sup> It is not easy to differentiate the offense from the insult, or the immediate wounding of an epithet from the perception of a threat, or the outrage from the humiliation, or the anger from the shame of having to explain

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<sup>81</sup> I do not mean to deny how distressing an attack on (say) the Koran might be. The deliberate infliction of that distress might be wrong and unlawful in other contexts, for example as a way of abusing detainees in the war against terrorism. See Jeremy Waldron, *What Can Christian Teaching Add to the Debate About Torture?*, 63 THEOLOGY TODAY 330, 341 (2006).

<sup>82</sup> See Jeremy Waldron, *Mill and the Value of Moral Distress*, 35 POL. STUD. 410 (1987), reprinted in JEREMY WALDRON, LIBERAL RIGHTS 115 (2003); Jeremy Waldron, *Too Important for Tact*, TIMES LITERARY SUPPLEMENT, Mar. 10–16, 1989, at 248, 260, reprinted in WALDRON, LIBERAL RIGHTS, *supra*, at 134 (discussing the Salman Rushdie *The Satanic Verses* affair in a chapter entitled *Rushdie and Religion*).

<sup>83</sup> See WALDRON, LIBERAL RIGHTS, *supra* note 82, at 115–16.

to one's children what is going on. The reactions are all mixed up, and it will often seem that the law, in responding to one set of phenomena, is also responding to others. I think this is likely to be true of hate speech also. When a racial group is hatefully denigrated, there will be fear, hurt, vehement disapproval to the point of outrage, humiliation, shame, anger, offense, and so on. And it will be hard to disentangle; often there will be no point in doing so.

But it is important in this context to try. In American discussions of hate speech, it is often assumed that hate speech laws are an attempt to protect people from the immediate wounding effect of vicious slurs and epithets. I have no doubt that the wounding effect of slurs and epithets is considerable. Professor Charles Lawrence has done a tremendous amount to convey the trauma that such wounding words — assaultive hate speech — might cause,<sup>84</sup> and I can imagine an honorable legislative attempt to protect people from this and to prohibit the infliction of this harm. But that project is different from the dignity and reputation rationale that I am considering here.

G. *Beauharnais and Libel in Light of*  
New York Times Co. v. Sullivan

I want to return now to *Beauharnais v. Illinois*, where we left it in section I.D. It is remarkable that in the half century since it was decided, *Beauharnais* has never explicitly been overturned by the Supreme Court. In a few cases, lower courts have expressed doubts about the precedent,<sup>85</sup> and among First Amendment scholars there is considerable doubt whether the Supreme Court would nowadays accept the idea of group libel as an exception to First Amendment protection. Many jurists — better informed than I am in the ways of the Justices — say they probably would not.<sup>86</sup>

Some attribute faulty reasoning to the Justices in making this prediction. (That of course does not mean the prediction is false as a prediction.) Anthony Lewis says that the basis of *Beauharnais* was undermined by the 1964 Supreme Court decision in *New York Times Co. v. Sullivan*,<sup>87</sup> where the Court held that public figures cannot recover

<sup>84</sup> See Lawrence, *supra* note 12, at 452–56.

<sup>85</sup> See, e.g., *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1200 (9th Cir. 1989); *Collin v. Smith*, 578 F.2d 1197, 1205 (7th Cir. 1978); *United States v. Handler*, 383 F. Supp. 1267, 1277–78 (D. Md. 1974); see also *Garrison v. Louisiana*, 379 U.S. 64, 82 (1964) (Douglas, J., concurring); MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT* 83–86 (1996). But see *Smith v. Collin*, 439 U.S. 916, 919 (1978) (Blackmun, J., dissenting from denial of certiorari) (providing interesting and not unfavorable comments about the *Beauharnais* precedent).

<sup>86</sup> Professor Laurence Tribe, for example, has observed that “subsequent cases seem to have sapped *Beauharnais* of much of its force.” LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 926 (2d ed. 1988).

<sup>87</sup> 376 U.S. 254 (1964).

damages for libel unless they can prove that a false statement of fact was made maliciously or recklessly.<sup>88</sup> The Court argued that robust discussion of public issues, to which the United States has “a profound national commitment,” is bound to include “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>89</sup> The idea was that when they take on public responsibilities, state and federal officials have a duty to develop a thick skin and sufficient fortitude to shrug off public attacks. Lewis is right that the Court no longer regards libel per se as an exception to the First Amendment. But it is not at all clear why the reasoning in *New York Times Co.* should protect the defendant in the *Beauharnais* case. The African Americans libeled collectively in *Beauharnais*’s “obnoxious leaflet”<sup>90</sup> were not public officials who had taken on the burden of office. They were ordinary citizens who may have thought that they had a right to be protected from scattershot allegations of the most severe criminal misconduct — the “rapes, robberies, knives, guns and marijuana of the negro.”<sup>91</sup>

Still, as an empirical matter, the naysayers are probably right: Joseph *Beauharnais*’s conviction would not be upheld today.<sup>92</sup> Lewis’s fallacious reasoning is common, and if constitutional scholars are taken in by it, there is no reason to suppose the present Justices are immune. But my argument in this Article is not about the desirability of using the group libel idea as a constitutional strategy in the United States, but about what might be involved as a matter of principle in thinking that group defamation is a problem, and what insight may be available from this characterization for those willing to take the risk of appearing thoughtful in these matters.

#### H. Who Needs Protection Against Libel?

In the *New York Review of Books* piece that I mentioned at the outset, I asked: What is it that we believe now that we did not believe in the days when we had laws against blasphemous libel and seditious libel? And how much (*if any*) of that change of belief on that topic in fact carries through to also disqualify laws protecting the reputation of groups, laws of the kind I have been discussing in this Article?<sup>93</sup>

We know that prosecutions for attacks on Christianity faded away much more quickly than prosecutions for political speech. The logic of

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<sup>88</sup> See *id.* at 279–80; see also LEWIS, *supra* note 1, at 159.

<sup>89</sup> *New York Times Co.*, 376 U.S. at 270.

<sup>90</sup> *Beauharnais v. Illinois*, 343 U.S. 250, 287 (1952) (Jackson, J., dissenting).

<sup>91</sup> *Id.* at 252 (majority opinion).

<sup>92</sup> See, e.g., SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 77–100 (1994).

<sup>93</sup> See *supra* note 1 and accompanying text.

prosecuting atheists always sat uncomfortably with the American position on religion. Christian belief might appear vulnerable to public denunciations; it might seem in need of the law's support; but it was not clear that this was support that the law was constitutionally entitled to give. Often the concerns were not so much free speech as anti-establishment considerations.<sup>94</sup> Since Christianity could no longer be seen as part of the organized apparatus of social control, then, vulnerable or not, it would just have to fend for itself in the unruly marketplace of sacred and profane ideas.

So far as political speech is concerned, there is a different story to be told.<sup>95</sup> In 1798, federal authority looked precarious; it was at the mercy of public opinion and public opinion was looking well-nigh ungovernable. Public agitation led to political violence and brief uprisings in some of the states. George Washington was denounced as a thief and a traitor;<sup>96</sup> John Jay was burned in effigy;<sup>97</sup> Alexander Hamilton was stoned in the streets of New York;<sup>98</sup> a Connecticut Federalist was attacked with fire tongs in the House of Representatives;<sup>99</sup> and Republican militias armed and drilled openly, ready to stand against Federalist armies.<sup>100</sup> Over everything, like a specter, hung fears of the Jacobin terror in France.<sup>101</sup> It was by no means obvious in those years — though it seems obvious to us — that the authorities could afford to ignore venomous attacks on the structures and officers of government, or leave these critics' publications unmolested in the hope that they would be adequately answered in due course in the free marketplace of ideas. That government could survive the published vituperations of the governed seemed more like a reckless act of faith than basic common sense.

However, in the two centuries since then we have learned that the state does not need legal protection against criticism. It is strong enough to shrug off our attacks, strong enough to dismiss our denun-

<sup>94</sup> See, e.g., *State v. West*, 263 A.2d 602 (Md. Ct. Spec. App. 1970).

<sup>95</sup> See generally John R. Howe, Jr., *Republican Thought and the Political Violence of the 1790s*, 19 AM. Q. 147 (1967).

<sup>96</sup> See GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC*, 1789–1815, at 198 (2009); cf. James D. Tagg, *Benjamin Franklin Bache's Attack on George Washington*, 100 PA. MAG. HIST. & BIOGRAPHY 191 (1976) (noting that an effigy of Jay was guillotined, filled with gunpowder, and exploded).

<sup>97</sup> See WOOD, *supra* note 96, at 198; Matthew Schoenbachler, *Republicanism in the Age of Democratic Revolution: The Democratic-Republican Societies of the 1790s*, 18 J. EARLY REPUBLIC 237, 254 n.25 (1998).

<sup>98</sup> See WOOD, *supra* note 96, at 198; Monroe Johnson, *Washington Period Politics*, 12 WM. & MARY C. Q. HIST. MAG. 159, 162 (1932).

<sup>99</sup> See WOOD, *supra* note 96, at 229; Eric M. Uslaner, *Comity in Context: Confrontation in Historical Perspective*, 21 BRIT. J. POL. SCI. 45, 66 (1991).

<sup>100</sup> See Howe, *supra* note 95, at 147.

<sup>101</sup> See generally WOOD, *supra* note 96, at 239–75.

ciations as not worth the effort of suppression (though strong enough to make the effort if it wants). In 1919, the jurist for whom the lectures on which this Article is based are named began supporting free speech ideas. In his seminal dissent in *Abrams v. United States*,<sup>102</sup> Justice Holmes predicated his position on the derisory impotence of what he called the defendants' "pronunciamentos"<sup>103</sup> and on a greater confidence in the state's ability to resist their destructive effect. "[N]obody," he said, "can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms . . . ."<sup>104</sup>

So what about group defamation? Prosecutions for seditious libel began to seem inappropriate when we realized that the government had become so powerful that it did not need the support of the law against the puny denunciations of the citizenry. Does that apply to vulnerable minorities? Is their status as equal citizens in the society now so well assured that they have no need of the law's protection against the vicious slurs of racist denunciation? Prosecutions for blasphemous libel began to seem inappropriate when religion came to be regarded as a private matter. Is that true of the status of embattled minorities? Is their position in society — the respect they receive from fellow citizens — a matter of purely private belief, with which the law should have no concern? The state and its officials may be strong enough, thick-skinned enough, well enough armed, or sufficiently insinuated already into every aspect of public life to be able to shrug off public denunciations. But the position of minority groups as equal members of a multiracial, multiethnic, or religiously pluralistic society is not something that anyone can take for granted. It is a recent and fragile achievement in the United States and the idea that law can be indifferent to published assaults upon this principle seems to me a quite unwarranted extrapolation from what we have found ourselves able to tolerate in the way of political and religious dissent.

## II. WHAT DOES A WELL-ORDERED SOCIETY LOOK LIKE?

I chose as the title of the second of my Holmes Lectures a rather technical philosophical question: what does a well-ordered society look like? The idea of a well-ordered society is "a highly idealized" abstraction from the philosophy of John Rawls.<sup>105</sup> Rawls wants to consider the possibility of a society whose basic structure is regulated (and

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<sup>102</sup> 250 U.S. 616 (1919).

<sup>103</sup> *Id.* at 626 (Holmes, J., dissenting).

<sup>104</sup> *Id.* at 628.

<sup>105</sup> JOHN RAWLS, POLITICAL LIBERALISM 35 (1996); *see also id.* at 46.

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known to be regulated) by principles of justice and inhabited by people with an effective sense of justice; he wants to posit this conception for the purpose of asking certain questions about such an imagined possibility — for example, whether it could exist stably under conditions of religious and philosophical diversity where there is no body of deep foundational ideas affirmed by all of its citizens.<sup>106</sup>

I am not going to go into any of the technical detail of Rawls's theory. Instead I want to use one central element of his conception of a well-ordered society — an element that I shall call *assurance* — to cast some light on our problem of what to do about hate speech, particularly when it takes the form of group defamation.

#### A. *The Look of Hate*

A society which permits such publications may *look* quite different from a society that does not. Its hoardings and its lamp-posts may be plastered with depictions of members of racial minorities, characterizing them as bestial or subhuman. There may be posters proclaiming that members of these minorities are criminals, perverts, or terrorists, or leaflets saying that members of a certain race or followers of a certain religion are threats to decent people and that they should be deported or made to disappear. There may be swastikas celebrating the genocidal campaigns of the past. There may be signs indicating that the members of some minority are not welcome in certain neighborhoods or in polite society generally, or flaming symbols intended to intimidate them if they remain. That is what a society may look like when group defamation is permitted. And my question is: is that what a *well-ordered* society looks like?

I ask because it is assumed by many liberal constitutionalists, particularly in the United States, that a free society with a constitution will not permit laws prohibiting speech like this, on the ground that any such prohibition is precluded by our commitment to the First Amendment principle of free speech. They may acknowledge that the social environment that results from their toleration of hate speech is likely to *look* unpleasant; they may say that they do not like the look of these billboards, placards, or flaming crosses any more than we do. But, they say, the society that permits them may still be well ordered, even though it presents this ugly appearance, precisely because the society is one in which racists are allowed to speak their minds like everyone else.<sup>107</sup> Some go further and are inclined to celebrate the diversity and unruliness of the various messages and speeches milling

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<sup>106</sup> See *id.* at 35–40.

<sup>107</sup> See, e.g., Dworkin, *supra* note 10, at vi–vii. I discuss Dworkin's argument at great length in sections III.C–III.E.

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around in the marketplace of ideas. They love this richness and untidiness: let a thousand flowers bloom, they say, even the poisonous ones. For of course some of the ideas are foul and distasteful. But if you blur your eyes a bit, you can abstract away from the distasteful content, and what you see is a glorious splash of moving, variegated color — ideas interacting openly and unpredictably with one another. And that, they say, is surely a feature of a well-ordered society (even if the men, women, and children who are the targets of the foul and distasteful messages have difficulty maintaining this lofty perspective).

Of course, if the racist appearances correspond to a racist reality, everything is different. If the signs saying “Christians only” are accompanied by discriminatory practice against Jews, if Muslims are beaten up in the street, if minority members are not protected against the discrimination advocated in racist posters, or if those in power treat people in the unequal and degrading ways that the racist leaflets call for — then there *is* something to worry about. And that would show that the society is not well ordered. But if it is just signage, they say, there is no cause for concern.

That is the position I want to test, by focusing on this issue of appearances. My question — what does a well-ordered society look like? — is not a coy way of asking what makes a society well ordered or what a well-ordered society is *like*. I am interested in how things literally look, the visible environment. How important is the look of things? Is it unimportant compared to how things actually are? Or is it an important *part* of how things actually are? And if it is an important part of how things are, what in particular should we be looking for? The colorful, unruly diversity of a free market in ideas? Or the absence of visible features that are at odds with the fundamental commitment to justice with which a well-ordered society is supposed to be imbued?

If it is the latter, then can we use this as a way of understanding restrictions on hate speech and group defamation? In our interpretive characterization of these laws where they exist, can we say that they are among the ways in which real-world societies, in Europe for example, try to make themselves more well ordered (better ordered) than they would otherwise be?

My question is not about Rawls the man.<sup>108</sup> I want to make use of a Rawlsian idea, but run with it in a direction that may be quite dif-

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<sup>108</sup> I am not asking this Rawlsian question in order to get at John Rawls’s own views in the free speech-hate speech debate. What Rawls says about free speech, set out mainly in a lecture entitled *The Basic Liberties and Their Priority*, RAWLS, *supra* note 105, at 289–371, is not particularly interesting for our purposes. It does not address the specific issue of hate speech or group libel at all. And it does not follow up on the implications of Rawls’s own characterization of public knowledge and assurance in a well-ordered society in the way that I want to. Also, it is a bit

ferent from the direction in which Rawls would have run. Nor am I asking whether those who enact hate speech legislation are appealing to Rawlsian ideas. I am asking whether hate speech regulation amounts *in effect* to an embrace of one element of Rawls's conception of a well-ordered society — an element on which I am going to focus continually in this Part. That element is the idea of *assurance* — the assurance of support and dignitarian vindication that a well-ordered society offers to all of its members, especially the most vulnerable.

One of the most important things that Rawls says about a well-ordered society is that “everyone accepts, and knows that everyone else accepts, the very same principles of justice.”<sup>109</sup> “[T]his knowledge,” as he puts it, “is publicly recognized.”<sup>110</sup> That is what I want to concentrate on: the assurance of a generalized commitment to the fundamental elements of justice and dignity that a well-ordered society is supposed to furnish to its citizens as part of “the public culture of a

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confusing because unlike almost everything else in *Political Liberalism*, the chapter on “The Basic Liberties and Their Priority” is focused on real-world constitutions, with all their flaws and messiness, rather than on the more utopian abstraction of a well-ordered society. Rawls says that one possible method for developing a list of basic liberties is to “survey the constitutions of democratic states and put together a list of liberties normally protected, and . . . examine the role of these liberties in those constitutions which have worked well.” *Id.* at 292–93. In the context of free speech, then, his analysis is grounded in the actual role of this concept in constitutional doctrine. *See id.* at 340–63. Rawls draws mainly upon the American experience, though he has acknowledged elsewhere that, as things stand, the United States certainly cannot be regarded as a well-ordered society. *See* JOHN RAWLS, *Kantian Constructivism in Moral Theory*, in COLLECTED PAPERS 303, 355 (Samuel Freeman ed., 1999).

There is some speculation in Rawlsian literature on what Rawls's view on hate speech *might* have been, or what the implications are for this issue or other more abstract views that he did hold. *See* Richard Delgado & Jean Stefancic, *Four Observations About Hate Speech*, 44 WAKE FOREST L. REV. 353, 368 (2009); Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 351–52 (1993); T.M. Scanlon, *Adjusting Rights and Balancing Values*, 72 FORDHAM L. REV. 1477, 1484–86 (2004); R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527, 553–54 (2006). But that discussion is mostly inconclusive.

The closest Rawls gets to the issue of hate speech is in a discussion of seditious libel, where he insists — in line with American free speech orthodoxy — that a well-ordered society will be one in which anything and everything may be published, even things which tend to question the basic principles of a given society. Subversive advocacy, he says, must be permitted. But I am not sure whether he thinks this should extend even to advocacy against the fundamentals of justice — for example, to public advocacy for the exclusion or subordination of a given group, or their disenfranchisement, segregation, enslavement, concentration, or deportation. Rawls does not consider the status of speech that in its content and tone runs counter to the assurances that citizens are supposed to have of one another's commitment to equality. I suspect he would not have dissented from First Amendment orthodoxy in this regard; certainly that is what his expressed admiration of the work of Harry Kalven, *see* RAWLS, *supra* note 105, at 342–44, intimates (though it has to be said that Kalven's own discussion of group libel in KALVEN, *supra* note 18, at 7–64, is nuanced, thoughtful, and complicated).

<sup>109</sup> RAWLS, *supra* note 105, at 35.

<sup>110</sup> *Id.* at 66 (“[C]itizens accept and know that others likewise accept those principles, and this knowledge in turn is publicly recognized.”).

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democratic society.”<sup>111</sup> I want to take the measure of this assurance and, to the extent that it is important, consider how comfortable we should be with public and semi-permanent manifestations of racial and ethnic hatred as visible aspects of the civic environment.

*B. Hatred and Law in a Well-Ordered Society*

Will hate speech be tolerated by law in a well-ordered society? We have already considered one response: yes, it will be tolerated as part of the energizing diversity of a free market in ideas. Another response might go as follows: a society cannot *be* well ordered if people are advocating racial and religious hatred. The idea of a well-ordered society is the idea of a society fully and effectively governed by a conception of justice. In technical terms, it is strict compliance theory rather than partial compliance theory.<sup>112</sup> On this account, a society with sufficient rancor and division to generate hate speech cannot be a well-ordered society.

Compare what Rawls says about illiberal religions. Intolerant religions, Rawls says, “will cease to exist in the well-ordered society of political liberalism.”<sup>113</sup> A society cannot be well ordered unless religions that demand the suppression of other religions, religions that insist on establishment, or religions that demand the adoption of comprehensive conceptions of the good by the whole society have, so to speak, died out. So the question of what to do about such religions in a well-ordered society will not arise. And similarly, a society cannot have become well-ordered unless bigots and racists have given up their mission and accepted the basic principles of justice and equal respect. Thus, the question of what to do about hate speech and group defamation in a well-ordered society does not arise. A well-ordered society will definitely not look racist; it will not present or exhibit the offensive manifestations that I spoke about earlier. But this will not be on account of prohibitory laws. It will be because citizens have no wish to express themselves in these terms.

Taking this response one step further, our well-ordered respondent may say: so, even if it is true that Rawls’s ideal society would not be festooned with racial signage, Islamophobic leaflets, and ethnically prejudiced billboards, nothing of interest follows for the debate we are conducting. A well-ordered society would not need such laws. Maybe the lesson for us, in our much-*less*-than-well-ordered society, is that we must hope that hate speech just withers away, not because of coercive

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<sup>111</sup> RAWLS, *Kantian Constructivism in Moral Theory*, *supra* note 108, at 355.

<sup>112</sup> For these terms, see JOHN RAWLS, *A THEORY OF JUSTICE* 8 (rev. ed. 1999). For the idea of well-ordered society as part of strict compliance theory, see RAWLS, *Kantian Constructivism in Moral Theory*, *supra* note 108, at 355.

<sup>113</sup> RAWLS, *supra* note 105, at 197.

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laws limiting freedom of speech, but because of changes of attitude and changes of heart, including — not least — changes brought about by effective answers to hate speech in the free marketplace of ideas.

I think that this response — I am not blaming it on anyone in particular — is misconceived at a number of levels. Consider again the case of intolerant religions. They do not feature in a well-ordered society. Why? Presumably because they have died out. But Rawls says a little more than that; he says that the basic institutions of a just society “inevitably encourage some ways of life and discourage others, or even exclude them altogether.”<sup>114</sup> That is an ambiguous formulation: what does “discourage” mean here, in terms of the operation of institutional arrangements? And what does it mean to exclude certain ways of life altogether?

One thing is for sure. We should not think of a well-ordered society as a utopian fantasy, in which laws are unnecessary because everyone’s attitudes are now utterly just. No one supposes that law can be eliminated from a well-ordered society or that we can drop the laws about murder or burglary because, by definition, no one in such a society would ever be motivated to engage in those crimes. Rawls’s society is not utopian in that fantasy sense; it is steadfastly located in the circumstances of justice, which include among other things the subjective circumstances of anxiety and limited strength of will among its citizens.<sup>115</sup> Rawls himself gives a fine account in *A Theory of Justice* of the role of law in a well-ordered society:

[E]ven in a well-ordered society the coercive powers of government are to some degree necessary for the stability of social cooperation. For although men know that they share a common sense of justice and that each wants to adhere to the existing arrangements, they may nevertheless lack full confidence in one another. . . . [T]he existence of effective penal machinery serves as men’s security to one another.<sup>116</sup>

Maybe in a well-ordered society “sanctions . . . never need to be imposed.”<sup>117</sup> But that does not mean that their existence or the laws providing for them are unnecessary or redundant. Apart from anything else, laws have an important *expressive* as well as coercive function; and one would expect that expressive function to be at the fore in a well-ordered society, particularly in connection with the public and

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<sup>114</sup> *Id.* at 195.

<sup>115</sup> For a discussion of the circumstances of justice, see RAWLS, A THEORY OF JUSTICE, *supra* note 112, at 109–112.

<sup>116</sup> *Id.* at 211.

<sup>117</sup> *Id.*

visible assurance of just treatment that a society is supposed to provide to all of its members.<sup>118</sup>

In any case, even if a well-ordered society could dispense with laws prohibiting group defamation, it would be spectacularly dumb to infer from this that the societies we know must be prepared to dispense with those laws as a necessary way of *becoming* well-ordered. Societies do not become well ordered by magic. The expressive and disciplinary work of law may be a necessary ingredient for the change of heart on the part of its racist citizens that a well-ordered society presupposes. And anyway, as with all issues of justice, the necessity of such laws is a matter of the goods to be secured and the likelihood that they can be secured in the absence of legal intervention. If, as I am going to argue, the good to be secured is a *public* good, a general and diffuse assurance to all the inhabitants of a society concerning the most basic elements of justice, then it is natural to think that law would be involved — both in its ability to underpin the provision of public goods and in its Durkheimian ability to express and communicate common commitments. This is particularly likely to be true in the case of societies, like European societies (and I think also the United States), which have not yet entirely shaken off histories of murderous racist oppression.

### C. *Political Aesthetics*

What should a well-ordered society look like? I suppose we could ask, with equal sense: what should a well-ordered society *sound* like? We might have our positive impression: say, the flat steady drone of an interminable but well-ordered exercise of what Rawls calls public reason — respectful and mutually comprehensible speech in matters of common concern, with every third word being “autonomy,” “equality,” or “liberty.” And we might contrast that impression with darker sounds: the tread of marching feet and ominous chants, or perhaps the genocidal radio broadcasts of *Radio Télévision Libre des Mille Collines* (RTLM) in Rwanda that my NYU colleague, Professor Ted Meron, American representative on the International Criminal Tribunal for Rwanda, sought to privilege as free speech in his dissenting opinion in the *Nahimana* case.<sup>119</sup>

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<sup>118</sup> See ROGER COTTERRELL, *ÉMILE DURKHEIM: LAW IN A MORAL DOMAIN* 152 (1999). For an application of Durkheim’s conception in relation to hate speech, see THOMAS DAVID JONES, *HUMAN RIGHTS: GROUP DEFAMATION, FREEDOM OF EXPRESSION AND THE LAW OF NATIONS* 88–89 (1998).

<sup>119</sup> See *Nahimana v. Prosecutor*, Case No. ICTR-99-52-A, Partly Dissenting Opinion of Judge Meron ¶¶ 4–5, 9–21 (Int’l Crim. Trib. for Rwanda Trial Chamber I Nov. 28, 2007). *But cf.* Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INT’L L. 485 (2008) (articulating a more complex view).

I said in Part I that an emphasis on speech is an emphasis on the ephemeral. There I had in mind the occasional angry and politically incorrect use of one or another racial epithet, and I contrasted that — using the figure of slander versus libel — with the relatively enduring expression of public signage or the published word. But it is true, on the other hand, that the accepted vocabulary of a culture can become part of its established environment. And certainly the broadcast word can be as much a matter of enduring concern as the printed word, especially when it insistently and repeatedly demonizes a minority as cockroaches and vermin.

So there is the visible and the audible. We might round out the picture with the emphasis by Professors Richard Delgado and Jean Stefancic on tangible aspects of a society's self-presentation. Their book *Understanding Words that Wound* has a chapter entitled "When Hate Goes Tangible: Logos, Mascots, Confederate Flags, and Monuments." And the authors say this:

[S]tatues, monuments, and the like . . . perhaps because they are intended to be seen by a large audience, . . . contribute to a climate of opinion that is injurious to members of the group singled out. . . . [T]angible symbols have a quality that words — at least of the spoken variety — do not: They are enduring. Words disappear as soon as they are spoken. They may resonate in the mind of the victim, causing him or her to recall them over and over again. But a flag [or a] monument . . . is always there to remind members of the group it spotlights of its unsolicited message.<sup>120</sup>

Delgado and Stefancic do not advance the discussion much beyond this in their short book; but I shall try to proceed in the spirit of the concerns that they raise.

A *general* consideration of what a well-ordered society looks like, sounds like, smells like, and feels like to the touch, might be an exercise in *political aesthetics*. It is the sort of thing we find in Edmund Burke's observation that "[t]o make us love our country, our country ought to be lovely"<sup>121</sup> and in his talk about "the pleasing illusions, which [make] power gentle, and obedience liberal, . . . the superadded ideas, furnished from the wardrobe of a moral imagination, which the heart owns, and the understanding ratifies, as necessary to cover the defects of our naked shivering nature, and . . . raise it to dignity in our own estimation."<sup>122</sup> Political aesthetics invite us to think about such things as monuments, cenotaphs, public statues, public architecture, flags and banners, and the ceremonies (coronations, inaugurations, ar-

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<sup>120</sup> RICHARD DELGADO & JEAN STEFANCIC, *UNDERSTANDING WORDS THAT WOUND* 142 (2004).

<sup>121</sup> EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 78 (L.G. Mitchell ed., Oxford Univ. Press 1999) (1790).

<sup>122</sup> *Id.* at 77.

mistice days, and the like) for public or political events and their settings, choreography, and costumes. That is political aesthetics — and I think we need to pay more attention to this topic in political philosophy than we do.<sup>123</sup>

Notice that the examples I have mentioned are mostly a matter of official or publicly sponsored appearances. But in the case of hate speech, it is appearances sponsored by private persons, not the state, that we are concerned about. There is of course sometimes a messy interface between public and private, which shows up (for example) in the United States in the First Amendment jurisprudence of church and state: I mean issues about the presence of religious symbols — crosses, crèches, menorahs, depictions of the Ten Commandments — in the town square on public property. We know that it is possible for a society to *look* religious, without in any official or governmental sense *being* religious.<sup>124</sup> There may be temples, steeples, churches, mosques, and synagogues as far as the eye can see, and many of us think this can be so without any message being conveyed that the society as a whole is committed to any particular religion. All this may be compatible with a society being well ordered in the sense of being religiously neutral.

Balancing private religious expression with society's perceived endorsement is not a simple matter. Some liberals express concern about the appearance in public of private individuals dressed in certain ways; think of the controversy in countries like France about Muslim women appearing in public with headscarves or veiled or with the full covering of the burqa.<sup>125</sup> President Nicholas Sarkozy and others who call for a ban on the burqa are also interested in our theme: what should a well-ordered society look like? For them, the interest is the appearance that people present to one another. It is as though they are using the old idea of sumptuary laws: people must dress in a way that connotes the dignity of a free person, not in a way that intimates their subordination. (The burqa might be compared to a portable private realm carted around in public — like an Edwardian bathing machine — as though women may appear in public only by remaining in effect in the private realm.) I am not a supporter of the proposal to ban the burqa. But the arguments that are used on the other side are not a

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<sup>123</sup> For a fine account of the presence and importance of monuments in modern society, see generally AJUME H. WINGO, *VEIL POLITICS IN LIBERAL DEMOCRATIC STATES* (2003).

<sup>124</sup> This paradox was noted in Karl Marx, 'On the Jewish Question' (1844), reprinted in *NON-SENSE UPON STILTS: BENTHAM, BURKE, AND MARX ON THE RIGHTS OF MAN* 137, 137–38 (Jeremy Waldron ed., 1987).

<sup>125</sup> Doreen Carvajal quotes President Nicholas Sarkozy as saying, "The burqa . . . is a sign of the subjugation, of the submission, of women. . . . I want to say solemnly that it will not be welcome on our territory." Doreen Carvajal, *Sarkozy Backs Drive To Eliminate the Burqa*, N.Y. TIMES, June 23, 2009, at A4.

million miles from the argument that I am pursuing in this Article. What individuals do, how they present themselves, can add up to an impression that matters: maybe not the burqa, but the appearance of large numbers of masked men in white sheets and pointy hats is a problem, protestations about purely private dress codes notwithstanding.

*D. Assurance and Security*

Why does it matter what a well-ordered society *looks* like? Why do appearances count? I believe the answer has to do with *assurance*, with conveying to people a sense of security in the enjoyment of their most fundamental rights. And this is what I want to draw from Rawls's account. Rawls insists throughout his work that a well-ordered society is one "in which everyone accepts, and knows that everyone else accepts, the very same principles of justice."<sup>126</sup> That shared knowledge plays an important role in everyone's life.

The content of the relevant assurances may vary. In Rawls's philosophical ideal, a well-ordered society is defined by reference to the whole detailed array of principles that characterize his conception of justice as fairness: what people know and assure each other of, people's joint allegiance to the difference principle, the details of the first principle, the exact formulation of the second principle, the balance between the difference principle and the equal opportunity principle, and the various priority rules. Rawls is of course right to note that one of the reasons why we cannot describe the United States as a well-ordered society is that there is nothing approaching a consensus about justice at this level of detail. But in the real world, when people call for the sort of assurance to which hate speech laws might make a contribution, it is not on the controversial *details* of justice. Instead, it is on some of the most elementary fundamentals — that all are equally human and have the dignity of humanity, that all have an elementary entitlement to justice, and that all deserve protection from the most egregious forms of violence, exclusion, and subordination.<sup>127</sup> Hate

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<sup>126</sup> RAWLS, *supra* note 105, at 35.

<sup>127</sup> My reference here to the fundamentals of justice is similar to, but not quite the same as, Rawls's idea of "constitutional essentials." *Id.* at 214, 227. The idea is that some claims of justice are based on or presuppose others; some represent controversial developments of or extrapolations from others. The fundamentals of justice are the claims that lie at the foundations of these derivations and controversies. They include propositions establishing everyone's right to justice and elementary security, everyone's claim to have their welfare counted along with everyone else's welfare in the determination of social policy, and everyone's legal status as a rights-bearing member of society. They also include repudiations of particular claims of racial, sexual, and religious inequality that have historically provided grounds for denying these rights. See Jeremy Waldron, *Basic Equality* (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 08-61, 2008), available at <http://ssrn.com/abstract=1311816> (discussing basic equali-

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speech or group defamation involves the express denial of these fundamentals so far as some group in society is concerned. It seems to me that if we are imagining a society on the way to becoming well ordered, these fundamentals must be secured in people's minds by public guarantees, even if we are not yet in a position to secure a more detailed consensus on justice.

I referred earlier to political aesthetics, the "decent drapery" celebrated by Edmund Burke.<sup>128</sup> But when we talk about the public manifestation of a society's commitment to fundamental principles of justice, we are not just talking about justice displayed for the sake of an impressive or pretty show (in the way that a society might display the might of its military resources, the splendor of its culture, or the pride of its athletes). We are talking about a display that matters practically to individuals. It matters to them in their reliance on the principles of justice in the ordinary course of their lives, and in the security with which they enjoy that reliance. In a well-ordered society, where people are visibly impressed by signs of one another's commitment to justice, everyone can enjoy a certain assurance as they go about their business. People know that when they leave home in the morning they can reasonably count on not being discriminated against, humiliated, or terrorized. They feel secure in the basic rights that justice defines; they can face social interactions without the elemental risks that interaction would involve if one could not count on others to act justly.

We can put the same points negatively. When a society is defaced with anti-Semitic signage, burning crosses, or defamatory racial leaflets, that sort of assurance evaporates. A vigilant police force and Justice Department may still keep people from being attacked or excluded, but people no longer have the benefit of a general public assurance to this effect, provided and enjoyed as a public good, furnished to all by all. There is security in such public knowledge for the proper pride — holding one's head upright — that we associate with human dignity. President Lyndon Johnson once gave this reason for the moral necessity of the Civil Rights Act: "A man has a right not to be insulted in front of his children."<sup>129</sup> The security that people look for is security against the soul-shriveling humiliation that accompanies the manifestation of injustice in society. In the landmark Canadian case, *R. v. Keegstra*,<sup>130</sup> Chief Justice Brian Dickson said this about the effect that public expressions of hatred may have on people's lives:

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ty, as distinct from various egalitarian policies). For further discussion of this idea of the fundamentals of justice, see *infra* pp. 1646–47.

<sup>128</sup> See *supra* p. 1624.

<sup>129</sup> DAVID BROMWICH, POLITICS BY OTHER MEANS: HIGHER EDUCATION AND GROUP THINKING 157 (1992) (internal quotation marks omitted).

<sup>130</sup> [1990] 3 S.C.R. 697 (Can.).

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The derision, hostility and abuse encouraged by hate propaganda . . . have a severely negative impact on the individual's sense of self-worth and acceptance. This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority. Such consequences bear heavily in a nation that prides itself on tolerance and . . . respect for the many racial, religious and cultural groups in our society.<sup>131</sup>

The point of the visible self-presentation of a well-ordered society, then, is not just aesthetic; it is the conveying of an assurance to all citizens that they can count on being treated justly.

This assurance is connected in important ways to the values of dignity and reputation that were discussed in Part I of this Article. A person's dignity is not just a decorative fact about him or her. It is a matter of status, and as such, it is in large part normative: it is something about a person that commands respect from others and from the state. Moreover, one holds a certain status not just when one happens to have a given set of rights or entitlements, but also when the recognition of those rights or entitlements is basic to how one is treated. So it is with the fundamentals of social reputation. We accord people dignity on account of the sorts of beings human individuals are, and we are gravely concerned when it is said publicly that some people, by virtue of their membership in a racial, ethnic, or religious group, are not really beings of that kind and so are not entitled to that dignity in one way or another. Such hateful claims are not just anthropological speculation: they intimate that people should expect to be treated in a degrading manner if the person making the hateful claim (and the fellow travelers that he is appealing to) have their way.

Does this mean that individuals are required to accord equal respect to all their fellow citizens, that they may not esteem some and despise others? That proposition seems counterintuitive. Much of our moral and political life involves differentiation of respect. People respect those who obey the law and do good while withholding their respect from those they regard as wrongdoers. Democrats respect President Barack Obama, while some conservatives despise him; most Republicans have a great deal of respect for former President George W. Bush, while some of his political opponents want him tried as a war criminal. Many people despise bankers after the recent financial crisis. Are we now saying that these distinctions of respect are impermissible and that everyone has a duty to respect everybody else? Are we saying that no one is permitted to express his or her contempt for anyone else? Not quite. It is important to distinguish between two senses of respect that might be in play here: what Stephen Darwall has

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<sup>131</sup> *Id.* at 746.

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called “appraisal respect” (in which one’s estimation of people varies by their merits, their virtues and vices, their crimes, their views, and so on) and “recognition respect” (which is fundamental to the dignity of persons and invariant in the face of differential merit, even commanding how people are to be treated when they are guilty of terrible crimes).<sup>132</sup> It is recognition respect that we are talking about here; and the fact that in private we might subscribe to varying estimations of different persons as a matter of appraisal respect — something the government is *also* entitled to do — does not show that we may not reasonably be required to play our part in society by according the basics of recognition respect to each person.

How exactly is this assurance that we seek to provide for one another conveyed? I do not think Rawls imagines that there will be billboards proclaiming the difference principle or the list of basic liberties. The creepy totalitarian flavor of that makes us uneasy, and rightly so. There may be some affirmative efforts: I think of the public proclamation of a new constitution, like the South African Constitution, seeking to focus everyone’s attention on the fact that they now have certain rights; or just the mundane business of pamphlets and advertisements ensuring that people know their rights and how to claim them. I saw a sign recently on the New York subway, in English and Spanish, telling people that they do not have to put up with unwanted sexual touching in a crowded subway car.

Mostly, however, the assurance is implicit, as though the underlying status of each person as a citizen in good standing goes without saying. Various forums of social, political, and commercial interaction are just open to all as a matter of course; no one has to say “Muslims Welcome” or “African-Americans Allowed.” It is tremendously important that the assurance be conveyed in this implicit and ubiquitous way so that it can be effortlessly accepted and that people who might otherwise feel insecure, unwanted, or despised can put that insecurity out of their minds and concentrate on what matters to them in social interaction — its pleasures and opportunities.

At the same time, the implicitness of this assurance makes it tremendously vulnerable. For example, suppose a spate of discriminatory signs appear — maybe they intimate a real intention to discriminate or maybe they do not — but suddenly the stakes have changed for those to whom they are directed. This helps us see what hate speech is about. The point of the hateful displays that we want to regulate is not just autonomous self-expression on the part of the bigots. The dis-

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<sup>132</sup> See STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* 122–23 (2006). See generally Stephen L. Darwall, *Two Kinds of Respect*, 88 *ETHICS* 36 (1977).

plays target the assurance on which members of vulnerable minorities are supposed to be able to rely. Their point is to negate the implicit assurance that a society offers to the members of vulnerable groups — to undermine it, call it in question, and taint it with visible expressions of hatred, exclusion, and contempt. And so it begins: what was implicitly assured is now visibly challenged, and now there is a whole new set of calculations for a minority member setting out to take a walk with his family.

### *E. Public Goods*

Provision of the assurance that I am talking about is like a public good, albeit a silent one. It is implicit rather than explicit, but nonetheless real — a pervasive, diffuse, ubiquitous, general, sustained, and reliable underpinning of people's basic dignity and social standing, provided by all for all. A well-ordered society, it seems to me, has an interest in the provision of this public good, that is, in the furnishing of this assurance and in the recognition and upholding of the basic dignity on which it is predicated. It is a public good and part of the public order, but it is not ultimately a communal good, enjoyed collectively.<sup>133</sup> Instead, like street lighting, it is a public good whose benefit redounds ultimately to individuals — those whose dignity is affirmed when its social underpinnings might be otherwise in question; those who rely implicitly on a sense that there does not have to be anything specific on which to rely. But unlike street lighting, which can be provided by a central utility company, the public good of assurance depends on and arises out of what thousands or millions of ordinary citizens do singly and together. It is, as Rawls puts it, a product of "citizens' joint activity in mutual dependence on the appropriate actions being taken by others."<sup>134</sup> It may not *affirmatively* require a great deal of the ordinary citizen; that is part of what it means that this is an implicit good. But just because assurance is a low-key background thing, the prime responsibility for its provision that falls upon the ordinary citizen is to refrain from doing anything to undermine it or to make the furnishing of this assurance more laborious or more difficult. *And that is the obligation that hate speech laws or group defamation laws are enforcing.*

Those who publish or post expressions of contempt and hatred of their fellow citizens, those who burn crosses, and those who scrawl swastikas are doing what they can to undermine this assurance. Their actions may not seem all that significant in themselves; an isolated in-

<sup>133</sup> For the distinction between public goods whose ultimate payoff is collective and public goods that benefit individuals, see Jeremy Waldron, *Can Communal Goods Be Human Rights?*, in *LIBERAL RIGHTS*, *supra* note 82, at 339, 354–59. Some public goods may have both aspects. See Jeremy Waldron, *Safety and Security*, 85 *NEB. L. REV.* 454, 500–02 (2006).

<sup>134</sup> RAWLS, *supra* note 105, at 204.

cident here, a forlorn Nazi procession there, some ratty little racist leaflet. But precisely because the public good that is under attack is provided in a general, diffuse, and implicit way, the flare-up of a few particular incidents can have a disproportionate effect on the quality of assurance in society. I will say a little more at the conclusion of this Part about the social and historical context. But consider this observation by William Peirce Randel, a historian of the Ku Klux Klan, about isolated instances of cross-burning: “Such is the symbolic power of the fiery cross that people in many parts of the country still talk in subdued voices about the cross that was burned one night years ago in the field across the road or on a local hilltop.”<sup>135</sup> Randel also added this about the isolated instances of the burning cross:

What [a cross-burning] is commonly taken to mean is that neighbors one sees every day include some who are Klan members, and that Klaverns supposedly extinct are only dormant, ready to regroup for action when the Klan senses that action is needed. It casts a shadow on many a neighborhood to know that it harbors a potentially hostile element which at any moment may disrupt the illusion of peace.<sup>136</sup>

Hate speech does not just seek to undermine the public good of implicit assurance. It also seeks to establish a rival public good as the wolves call to one another across the peace of a decent society. The publication of hate speech, the appearance of these symbols and scrawls in places for all to see, is a way of providing a focal point for the proliferation and coordination of the attitudes that these actions express, a public manifestation of hatred by some people to indicate to others that they are not alone in their racism or bigotry. Frank Collin, the leader of the Nazis who sought to march through Skokie, said, “We want to reach the good people — get the fierce anti-Semites who have to live among the Jews to come out of the woodwork and stand up for themselves.”<sup>137</sup> Accordingly, hate speech regulation aims not only to protect the public good of dignity-based assurance, but also to block the construction of this rival public good.

Some object that such laws simply drive hate underground. But that is the whole point — to convey the sense that the bigots are isolated, embittered individuals, rather than to permit them to contact and coordinate with one another in the enterprise of undermining society’s most fundamental principles. True, there is a cost to this: such laws may drive racist sentiment into spaces where it cannot easily be engaged. As I shall suggest in Part III, however, hate speech laws operate best in an environment when the time for active debate on an is-

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<sup>135</sup> WILLIAM PEIRCE RANDEL, *THE KU KLUX KLAN: A CENTURY OF INFAMY* 224 (1965).

<sup>136</sup> *Id.*

<sup>137</sup> PHILIPPA STRUM, *WHEN THE NAZIS CAME TO SKOKIE: FREEDOM FOR SPEECH WE HATE* 15 (1999) (internal quotation marks omitted).

sue is over and so the benefits of engaging with the racists (except for redemptive purposes) are low.<sup>138</sup> Thus, while isolating racist sentiment from public discourse is a potential problem, introducing hate speech legislation at the proper time can help to mitigate this concern.

*F. The Role of Law and the Role of Individuals*

I have said that the good of dignity-based assurance is a public good provided to all by all and that unlike the benefit of street lighting it cannot be provided by a central utility. I am sure some readers will balk at this and say that it is a mistake for me to saddle private citizens with what is surely a responsibility of government. Is not the manifestation of commitment by government much more important than the manifestation of the attitudes of citizens to one another? If laws against discrimination are upheld and if people are confident that they will be upheld, what does it matter what signs citizens display? If laws protecting people from being driven out of their neighborhoods are upheld and if people are confident that they will be upheld, what does it matter whether the odd cross is burned on somebody's lawn? If the laws protecting people against violence and mass murder are upheld and if people are sure that they will be upheld, what does it matter what it says on the placards that neo-Nazis carry through Jewish neighborhoods in an Illinois suburb? It is law enforcement that matters, not the cardboard signs: that is the objection.

But this objection is based on a false contrast. In no society is the state able to offer these guarantees on its own without a complementary assurance that ordinary citizens will play their part in the self-application of the laws.<sup>139</sup> Think of the administration of antidiscrimination laws. The law does not have the resources to provide an armed escort for every minority member who wants to approach and enter a school, or university, or other public accommodation without fear of being turned away and humiliated on racial grounds. The spectacle of the National Guard being turned out to desegregate a school in Little Rock, Arkansas, in 1957 showed us exactly what such an escort would look like. States do not have the coercive resources to do this in any but a very few cases, and anyway, to proceed under armed escort is hardly a satisfactory indication of assurance. Military enforcement cannot be the basis of the effortless, implicit, and pervasive assurance that people need for the conduct of their ordinary lives. Even routine enforcement efforts by the Department of Justice against

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<sup>138</sup> See section III.E, pp. 1646–49.

<sup>139</sup> For a discussion of the idea of self-application, see HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 120–22 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

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routine discrimination can handle only a handful of cases. By and large, the law has to rely in this area — as in almost every area — on self-application by ordinary citizens. And that means that any citizen who relies upon the *law* is relying indirectly on the voluntary cooperation of fellow citizens.

Conversely, part of the concern about the public expression of racist attitudes is that these expressions are intimations that certain members of the public (and those they are trying to influence) will not play their necessary part in the administration of the laws, if they can get away with it. What is more, as I said in the previous section, they are playing a competing assurance game, using public and semi-permanent displays to assure those who are inclined not to play their part in upholding laws against violence and discrimination that they are not alone, that there are plenty of others like them.

Ronald Dworkin takes the view that all this is a matter for the government to handle. The government is the entity that is required to display equal concern and respect for all its citizens. But, he says, the citizens themselves do not share an identical obligation: on most occasions they are permitted to show respect for some and concern for others — respect for their parents and concern for their children that differ from the concern and respect that they manifest to strangers.<sup>140</sup> There may be something in this division of private and public responsibility. But as stated it is too simple. Government is not an entity separate from the people, not in the formation of its policies or in the enactment of its laws, and certainly not in the discharge of its distinctive responsibilities. The discharge of some governmental responsibilities is impossible without the whole-hearted cooperation of members of the public, and the discharge of other public responsibilities is vulnerable to what private people do in public. The responsibility of providing the dignity-based assurance that Rawls tells us will be a feature of a well-ordered society is of the latter sort. We must not be misled into treating hate speech and group defamation as essentially private acts with which governments are perversely trying to interfere in the spirit of mind-control. Hate speech and group defamation are actions performed in public, with a public orientation, aimed at undermining public goods. We may or may not be opposed to their regulation, but we need at least to recognize them for what they are.

#### *G. Transition and Assurance*

In this Part of the Article, I have taken up Rawls's suggestion that the members of a well-ordered society ought to be able to rely upon public assurance of one another's commitments to justice and that this

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<sup>140</sup> See RONALD DWORKIN, *LAW'S EMPIRE* 295–301 (1986).

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reliance should be public knowledge, publicly conveyed. I have argued that one way of thinking of the purpose of group defamation laws is that they protect this assurance against egregious forms of denigration and coordinated defiance. People need this assurance, and they need to be protected against displays and manifestations whose point is to undermine the assurance and to begin constructing an assurance of exactly the opposite — an assurance that, whatever the Constitution and the laws say, those who discriminate or those who try to drive minorities out of majority neighborhoods will be in good company. I argue that people have a responsibility to participate in the provision of these goods, at least to the extent of not participating in undermining them, and that certainly society is permitted to enforce that responsibility to protect this vital good.

I suspect that one could make a case along these lines, *in the abstract*, for any society. In any society, people are likely to stand in need of the assurances which, on Rawls's account, it is the task of a well-ordered society to provide. But the case becomes particularly pressing when we think not just of the abstractions of political philosophy, but also of the prospects of real-world societies becoming anything like well ordered. For us, the issue is not only the abstract need for assurance that people might have even in the best of social circumstances, but also a need for assurance in relation to the history of a society that has been far from well ordered — indeed hideously ill ordered — so far as the basic elements of justice and dignity are concerned.

It is often said that there is a historical reason why European countries are more receptive to laws prohibiting group defamation than the United States has been. This is half true: European peoples do have to think about these matters against the background of Nazism and the Holocaust (which is still within living memory). But it is false if this rationale is supposed to suggest that Americans have no such burden. Quite the contrary: the United States has historic memory within the last two centuries of one of the most vicious regimes of chattel slavery the world has ever known, which was upheld by the very Constitution that purported then and still purports to guarantee individual rights; living memory of institutionalized racism, segregation, and denial of civil rights in many of its states; living experience — here and now — of shameful patterns of discrimination and racial disadvantage; and above all living memory of racial terrorism — lynching, whipping, church bombing, cross-burning, and all the paraphernalia of Klan symbolism — from the end of the Civil War to the present.

This history is the background against which members of formerly subordinated minorities have to situate public manifestations of race hate, group libel, and the like. It is not merely that the tone and content of such manifestations are at odds with the guarantees supposedly afforded as public goods by the members of a well-ordered society to each other. The worry is that these manifestations intimate a *return* to

the all-too-familiar circumstances of murderous injustice that people or their parents or grandparents experienced. Such intimations are directly at odds with the assurances that a well-ordered society is supposed to provide. Those assurances are sought not only in the abstract, but also in relation to precisely the history that these displays nightmarishly summon up.

### III. LIBEL AND LEGITIMACY

It is time now to consider some objections. For all their good intentions, for all the fine work that they may do in protecting the assurances that a good society will provide to its most vulnerable citizens, statutory provisions of the kind I am talking about are designed to stop people from printing, publishing, distributing, and posting things that they would like to say, things that they would like others to read or hear. There is no getting around this fact. Such regulations make the public expression of ideas less free — in the straightforward negative sense of more constrained<sup>141</sup> — than it would otherwise be. Some defenders of hate speech restrictions toy with the idea that, since hate speech tends to silence minorities or to 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.<sup>142</sup> I do not want to rule out that possibility; but I believe many countries would uphold their hate speech laws even if that were not the case — that is, even if the harm done to minorities were not primarily their exclusion from public discourse.

#### A. *The Objection from Autonomy*

I have never been convinced by an objection that bases itself simply on autonomy. It is true that laws of the kind we are discussing make the public expression of ideas less free in a way that matters to individuals.<sup>143</sup> Often what racists or Islamophobes are punished for expressing in public is the very thing, out of all the messages a person could convey, that matters 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 them-*

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<sup>141</sup> For the notion of negative freedom, see ISIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 122–31 (1969).

<sup>142</sup> See, e.g., Tesis, *supra* note 76, at 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.” *Id.* at 499.). For a more nuanced discussion of this point, see generally Frank Michelman, *Universities, Racist Speech and Democracy in America: An Essay for the ACLU*, 27 HARV. C.R.-C.L. L. REV. 339 (1992).

<sup>143</sup> See C. Edwin Baker, *Autonomy and Hate Speech*, in *EXTREME SPEECH AND DEMOCRACY*, *supra* note 10, at 139, 143.

*selves* 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 be free to express racist ideas in a hateful form; and the question is whether we should say, on this ground, that hate speech regulations compromise their autonomy.<sup>144</sup>

The fact, however, 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 should not be restricted, any more than this position is furthered 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. And 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. Or think of the various ways in which we regulate religious activity,<sup>145</sup> which is at least as central to worshippers' autonomy as hateful expressions of racism are to the autonomy of bigots.

The question is whether the particular mode of autonomous self-expression that is at stake here has a special significance that goes beyond the simple point that the law — for what I think are very good reasons — is stopping people from doing what they want. It does not help the autonomy objection that even those who make the objection acknowledge the wrongness and the social undesirability of the speech they are protecting, and the suffering (if not the harm) that it inflicts upon others. In other circumstances, they might be tempted to use the old distinction between *liberty* and *license* to characterize hate speech.<sup>146</sup> Ronald Dworkin, for example, makes extensive use of that distinction elsewhere in his political philosophy when he suggests that we distinguish between a flat sense of liberty that “carries, in itself, no suggestion of endorsement,” and a normative sense of the word that identifies a value, virtue, or ideal that we endorse and are concerned about.<sup>147</sup> In the former sense, he says, someone may say that liberty is reduced by laws prohibiting murder;<sup>148</sup> but that would be a preposterous objection to the laws against murder. But our use of “liberty” in the latter sense indicates that we have already calculated the importance of people doing what they please in a certain area and found

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<sup>144</sup> See C. Edwin Baker, *Autonomy and Informational Privacy, or Gossip: The Central Meaning of the First Amendment*, SOC. PHIL. & POL'Y, July 2004, at 215, 225–26; Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992).

<sup>145</sup> See, e.g., *Employment Div. v. Smith*, 494 U.S. 872 (1990).

<sup>146</sup> See, e.g., JOHN LOCKE, TWO TREATISES OF GOVERNMENT 270 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (observing, concerning the state of nature, that “though this be a *State of Liberty*, yet it is *not a State of Licence*”).

<sup>147</sup> RONALD DWORIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 125 (2000).

<sup>148</sup> *Id.*

that this benefit outweighs or trumps considerations of the dangers or harms that might accrue from such behavior. Dworkin uses this distinction to show, for example, that there is no real objection on the grounds of liberty to the pursuit of economic equality.<sup>149</sup> The question I find interesting is why Dworkin and other opponents of hate speech regulation do not take that approach to the liberty claimed by the hatemongers; why they do not say that whether this is liberty worth fighting for depends precisely on its potential for harm to individuals and the social order.

Alternatively, what we need is an account of why the liberty at stake in the controversy about hate speech deserves our special concern, in a way that entitles us to forgo calculations of harmfulness. Professor Ed Baker took the view that the element of self-disclosure in hate speech is what makes it special. The key value, according to Baker, is individual autonomy. For autonomy to be respected, said Baker, a person “must have a general right over the value-expressive uses of herself — her own body.”<sup>150</sup> In some circumstances a person may not be permitted to act on her values (if they are thought to be harmful to others or destructive of the social order). But she must be permitted at least to disclose and express her values, if only so that she can present herself to others and in public as the value-bearing person she wants to be (or wants to be regarded as). Baker argued:

[T]he law must not aim at eliminating or suppressing people’s freedom to make decisions about behavior or values. These requirements have clear implications for speech, namely, that a person should be able to decide for herself what to say. . . . This view centrally identifies the person with agency, with action, and with the possibility of choice. In a sense, this is an activity view of personhood: it favors a person’s activity of speech over the status of being unknown.<sup>151</sup>

That view offers a plausible account of what might make speech special, an account that might perhaps explain an inclination to protect hate speech against regulation.

But I am not sure whether the argument works. Baker’s argument depends, as I said, on a distinction between *actions* that disclose a person’s values and *words* that disclose a person’s values. Regulating the former is permissible, on Baker’s account, but regulating the latter is not. However, that distinction must assume that what it categorizes as mere words cannot be destructive of individually or socially important values in the way that action can; a reference to autonomy cannot by itself explain why we want to immunize self-disclosing words from

<sup>149</sup> See *id.* at 128–39.

<sup>150</sup> Baker, *supra* note 143, at 142. Baker further argues that “[a] person is not treated as formally autonomous if the law denies her the right to use her own expression to embody her views.” *Id.*

<sup>151</sup> Baker, *supra* note 144, at 225–26.

regulation, because actions might be equally important for self-disclosure. Now, the whole tenor of my argument in Part II is to show that words, especially when they are expressed in a publicly visible and enduring form, *can* seriously undermine social values that are important for sustaining the dignity and reputation of vulnerable individuals. That effect does not evaporate as soon as the word “autonomy” is mentioned,<sup>152</sup> and unless Baker and others who make this argument want to suggest that anything that discloses a person’s values must be immunized from regulation no matter how dangerous it is, then we cannot regard autonomy as a conclusive objection in the present context.

### B. Viewpoint Discrimination

I am also not convinced by arguments that complain that hate speech legislation restricts free expression on the grounds of the content or the viewpoint being expressed.<sup>153</sup> I know this idea is one of the central pillars of American free speech doctrine.<sup>154</sup> Indeed, not only does my argument in favor of the regulation of hate speech confront the doctrine that prohibits viewpoint discrimination, it also confronts what seem to be the most compelling reasons behind the doctrine. In the view of Professor Geoffrey Stone, “[b]y definition, content-based restrictions distort public debate in a content-differential manner. . . . Such a law mutilates ‘the thinking process of the community.’”<sup>155</sup>

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<sup>152</sup> Of course, those who make the autonomy argument often dispute the impact that hate speech is said to have on others, and no doubt they will dispute the claims about the importance of assurance and the claims about the impact of hate speech upon assurance that I have made in Part II of this Article. They may or may not be right about this, but it is odd to think that this position — which is essentially an empirical claim — should be nourished by the claim about autonomy. No doubt those who make the autonomy claim *want* it to be true that hate speech does not have a deleterious impact, but certainly the claim about autonomy does not give any reason for thinking that that *is* true. On the contrary, where an exercise of freedom in Dworkin’s “flat sense,” *see supra* p. 1636, is challenged on grounds of the social harm that it produces, that challenge must be evaluated before we decide that the exercise of freedom is entitled to an elevated designation such as autonomy. The autonomy designation cannot be used to brush aside the challenge.

<sup>153</sup> I shall treat these two ideas — content-based regulation and viewpoint-based regulation — as synonymous.

<sup>154</sup> American free speech doctrine rests on the principle that an imposition on the freedom of speech may not be based on the viewpoint of the speakers, the particular content of what is said, or the distance between what is said and some official orthodoxy to which everyone in society is supposed to subscribe in public. For a helpful discussion of the analytic difficulties surrounding this distinction, see generally R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333 (2006).

<sup>155</sup> Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 55 (1987) (quoting ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 27 (1960)).

Now, words like “distort” and “mutilate” beg the question, privileging what public debate would be like without intervention. It is worth asking why we should privilege the unregulated process or its output. Defenders of free speech sometimes draw an analogy to free markets in the economic sphere. Left to themselves, free markets may generate efficient outcomes by processes that economists say they understand. And analogously, it is said (though without any analogous explanation), in the long run the free marketplace of ideas will generate truth or the acceptance of truth if it is left to its own devices. 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?

Stone is surely right to point out that restrictions on group defamation or hate speech are intended to modify the character of public debate. That is the whole point. They are designed to have such an impact in circumstances where it is reasonable to believe that without regulation public debate will have effects that the government has reason to be concerned about. We enact and enforce restrictions on the economic market for this reason all the time, prohibiting certain transactions and regulating others. We do this in the marketplace of ideas, too, as with the restriction of child pornography.

### C. Ronald Dworkin's Argument About Legitimacy

The objections I seek to dismiss may gain traction by being associated with arguments about the relationship between free expression and the political system. A democracy is supposed not only to respect the autonomy of its voters, but also to be responsive to the views that they hold. And the political process is supposed to be governed by the expression of views of the citizens, not rigged in advance to privilege some viewpoints over others.

There are a number of arguments in the literature that link the protection of free speech to the flourishing of self-government in a democracy. Some say little more than that, though they say it sonorously and at great length.<sup>156</sup> 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 legitimacy in a democracy.<sup>157</sup>

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<sup>156</sup> See generally, e.g., MEIKLEJOHN, *supra* note 155.

<sup>157</sup> See, e.g., James Weinstein, *Extreme Speech, Public Order, and Democracy*, in EXTREME SPEECH AND DEMOCRACY, *supra* note 10, at 23, 28, 38. Professor Robert Post also makes this

Some make the point even more strongly 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.<sup>158</sup> According to Professor Dworkin, freedom to engage in 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:

Dworkin agrees that it is important for the law to protect people, particularly vulnerable minorities, from, for example, discrimination or "unfairness and inequality in employment or education or housing."<sup>159</sup> He is as committed to these laws as any proponent of racial equality. Now, everyone knows that if we adopt such laws, often it will have to be over the opposition of people who favor discrimination. In the face of such opposition, we usually say that it is sufficient that such laws be supported by a majority of voters or elected representatives, provided of course that the opponents of the bills are not disenfranchised from that process. They must have a chance to vote against it or vote for candidates who oppose it, just as we have the chance to vote in its favor. But actually, says Dworkin, this 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.<sup>160</sup>

Opponents of antidiscrimination laws must have the opportunity to voice their opposition, and the ground of their opposition, in public; otherwise the political process by which their opposition is defeated is unfair. Free expression, says Dworkin, is a necessary condition of 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."<sup>161</sup> 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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argument. See Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 279–83 (1991).

<sup>158</sup> Dworkin, *supra* note 10, at v–ix.

<sup>159</sup> *Id.* at viii.

<sup>160</sup> *Id.* at vii.

<sup>161</sup> *Id.*

Now, some opponents of antidiscrimination 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 does not matter how foul and vicious the hater's contribution to political debate is. He must be allowed his say. Otherwise no legitimacy will attach to the laws that are enacted over his opposition. It does not even matter that the hater's speech is not couched as a contribution to political debate at all. "A community's legislation and policy," says Dworkin, "are determined more by its moral and cultural environment, the mix of its people's opinions, prejudices, tastes, and attitudes than by editorial columns or party political broadcasts or stump political speeches."<sup>162</sup> Whether the message 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 must be allowed to make its presence felt in the maelstrom of messages that populate the marketplace of ideas.

And so, Dworkin's legitimacy argument boils down to this: 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.<sup>163</sup> But, for Dworkin, 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, Dworkin would say:

[W]e 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 only democratic justification we have for insisting that everyone obey these laws, even those who hate and resent them.<sup>164</sup>

The structure of the position is interesting. Dworkin recognizes 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 defamation, and so on. On the other hand, there are other laws in place protecting

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<sup>162</sup> *Id.* at viii.

<sup>163</sup> In addition, Dworkin has doubts about some of the causal claims made by defenders of hate speech laws. *Id.* at vi. That is a separate argument, though, as I observed, *see supra* note 152, it is perhaps not surprising that opponents of hate speech legislation hope that the causal claims are false. *See* RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 219 (1996) (commenting on the causal claims of anti-pornography campaigners).

<sup>164</sup> Dworkin, *supra* note 10, at viii.

the people who are supposedly also protected by hate speech laws — laws against discrimination, hate crimes, and so on. Following Dworkin's metaphor, I am going to call these *upstream laws* and *downstream laws*.<sup>165</sup>

Those who support the upstream laws often say that they are necessary in order to address the causes of violations of the downstream laws. If we leave hate speech alone, they say, 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 — and that, he thinks, is a cost that even the defenders of hate speech legislation should not be willing to incur.

#### D. *Legitimacy: A Difference of Degree*

The first thing to say in response to Dworkin's argument is that there is a question about what "spoiling the legitimacy" of these downstream laws amounts to.<sup>166</sup> 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.<sup>167</sup> Whichever of these he means, there is a question about how literally we should take the claim that legitimacy is spoiled by the enforcement of hate speech laws. I know that Dworkin does not mean that racists are entitled to rise up in revolt against a society that enforces hate speech regulation: it is not a loss of legitimacy in that drastic sense.<sup>168</sup> But then what sort of loss of legitimacy are we talking about?

At worst it is supposed to be a loss of legitimacy in relation to *these particular downstream laws*, rather than a catastrophic loss of legitimacy for the legal and political system generally. But even with that limitation, the position seems counterintuitive if it is taken literally. In Britain, there are laws forbidding the expression of racial hatred.<sup>169</sup> There are also laws forbidding racial discrimination, not to mention laws forbidding racial and ethnic violence and intimidation,<sup>170</sup> and laws against criminal damage protecting mosques and synagogues from desecration; these are the downstream laws, the laws whose legitimacy Dworkin believes is hostage to the enforcement of hate speech

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<sup>165</sup> *Id.*

<sup>166</sup> It will be obvious in what follows that I am greatly indebted to Professor Dworkin for discussing with me the ideas in this and the following sections.

<sup>167</sup> See DWORKIN, *supra* note 140, at 190–92.

<sup>168</sup> Email from Ronald Dworkin to author (Oct. 4, 2009, 21:34 EST) (on file with the Harvard Law School Library).

<sup>169</sup> Public Order Act, 1986, c. 64, §§ 3, 3A.

<sup>170</sup> Race Relations Act, 1976, c. 74, § 70.

regulation. Should we really believe that in Britain citizens have no obligation to obey these downstream laws? 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? A 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 antidiscrimination 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 the police stand by and not intervene, because any intervention would be wrong? On a literal account, that is what “deprived of legitimacy” means. It is not just Britain. Almost every advanced democracy has hate speech laws, which, according to Dworkin, spoil the legitimacy of any antidiscrimination laws that they have.<sup>171</sup> 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.

Dworkin believes that hate speech laws may “spoil the only democratic justification we have for insisting that everyone obey [the downstream] laws.”<sup>172</sup> But I do not think he really means us to take this phrase in the literal sense considered in the previous paragraph. Any argument will look silly if “it is pushed to an extreme.”<sup>173</sup> So let us 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 violence. After all, laws of the latter type have independent reasons in their favor quite apart from the debate over race. But this position will be hard for Dworkin to maintain in light of his more holistic observations about the importance for legitimacy of speech that is just part of the cultural environment, even when it is not intended as a contribution to formal discussion of any particular law.<sup>174</sup>

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<sup>171</sup> See Dworkin, *supra* note 10, at viii.

<sup>172</sup> *Id.*

<sup>173</sup> Cf. JOHN STUART MILL, ON LIBERTY 26 (Currin V. Shields ed., 1956) (1859) (“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.”).

<sup>174</sup> See *supra* p. 1641.

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 downstream laws without destroying it altogether. I will address this point in detail in a moment.

A third possibility (also compatible with the other two) is that legitimacy is relative to persons. Professor 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."<sup>175</sup> In Dworkin's argument one might say the downstream law becomes legitimately unenforceable as 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.

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 altogether. Dworkin puts it this way:

[T]here is something morally to regret when we enforce general non-discrimination laws against racists who were not allowed to influence the formal and informal political culture as they wished to do. On balance Britain is entitled to enforce such laws, I think, but we are left with a deficit in legitimacy — something to regret under that title — because of the censorship.<sup>176</sup>

So it is all a matter of degree:<sup>177</sup> the "something to regret" might be more or less considerable; the "deficit in legitimacy" might be larger or smaller.

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*, may have a range of views:

(1) *X* may oppose it because he thinks he will be worse off under the law;

(2) *X* may oppose it because he thinks it will generate perverse economic incentives, undermining economic efficiency;

<sup>175</sup> Post, *supra* note 157, at 290 (emphasis added).

<sup>176</sup> Email from Ronald Dworkin to author, *supra* note 168.

<sup>177</sup> For a general acknowledgement that legitimacy is a matter of degree, see RONALD DWOR-KIN, IS DEMOCRACY POSSIBLE HERE? 97 (2006).

(3) *X* may oppose it because he distrusts the bureaucracy necessary to administer it; and

(4) *X* 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 that he thinks shows the inferiority of certain racial or ethnic groups;

(4c) *X* may express the view that the citizens who are intended to be protected by the antidiscrimination law are no better than animals; and

(4d) *X* may say in a leaflet or on the 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 regulating hate speech or group defamation are almost certain to restrict (4d), quite likely to restrict (4c), and maybe they will restrict some versions of (4b) depending on how hatefully these views 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 publicly as vituperation. They often insist on certain adverbial characteristics as a condition of restriction: in Britain, for example, racist hate speech that is not expressed in a way that is “threatening, abusive, or insulting” is not to be restricted.<sup>178</sup> Some such laws also try affirmatively 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. The most generous such provision I have seen is in the Australian Racial Discrimination Act, which says that its basic ban on actions that insult, humiliate, or intimidate a group of people done because of their race, color, 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

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<sup>178</sup> Britain 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 person concerned “did not intend . . . the written material, to be, and was not aware that it might be, threatening, abusive or insulting.” Public Order Act, 1986, c. 64, § 18(1)(a).

public interest.”<sup>179</sup> The purpose of these qualifications is precisely to limit the application of the restriction to the bottom end of something like a (4a)–(4d) spectrum.

Now if we adopt the basic framework of Dworkin’s position and if we accept that legitimacy is a matter of degree, 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 that merely forbade something like (4d). 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 would have anything more than a minimal effect on legitimacy.

Part of our estimation of the effect on legitimacy would surely also depend upon the reasonableness and importance of the objectives of the restrictive upstream laws. We see something similar with regard to *noncontent*-based restrictions on speech (laws restricting time, place, and manner of political demonstrations, for example). If such restrictions 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 want to address. But if the motivation is based on serious considerations of security, we might be more understanding. Something similar may be true 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, may seem like a much more compelling objective. And the complaint that attempting to secure this dignity damages the legitimacy of other laws may be much less credible as a result.

### *E. Time and Settlement*

We would not do justice to Dworkin’s argument without discussing one much more difficult and challenging response to it. If the proposal were to ban people from expressing contemptible views about welfare recipients or about democratic socialism, then I think there would be a case to be made along the lines of Dworkin’s argument — a case 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, as I said in Part II, we are talking about the fundamentals of justice, not its contestable elements.<sup>180</sup> By the fun-

<sup>179</sup> Racial Discrimination Act, 1975, § 18D.

<sup>180</sup> See *supra* note 111 and accompanying text.

damentals 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 two senses. On the one hand, they represent things that people rely on comprehensively and diffusely in almost every aspect of their dealings with others. If one cannot exact respect for one's basic status as a rights-bearing individual, then almost everything is thrown into question. On the other hand, they are also fundamental in the sense that they represent relatively settled points or premises of modern social and legal organization.<sup>181</sup> I do not mean that there is literal unanimity about them — the hatemongers show *that*. Still, these matters are more or less settled in our laws and Constitution and so it is not just morally necessary, but it is also quite reasonable now for us to treat them as foundations for an awful lot else that we do. A debate can be over in the sense that intelligent opinion has settled the matter and it is inconceivable that public policy could proceed on any other basis, and yet there can still be dangerous enclaves of politically powerless but socially destructive outliers who do what they can to undermine the furnishing of assurances based on these settlements.

So banning hate speech should not be understood as a way of influencing the great national debate about racial or sexual equality or religious tolerance, nor should it be seen as a way of contributing to the ending of that debate (as though without the intervention of these laws the racists might win). The argument about assurance that I made in Part II presupposes that the debate is more or less over. The evil that it seeks to remedy is not the evil of the racists' thinking or believing certain things. Rather, it is the evil of these racists trying to create the impression that the equal position of members of vulnerable minorities in a rights-respecting society is less secure than implied by the society's actual foundational commitments.

Maybe there was a time when we had to have a great national debate about *race* — about whether there were different kinds of human beings, inferior and superior lines of human descent, ranked hierarchies of capability, responsibility, and authority.<sup>182</sup> 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 deliberation on a more or less open question. There is a sense in which the debate about race is over, won, finished. As I said, there are outlying dissenters; but we are moving forward as a society as though this

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<sup>181</sup> For a helpful characterization of this settlement — in relation to racial equality — see David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445, 447 (1987).

<sup>182</sup> See, e.g., IVAN HANNAFORD, *RACE: THE HISTORY OF AN IDEA IN THE WEST* 277–368 (1996).

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were no longer a matter of serious or considerable contestation. And the basis on which we move forward is that the settling of this debate is fundamental to almost every aspect of the wellbeing, dignity, and security of formerly vulnerable minorities. On issues like affirmative action, we continue to debate ways of moving forward on the basis of the settled conviction that racism is wrong, but we are no longer in need of a continuing debate about the premises of that argument.

If anything like this is true, then there is something odd about Dworkin's 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 racists and the bigots) have a fair opportunity to persuade the majority of their position on these fundamentals the next time around. Dworkin's position seems to assume that debates are timeless and that considerations of political legitimacy relative to public debate must be understood in a way that is impervious to progress and settlement.

I understand the delicacy of any claim that a debate is over and finished and that any further attempt to challenge the winning position should now be suppressed.<sup>183</sup> To clarify: I am not putting this claim forward as an all-purpose license for the suppression of dissent or unpopular views or even as an all-purpose response to objections to the regulation of hate speech. I am using the idea of a debate being over *only* with reference to this question of how seriously we should regard the Dworkinian alarm about legitimacy, particularly in light of Dworkin's own acknowledgment that the effect of hate speech laws on legitimacy is a matter of degree. The legitimacy-impact of restricting debate about an issue that is live and open seems to me quite a different matter from the legitimacy-impact of restricting continued debate about a foundational issue that was settled effectively decades ago.

I am mindful of John Stuart Mill's point about the importance of sustaining a "living apprehension" of the truths on which our social system is organized, even when certain debates are for all intents and purposes settled. Mill worried in his essay *On Liberty* that the settled foundations of our social philosophy might become stale unless we kept alive a sense of what needed to be said to their most determined and persistent opponents.<sup>184</sup> Most of us, however, part company with Mill when he seems to suggest that it might be appropriate to cultivate

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<sup>183</sup> I would not like to see such a claim in the hands of someone who thought, for example, that the debate about socialism was over.

<sup>184</sup> See MILL, *supra* note 173, at 48–55.

opposition in order to enliven our deepest convictions.<sup>185</sup> We might agree with Mill when he says:

As 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 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.<sup>186</sup>

Yet we need not accept his claim that this cessation of controversy 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.”<sup>187</sup> Mill concedes that the loss of lively debate is not sufficient to outweigh the benefit of the universal recognition of some truth, but he says it is “no trifling drawback.”<sup>188</sup> He even suggests that if we did not have local racists to keep our egalitarianism alive and jumping, we might have to invent them.<sup>189</sup> Most people, I think, are very chary of that rather daft suggestion, and rightly so when manufacturing or empowering a “dissentient champion”<sup>190</sup> has an effect not only on the liveliness of the debate but also (and destructively) on the dignity-based assurance of vulnerable members of society.

Let me emphasize again that the argument of this section is developed, not as a freestanding position, but as a response to Professor 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, *to 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 antidiscrimination laws or the laws prohibiting racial violence by not permitting people to defame one another in these terms and with those effects.

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<sup>185</sup> See *id.* at 53–55.

<sup>186</sup> *Id.* at 53.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> See *id.* at 54.

<sup>190</sup> *Id.*

*F. 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, a corrections officer in Saskatchewan named Hugh Owens offered for sale in the *Saskatoon Star Phoenix* newspaper a bumper sticker designed to proclaim what he believed to be the Christian message concerning gay marriage and perhaps homosexual relations in general. He said that the advertisement was a Christian response to Gay Pride Week.<sup>191</sup> After a complaint by three gay men, who felt that 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.<sup>192</sup> He and the newspaper were ordered to pay \$1500 to the complainants.<sup>193</sup> A court in Saskatoon upheld the decision,<sup>194</sup> but when Owens appealed to the Saskatchewan Court of Appeals, it reversed the decision.<sup>195</sup> The court of appeals recognized that “[p]art 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.”<sup>196</sup> But it also said this:

[I]t is significant that the advertisement . . . was published . . . in the middle of an ongoing national debate about how Canadian legal and constitutional regimes should or should not 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

<sup>191</sup> *Anti-gays Ad Draws Protests*, THE RECORD (Kitchener-Waterloo, Ont.), July 4, 1997, at A6 (“Regina resident Hugh Owens said he placed the ad in response to an ad announcing Gay Pride Week in Saskatoon. He said he was not condoning gay-bashing but ‘as a Christian, I felt I had to respond in some way.’”).

<sup>192</sup> I should explain that Canada employs what is in my view a very silly arrangement utilizing human rights commissions, which seem to have the power to summon citizens to appear before them and issue injunctions and penalties, and initiate some hate speech proceedings in response to private complaints. Under the Canadian Human Rights Act, 2010 S.C., ch. H-6, the Human Rights Commission administers the hate speech and other provisions of the statute. In many other countries, similar 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 nonpartisan capacity. See, e.g., Public Order Act, 1986, c. 64, § 27(1) (stating 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”).

<sup>193</sup> *Hellquist v. Owens*, [2001] 40 C.H.R.R. D/197, para. 34 (Sask. Bd. Inq.) (Can.).

<sup>194</sup> *Owens v. Human Rights Comm’n*, [2002] 228 Sask. R. 148 (Sask. Q.B.) (Can.).

<sup>195</sup> *Owens v. Human Rights Comm’n*, [2006] 279 Sask. R. 161 (Sask. Ct. App.) (Can.).

<sup>196</sup> *Id.* at 177.

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.<sup>197</sup>

Many conservative Christians in Canada seem to have thought that Owens's speech should have been protected because all he did was cite Bible passages.<sup>198</sup> But that was not the argument of the court of appeal, and rightly so. 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, the fact that it was a Bible quotation 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,"<sup>199</sup> he might well have been liable to penalty. 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 ongoing debate about gay marriage and the accommodation of sexual identities, Canada has committed itself as a society 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 their sexual activity and about civil recognition or nonrecognition of various types of relationships.

I am conscious that this may seem an inadequate position to those who are impatient with prolonging 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 position 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 ap-

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<sup>197</sup> *Id.* at 177–78 (citations omitted).

<sup>198</sup> See ReligiousTolerance.org, Freedom of Canadians to Religiously Discriminate: A Canadian Civil Rights Ruling Dealing with Anti-Gay Hate Verses in the Bible, [http://www.religious-tolerance.org/bibl\\_hate3.htm](http://www.religious-tolerance.org/bibl_hate3.htm) (last visited Mar. 27, 2010).

<sup>199</sup> See Somebody Think of the Children, Anti-Gay Bumper Sticker: Free Speech, Hate Speech? (Sept. 24, 2008), <http://www.somebodythinkofthechildren.com/anti-gay-bumper-sticker-free-speech-hate-speech/> (discussing a Queensland bumper sticker that led to a conviction under hate speech legislation).

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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 Dworkin's position that there may be a serious loss of political legitimacy if real debates are closed down too quickly; but I believe my example also illuminates by contrast the point 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 legitimacy argument are concerned.

### G. *Islamophobia*

Everything I have said in these lectures is conditioned by a number of important distinctions: (1) 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; (2) a distinction between hateful and moderate modes of expressing essentially the same message, which most hate speech statutes admit; (3) 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 is alive and ongoing; (4) a distinction between speech that undermines the social enterprise of securing dignity and assurance and speech that merely offends; and finally (5) 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. 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 community 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 debate too is not settled. To the debate about the Islam-terrorist connection, I suspect that Mark Steyn's infamous piece in *Macleans* magazine in Canada, *The New World Order*,<sup>200</sup> and maybe even the Danish cartoons (portraying the prophet Mohammed as a bomb-throwing terrorist)<sup>201</sup> make some sort of twisted contribution; and I believe they should be tolerated as such.

I do not mean that these contributions 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

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<sup>200</sup> Mark Steyn, *The New World Order*, *MACLEANS*, Oct. 23, 2006, at 30.

<sup>201</sup> The cartoons were originally published in the Danish newspaper *JYLLANDS-POSTEN*, Sept. 30, 2005, at 3.

Danish cartoons in country after country and forum after forum. Often the best they could say for this was that they were upholding their right to publish the cartoons. 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.<sup>202</sup> My view is that the exercise of this right was unnecessary and offensive; but as I have now said several times, offensiveness by itself is not a good reason for legal regulation.

However, 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, for example in the Public Order Act<sup>203</sup> in the United Kingdom. Section 29C(1) of that statute 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."<sup>204</sup> 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."<sup>205</sup> No doubt this provision fails to give Muslim communities the legal protections that they want — 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 it wants. I have used these examples nevertheless to illustrate distinctions that I think necessarily accompany any regulation based on the considerations that I have emphasized.

Some will say that these are hard lines to draw. So they are. But I do not infer from this that we should therefore give up the position. Legislative policy is often complicated and requires nuanced drafting and careful administration, and 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, is uncontroversially administrable, and requires nothing in the way of further moral judgment or careful

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<sup>202</sup> See generally Jeremy Waldron, *A Right To Do Wrong*, 92 ETHICS 21 (1981), reprinted in WALDRON, *supra* note 82, at 63.

<sup>203</sup> Public Order Act, 1986, c. 64, amended by Racial and Religious Hatred Act, 2006, c. 1.

<sup>204</sup> *Id.* § 29C(1).

<sup>205</sup> *Id.* § 29J.

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 (for example, rights to free expression and to dignity) will often be delicate and challenging, often involve 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.<sup>206</sup> 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.

#### H. *Distrust of Government*

I am conscious that I have not even come close to addressing all the arguments that there are against hate speech legislation. For example, I have not said anything in these lectures to address the general mistrust of government that many people think underlies all First Amendment concerns and that explains why many American legal scholars are so opposed to hate speech laws.<sup>207</sup> 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, their vanity, their misguided insecurity, or their undue responsiveness to majoritarian prejudice, anger, or panic. Officials may not always get it wrong, but there is a standing danger that they will. Why this danger is felt in the particular area of speech (as opposed to government actions in general) 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 — culminating in the 1951 decision about the application of the Smith Act in *Dennis v. United States*<sup>208</sup> — 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 especially mistrustful of our lawmakers? The worry about majoritarianism seems particularly strange. No doubt there are cases where majorities legislate for their own interests to the

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<sup>206</sup> See DWORKIN, *supra* note 163, at 7–12; see also Ronald Dworkin, *Comment*, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 115, 120–24 (Amy Gutmann ed., 1997).

<sup>207</sup> I am grateful to Geoffrey Stone for pressing this point.

<sup>208</sup> 341 U.S. 494 (1951).

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disadvantage of 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 backward to ensure that vulnerable minorities are protected against hatred and discrimination that might otherwise be endemic in society.

I have heard people say that it is not surprising that I oppose constitutional restrictions on hate speech laws, since I am in general an opponent of judicial review of legislation. However, it is 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 this speculation 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.<sup>209</sup>

But hate speech is an area where, against all 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 these laws are administered responsibly. Certainly they do not seem to have been transformed into vehicles for the promotion of majority interests in the way that a general distrust of government interference would suggest.

You may say, “Well that’s because you are focusing on the wrong minority. The relevant minority here is not the African-American, Muslim, or gay community. The real minorities 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 does not 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. At most, 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 drunk drivers. In both cases, we have an account of a serious social harm that certain activities, if they are left unregu-

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<sup>209</sup> See JEREMY WALDRON, LAW AND DISAGREEMENT 211–312 (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006); Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18 (1993).

lated, 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 remains that 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 will not be a Trojan horse for other majoritarian speech restrictions that are less benign. And I agree: it is 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 in Part I, many American constitutionalists have done their best to make that category unusable. It is as though 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 physical harm or violence, and so on — and there is nowhere to turn and no way back that would not unravel the whole scheme, making it “open season” on speech of every kind. It is as good an example of path dependency as you could wish for.

Other societies are not in this predicament. Their experience has not been that hate speech laws pave the way for more comprehensive restrictions on speech.<sup>210</sup> They began quite early on with the conviction that speech of this sort — defaming vulnerable minorities and inciting hatred against them — was *sui generis*, and that it had to be regulated if any speech was. They work with 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<sup>211</sup>). They have been able to

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<sup>210</sup> What may be true is that other countries’ openness to other restrictions on speech (for example, general restrictions on defamation or general restrictions on journalism that are likely to prejudice a fair trial) has meant that they have not been blinded to the importance of hate speech laws as American First Amendment ideologues have been. But that is not the Trojan Horse hypothesis; the causality works in the other direction.

<sup>211</sup> Article 10 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.” Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, art. 10, ¶2. The Canadian Constitution says this in Article 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.” Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 1 (U.K.).

draw on each others' experiences in drafting and formulating these laws. And they have been 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."<sup>212</sup>

I said at the beginning that it was not my intention to make a constitutional argument.<sup>213</sup> I can offer no way out of the First Amendment labyrinth. I have taken some American arguments on this matter seriously, but mostly my purpose has been to present 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:<sup>214</sup> let us make the impulse to enact them the best that it can be; let us try to make sense of the reasons behind them and the limitations and exceptions that such laws embody. I am not saying that we should blindly imitate the forms of regulation that we find in other advanced democracies.<sup>215</sup> 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? where would we start? how would we phrase it? 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 issue and are doing quite well. Even if we do not propose to follow them, we should have a better understanding of what they are doing so that we can give an intelligent account of our position that is responsive to the best that can be said against it.

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<sup>212</sup> International Covenant on Civil and Political Rights art. 20, ¶2, Mar. 23, 1976, 999 U.N.T.S. 171. See also International Convention on the Elimination of All Forms of Racial Discrimination art. 4, Dec. 21, 1965, G.A. Res. 2106 A (XX), 660 U.N.T.S. 195 (1969). The United States entered reservations against both provisions at the time of its ratification of these treaties.

<sup>213</sup> See *supra* p. 1599.

<sup>214</sup> See DWORKIN, *supra* note 140, at vii–ix.

<sup>215</sup> See Dieter Grimm, *Freedom of Speech in a Globalized World*, in EXTREME SPEECH AND DEMOCRACY, *supra* note 10, at 11, 19–22. But for the damaging externalities of American exceptionalism, particularly with regards to other countries' attempts to respond to hate speech on the internet, see Alexander Tsesis, *Hate in Cyberspace: Regulating Hate Speech on the Internet*, 38 SAN DIEGO L. REV. 817, 853–58 (2001).