

# I Approaching Hate Speech

I want to begin by explaining the position I am going to defend in this book, and I want to say something, too, about what has led me into this controversy. Let me start with the position and the concerns that underlie it.

## Dignity and Assurance

A man out walking with his seven-year-old son and his ten-year-old daughter turns a corner on a city street in New Jersey and is confronted with a sign. It says: “Muslims and 9/11! Don’t serve them, don’t speak to them, and don’t let them in.” The daughter says, “What does it mean, papa?” Her father, who is a Muslim—the whole family is Muslim—doesn’t know what to say. He hurries the children on, hoping they will not come across any more of the signs. Other days he has seen them on the streets: a large photograph of Muslim children with the slogan “They are all called Osama,” and a poster on the outside wall of his mosque which reads “Jihad Central.”

What is the point of these signs? We may describe them

loosely as “hate speech,” putting them in the same category as racist graffiti, burning crosses, and earlier generations of signage that sought to drive Jews out of fashionable areas in Florida with postings like “Jews and Dogs Prohibited.” Calling these signs hate speech makes it sound as though their primary function is expressive—a way in which one or another racist or Islamophobic element “lets off steam,” as it were, venting the hatred that is boiling up inside. But it is more than that. The signs send a number of messages. They send a message to the members of the minority denounced in the posters and pamphlets:

Don't be fooled into thinking you are welcome here. The society around you may seem hospitable and nondiscriminatory, but the truth is that you are not wanted, and you and your families will be shunned, excluded, beaten, and driven out, whenever we can get away with it. We may have to keep a low profile right now. But don't get too comfortable. Remember what has happened to you and your kind in the past. Be afraid.

And they send a message to others in the community, who are not members of the minority under attack:

We know some of you agree that these people are not wanted here. We know that some of you feel that they are dirty (or dangerous or criminal or terrorist). Know now that you are not alone. Whatever the government says, there are enough of us around to make sure these people are not welcome. There are enough of us around to draw attention

to what these people are really like. Talk to your neighbors, talk to your customers. And above all, don't let any more of them in.

That's the point of these signs—that's the point of hate speech—to send these messages, to make these messages part of the permanent visible fabric of society so that, for the father walking with his children in our example, there will be no knowing when they will be confronted by one of these signs, and the children will ask him, "Papa, what does it mean?"

Many of my colleagues who are not Muslim say that they detest these signs and others like them (the racist slogans, the anti-Semitic signage). But they say that people like us, who detest hate speech, should learn to live with it. Less often, and only under pressure, they will say that the father in our example (who is not a First Amendment scholar) and his children and others like them should also learn to live with these signs. But they say that uneasily. They are more often confident in their own liberal bravado, calling attention to their ability to bear the pain of this vicious invective: "I hate what you say but I will defend to the death your right to say it."

That is the most important thing, in their opinion. The signs that we have been talking about, the bigoted invective that defiles our public environment, should be no concern of the law, they say. People are perfectly within their rights, publishing stuff like this. There is nothing to be regulated here, nothing for the law to concern itself with, nothing that a good society should use its legislative apparatus to suppress or disown. The people who are targeted should just learn to live with it. That is, they should learn

to live their lives, conduct their business, and raise their children in the atmosphere that this sort of speech gives rise to.

I disagree. I think there is something socially and legally significant at stake. We can describe what is at stake in two ways. First, there is a sort of public good of inclusiveness that our society sponsors and that it is committed to. We are diverse in our ethnicity, our race, our appearance, and our religions. And we are embarked on a grand experiment of living and working together despite these sorts of differences. Each group must accept that the society is not *just* for them; but it *is* for them too, along with all of the others. And each person, each member of each group, should be able to go about his or her business, with the assurance that there will be no need to face hostility, violence, discrimination, or exclusion by others. When this assurance is conveyed effectively, it is hardly noticeable; it is something on which everyone can rely, like the cleanness of the air they breathe or the quality of the water they drink from a fountain. This sense of security in the space we all inhabit is a public good, and in a good society it is something that we all contribute to and help sustain in an instinctive and almost unnoticeable way.

Hate speech undermines this public good, or it makes the task of sustaining it much more difficult than it would otherwise be. It does this not only by intimating discrimination and violence, but by reawakening living nightmares of what this society was like—or what other societies have been like—in the past. In doing so, it creates something like an environmental threat to social peace, a sort of slow-acting poison, accumulating here and there, word by word, so that eventually it becomes harder and less natural for even the good-hearted members of the society to play their part in maintaining this public good.

The second way of describing what's at stake looks at it from the point of view of those who are meant to benefit from the assurance that is thrown in question by the hate speech. In a sense we are all supposed to benefit. But for the members of vulnerable minorities, minorities who in the recent past have been hated or despised by others within the society, the assurance offers a confirmation of their membership: they, too, are members of society in good standing; they have what it takes to interact on a straightforward basis with others around here, in public, on the streets, in the shops, in business, and to be treated—along with everyone else—as proper objects of society's protection and concern. This basic social standing, I call their *dignity*. A person's dignity is not just some Kantian aura. It is their social standing, the fundamentals of basic reputation that entitle them to be treated as equals in the ordinary operations of society. Their dignity is something they can rely on—in the best case implicitly and without fuss, as they live their lives, go about their business, and raise their families.

The publication of hate speech is calculated to undermine this. Its aim is to compromise the dignity of those at whom it is targeted, both in their own eyes and in the eyes of other members of society. And it sets out to make the establishment and upholding of their dignity—in the sense that I have described—much more difficult. It aims to besmirch the basics of their reputation, by associating ascriptive characteristics like ethnicity, or race, or religion with conduct or attributes that should disqualify someone from being treated as a member of society in good standing.

As the book goes on, we will look at a number of examples of this, of the way in which hate speech is both a calculated affront to the dignity of vulnerable members of society and a calculated

assault on the public good of inclusiveness. I offer a characterization of these concerns at this early stage in order to give readers a sense of what I think is at stake in the discussion of hate speech, a sense of what legislation limiting it or regulating it might be trying to safeguard. The case will be made in detail as the book goes on, and various objections confronted and answered.

The argument is not easy, and many readers will be inclined to dismiss it at the outset, because they just “know” that these sorts of publications must be protected as free speech and that we must defend to the death their authors’ right to publish them. Most people in the United States assume that that’s where the argument must end up, and they are puzzled (not to say disappointed) that I am starting off down this road. I think it is a road worth exploring, even if no one’s mind is changed. It’s always good to get clear about the best case that can be made for a position one opposes. However, for those who are puzzled about my involvement, let me begin with a little bit of intellectual biography.

### A Tale of Two Book Reviews

In 2008, I published a short piece in the *New York Review of Books*, reviewing a book by Anthony Lewis on the topic of free speech.<sup>1</sup> Lewis is a distinguished author and journalist who has written a number of books on constitutional issues, including *Gideon’s Trumpet* (1964), which was made into a TV movie starring Henry Fonda, and *Make No Law: The Sullivan Case and the First Amendment* (Random House, 1991).<sup>2</sup> Lewis’s 2007 book, *Freedom for the Thought That We Hate*, is a fine essay on the history and future of First Amendment protections in the United

States. *The New York Review of Books* does not seem to mind if a person reviews something in which the reviewer has been criticized. In *Freedom for the Thought That We Hate*, Lewis said that “[o]ne of the arguments for allowing hateful speech is that it makes the rest of us aware of terrible beliefs”—the depth and intensity of racist beliefs, for example—“and strengthens our resolve to combat them.”<sup>3</sup> He continued: “This argument was rudely countered by Jeremy Waldron, an Englishman who emigrated to teach law in the United States.”<sup>4</sup> And he quoted a passage from a 2006 essay I wrote in the *London Review of Books*, discussing John Durham Peters’s book *Courting the Abyss: Free Speech and the Liberal Tradition*.<sup>5</sup> In that review I said:

[T]he costs of hate speech . . . are not spread evenly across the community that is supposed to tolerate them. The [racists] of the world may not harm the people who call for their toleration, but then few of *them* are depicted as animals in posters plastered around Leamington Spa [an English town]. We should speak to those who are depicted in this way, or those whose suffering or whose parents’ suffering is mocked by [the Skokie neo-Nazis], before we conclude that tolerating this sort of speech builds character.<sup>6</sup>

Having quoted me, Lewis retorted that something like this view of mine had earlier “animated a movement, in the 1980s and 1990s, to ban hateful speech on university campuses.” And he said that that movement had led to all sorts of “foolishness” and political correctness. “Even a sense of humor seemed endangered.”<sup>7</sup>

With this provocation, I thought it appropriate to write a mildly critical review of Lewis's book in the *New York Review of Books*. I focused my critical comments on this issue of racist speech, expressing some misgivings about the arguments commonly used by Mr. Lewis and others in America to condemn what we call hate speech regulation. An expanded version of that review is included as Chapter 2 in the present volume.

Let me interrupt this tale with a word about definitions. By "hate speech regulation," I mean regulation of the sort that can be found in Canada, Denmark, Germany, New Zealand, and the United Kingdom, prohibiting public statements that incite "hatred against any identifiable group where such incitement is likely to lead to a breach of the peace" (Canada);<sup>8</sup> or statements "by which a group of people are threatened, derided or degraded because of their race, colour of skin, national or ethnic background" (Denmark);<sup>9</sup> or attacks on "the human dignity of others by insulting, maliciously maligning or defaming segments of the population" (Germany);<sup>10</sup> or "threatening, abusive, or insulting . . . words likely to excite hostility against or bring into contempt any group of persons . . . on the ground of the colour, race, or ethnic or national or ethnic origins of that group of persons" (New Zealand);<sup>11</sup> or the use of "threatening, abusive or insulting words or behaviour," when these are intended "to stir up racial hatred," or when "having regard to all the circumstances racial hatred is likely to be stirred up thereby" (United Kingdom).<sup>12</sup> As is evident, there are similarities and differences between these various instances of hate speech regulation. We shall discuss some of the details later. But all of them are concerned with the use of words which are deliberately abusive and/or insulting and/or threaten-



ing and/or demeaning directed at members of vulnerable minorities, calculated to stir up hatred against them. (Also, some of these laws, in an evenhanded spirit, threaten to punish insulting words directed at *any* racial group in the community even when the group is a dominant or majority group.)<sup>13</sup> Racial and ethnic groups are prime examples of the kinds of groups that are supposed to be protected by these laws, but more recently the protection has been extended to groups defined by religion as well.<sup>14</sup>

That was the kind of legislation Anthony Lewis and I were talking about. He was mostly opposed to it, though he said he wasn't as sure now about this opposition as he once was.<sup>15</sup> In my review, I ventured the suggestion that there was perhaps more to be said in favor of this legislation than Lewis was indicating. I didn't make any very strong assertion. As I have said, Lewis's book was, on the whole, a thoughtful contribution to this debate and I wanted to review it in that spirit. I did say that it wasn't clear to me that the Europeans and the New Zealanders were mistaken in their conviction that a liberal democracy must take affirmative responsibility for protecting the atmosphere of mutual respect against certain forms of vicious attack. And I ended the piece quite reasonably (I thought), saying that "[t]he case is . . . not clear on either side," and repeating (more elaborately) the sentiments that had annoyed Mr. Lewis earlier:

[T]he issue is not just *our* learning to tolerate thought that *we* hate—we the First Amendment lawyers, for example. The harm that expressions of racial hatred do is harm in the first instance to the groups who are denounced or bestialized in pamphlets, billboards, talk radio, and blogs. It is not

harm . . . to the white liberals who find the racist invective distasteful. 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>16</sup>

I thought that sounded all very measured and moderate. Until . . .

“YOU ARE A TOTALITARIAN ASSHOLE” screamed one of the emails I received after the piece was published. Other messages called me human garbage and a parasite on society. The emails left me a little bit bruised, and so when I was invited to deliver some lectures at Harvard—the 2009 Holmes 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 decided I would take the opportunity to explain myself. The three Holmes Lectures were delivered in Cambridge, Massachusetts, on October 5, 6, and 7 under the title “Dignity and Defamation,”<sup>17</sup> and were published in 2010 as an article in the *Harvard Law Review*.<sup>18</sup> The published lectures correspond (roughly) to Chapters 3, 4, and 7 of this book, though some ideas set out briefly in the third lecture are also developed in Chap-

ters 5 and 6. Chapter 8, which is more historical in character, was presented originally as an Amnesty International Lecture at Oxford in June 2010.

### **My Modest Intention**

My purpose in putting all this in front of you is not to persuade you of the wisdom and legitimacy of hate speech laws. My in-box can't take too many more of those hateful emails. Still less is it my aim to make a case for the constitutional acceptability of these laws in the United States. I will refer to the American debate from time to time, mostly suggesting ways in which it might be enriched by more thoughtful consideration of the rival positions. But as things stand, I think it is unlikely that legislation of the kind I set out above will ever pass constitutional muster in America. That's alright: there are many different kinds of laws, regarded as enlightened in other parts of the world, that do not satisfy this test—gun control laws, for example. The point is not to condemn or reinterpret the U.S. constitutional provisions, but to consider whether American free-speech jurisprudence has really come to terms with the best that can be said for hate speech regulations. Often, in the American debate, the philosophical arguments about hate speech are knee-jerk, impulsive, and thoughtless. Like Mr. Lewis's title, they address the case for hate speech legislation as though it consisted of certain do-gooders' disliking speech of a certain kind (speech that expresses "thought that we hate") and trying to write their likes and dislikes into law. We can do better than that, I think; *I* will certainly try to do better.

The hope is that even if my readers end up continuing to support the current constitutional position in the United States, they will at least understand—rather than impatiently dismiss—the more thoughtful arguments that can be mustered in favor of these laws.

Mostly what I want to do in this book, then, is to offer a characterization of hate speech laws as we find them, in Europe and in the other advanced democracies of the world. I also want to characterize hate speech regulations as we have found them, too, in America from time to time—because we must remember that opposition to these laws in the United States is by no means unanimous or monolithic. Apart from the legal academy, which is definitely divided on the matter, there is division among our lawmakers. There were state, municipal, and village ordinances enacted and waiting to be struck down in *Virginia v. Black*,<sup>19</sup> in *R.A.V. v. City of St. Paul*,<sup>20</sup> and in *Collin and the National Socialist Party v. Smith (Village President of Skokie)*,<sup>21</sup> and there was a state law enacted in Illinois, waiting to be upheld by the Supreme Court in *Beauharnais v. Illinois*.<sup>22</sup> Not everyone in America is happy with the constitutional untouchability of racist leaflets in Chicago, Nazi banners and uniforms in Skokie (Illinois), and the burning of crosses in Virginia; not everyone thinks that lawmakers must be compelled to stand back and let this material deface their society. There has been an honorable impulse among some legislators in America to deal with this problem; and what we need to do—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, rather than permitting and tolerating them in the name of free speech? How do they characterize these prohibitions, and how do they position them in relation to concerns—to which they also subscribe—about individual rights and freedom of expression?

One obvious point is that many countries see these laws not as violations of rights but as something which may be permitted or even required in a human-rights context. For one thing, their constitutions acknowledge that basic rights, including freedom of expression, are legitimately subject to restriction. The Canadian Charter and the South African Constitution say this of 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.”<sup>23</sup> Prohibitions on hate speech are seen as satisfying that provision. Moreover, there are the affirmative requirements of the International Covenant on Civil and Political Rights (ICCPR) to consider. It is sometimes said that these provisions prohibit hate speech. That’s not quite right; what they do is obligate countries to pass legislation prohibiting it. Article 20(2) of the ICCPR requires that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”<sup>24</sup> So does the International Convention on the

Elimination of All Forms of Racial Discrimination (ICERD).<sup>25</sup> No doubt, states vary in the extent to which they allow their national legislation to be guided by international human-rights law; but this aspect of the international human-rights consensus cannot be lightly dismissed.<sup>26</sup>

These prohibitions are not just a matter of obligation. Many advanced democracies willingly embrace the idea of restrictions on hate speech. Unless we understand how that embrace might be motivated—what deeper values of dignity, respect, equality, democracy, and social peace might be involved—we will not understand the thinking behind the international-law position.

Equally, it is important to have a sense of the best that can be said against these provisions, whether it is said in terms of constitutional rights or not. Again, the case against hate speech restrictions is not made simply by treating the free-speech icon as a monstrosity. Hate speech is speech, no doubt; but not all forms of speech or expression are licit, even in America, and we need to understand why there might be a particular problem with restricting speech of this kind. My book is not an evenhanded survey of the arguments for and against. But I try to come to terms with and respond to what I think are the best arguments that can be made against the regulation of hate speech.

In Chapter 5, I shall respond to some arguments by the late C. Edwin Baker which assert that hate speech regulation (or almost any restriction on free speech) poses a threat to the ethical autonomy of the individual. Baker does not simply use “autonomy” as a slogan. He explains why it is a crucial part of a person’s autonomy to be able to disclose her values to others, and he approaches the issue of hate speech through that lens. I engaged in

oral argument with Baker on this issue on a number of occasions, and I believe his argument deserves a published answer.

The same is true of another powerful argument against hate speech laws—one made by Ronald Dworkin. Like a number of free-speech advocates, Dworkin is interested in 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>27</sup> He thinks that suppressing hate speech undermines the legitimacy of anti-discrimination laws by depriving people of the opportunity to oppose them. I have a great deal of respect for Professor Dworkin's work on this issue, as on many others. But I believe that in regard to hate speech, his legitimacy argument can be answered. I will consider this in Chapter 7.

In addition to these specific responses to Baker and Dworkin, I also devote some additional pages—in Chapter 5—to the distinction between offending people and attacking their dignity. I accept the point, which many critics make, that offense is not something the law should seek to protect people against. I have argued this elsewhere in connection with the furor that accompanied the publication of Salman Rushdie's novel *The Satanic Verses* in 1988.<sup>28</sup> But the case made in the present book is about dignity, not offense, and I try to explain the distinction between the two.

The chapters in the first half of the book are less defensive in character. As I have said, I want to develop an affirmative characterization of hate speech laws that shows them in a favorable light—a characterization that makes good and interesting sense of the evils that might be averted by such laws and the values and principles that might plausibly motivate them. The core of my argument—the best and most favorable account of hate speech

laws that I can give—is in the second half of Chapter 4, beginning with the section entitled “Assurance.”

Talk of hate speech is never particularly pleasant: opponents as well as defenders of this legislation find such speech distasteful. But we need to go beyond the description of the speech itself as hateful to an understanding of the way it pollutes the social environment of a community and makes life much more difficult for many of those who live in it. In Chapter 4, I will argue that the issue is about what a good society looks like, and what people can draw from the visible aspect of a well-ordered society in the way of dignity, security, and assurance, as they live their lives and go about their business. I shall argue that this can be understood as the protection of a certain sort of precious public good: an open and welcoming atmosphere in which all have the opportunity to live their lives, raise their families, and practice their trades or vocations. In Chapter 3 I shall sketch some background for this, arguing that it may be helpful to view hate speech laws as representing a collective commitment to uphold the fundamentals of people’s reputation as ordinary citizens or members of society in good standing—vindicating, as I shall say, the rudiments of their *dignity* and social status. These chapters, 3 and 4, are the affirmative core of the book.

The book ends with an essay of a different kind. Though there is a bit of history in Chapters 2, 3, and 4, my focus there is mainly on contemporary discussions. Chapter 8, however, takes us from twentieth-century and twenty-first-century debates about hate speech legislation into seventeenth- and eighteenth-century debates about religious toleration. I have long suspected that these debates were connected, but in the legal and philosophical litera-



ture they are often pursued as though they had nothing to do with each other. In this final chapter, I try to bring them together with a discussion of the way in which Enlightenment *philosophes*, from Locke to Voltaire, dealt with the question of expressions of religious hatred as threats to the character and viability of a tolerant society.

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