## The HEDGEHOG REVIEW

## Critical Reflections on Contemporary Culture

## **BOOK REVIEWS**



The Harm in Hate Speech

Jeremy Waldron

Cambridge: Harvard University Press,

Parents and teachers tell children that sticks and stones may break their bones but names will never harm them. Most children intuit that the adults are speaking nonsense: names and other nasty words hurt.

When not consoling children, most adults recognize that acts of cruelty are routinely perpetrated by means of ugly utterances that can sear and scorch, inflicting wounds and leaving scars. The larger truth underlying the deceptive bromide is that while the law in a free society prohibits deliberate harm to property and body, commitment to liberty of thought and discussion generally

restrains states from shielding citizens from emotional harms speech can inflict.

Drawing the line is a challenge. The United States is exceptionally protective of speech. The major restraint that constitutional law imposes on the content of speech stems from the landmark case Brandenburg v. Ohio (1969). In it, the Supreme Court held that inflammatory speech may be prohibited only if it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Other liberal democracies are less protective of speech. Indeed, there is a growing tendencyvisible, for example, in Canada, Denmark, Germany, New Zealand, and the United Kingdom-to enact expansive bans on inflammatory speech. This tendency can also be seen in the United States-particularly, and for going on three decades, on university campuses.

In The Harm in Hate Speech, which grew out of his 2009 Holmes Lectures at Harvard Law School, Jeremy Waldron presents the case in favor of regulating hate speech. A professor at New York University School of Law, and the Chichele Professor of Social and Political Theory at All Souls College, University of Oxford, Waldron believes that

American professors of constitutional law often fail to grasp the seriousness of the harms caused by hate speech and the justification, consistent with the requirements of a free society, for barring it. Waldron is at his best in examining the pain, the humiliation, and the obstacles to the full enjoyment of the rights and pleasures of citizenship arising from speech that targets a group and ascribes to all members wicked or monstrous qualities. But typifying much progressive thought, Waldron overlooks the critical question of the competence of legislators, executive branch officials, and judges to police the content of speech while preserving liberty of thought and discussion.

Waldron insists his critics misunderstand him. He is not in favor of restricting speech that merely causes offense. "The issue is publication and the harm done to individuals and groups through the disfiguring of our social environment by visible, public, and semipermanent announcements to the effect that in the opinion of one group in the community, perhaps the majority, members of another group are not worthy of equal citizenship." It does not seem to occur to Waldron that authorizing the government to determine what counts as the "disfiguring of our social environment" effectively gives the state limitless power to endorse speech it likes and suppress speech it dislikes.

Although he offers hypothetical and historical examples of hate speech directed at blacks, Jews, and Muslims, Waldron provides no evidence that blacks, Jews, or Muslims in America today are subject to visible, public, and semipermanent announcements of their unfitness for citizenship. Consequently, his book sometimes reads like an urgent quest for a solution to a hypothetical or historical problem.

To be sure, the United States has a painful history of the subjugation of, and discrimination against, blacks. To a vastly lesser extent, Jews faced prejudice. And many worried after al-Qaida's 9/11 attacks that Muslim Americans would be beset with widespread outpourings of vituperation and violence, which thankfully never materialized. Given the tremendous strides the country has made since its founding without hate speech laws, it is hard to understand why now, at the most inclusive moment in American history, the benefits of dramatically expanding governmental regulation of speech would outweigh the costs.

Waldron is aware that the regulation of speech involves tradeoffs. For example, he appreciates that restrictions on hate speech curtail individual autonomy. But he thinks we should weigh that loss against "the undermining of a public good, the dispelling of an assurance given by society to its most vulnerable members." While he recognizes that democratic legitimacy is rooted in the opportunity to debate the issues, he doubts we need to give voice in public discussions to "attacks on the dignity of minority groups."

Waldron appears to assume that the speech regulators will routinely be men and women of incorruptible character and impeccable judgment. But the conduct of faculty and administrators in universities, where speech codes, written and unwritten, have flourished for the last quarter-century, illustrates why government officials, subject to the greater temptations that come with greater power, should not be entrusted with the responsibility to regulate hate speech. Consider Harvard. In 2005 thenuniversity President Lawrence Summers precipitated a crisis when, at a closed-door session about how to promote women in the sciences, he observed that according to studies a higher proportion of men than women demonstrate the rare theoretical intelligence necessary to excel in the sciences—only to reject that as an explanation for women's under-representation. Despite Summers' multiple apologies for speaking unspeakable thoughts, the faculty demanded and got his resignation.

Tellingly, perhaps, Waldron praises Martha Minow, dean of Harvard Law School, for her writings on hate speech. Yet in 2010 Minow put an icy chill on free speech at the law school by condemning what she imperiously judged to be hurtful and degrading speech. She did so, specifically, by publicly reproaching a student for sending a private e-mail to two classmates that expressed the hope there was no connection between race and intelligence even as the student indicated that she could not dismiss the possibility without examining the scientific evidence.

These examples of the stifling of unpopular opinions by declaring them hurtful occurred at an institution whose very mission involves the vigilant protection of liberty of thought and discussion. They testify to the wisdom of our constitutional tradition, which keeps regulation of even genuinely hateful speech out of the hands of the state and leaves to the people the vital task of criticizing those who utter hate speech and defending those it targets.

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