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.[1] 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).[2] 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."[3] He continued: "This argument was rudely countered by Jeremy Waldron, an Englishman who emigrated to teach law in the United States."[4] 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.*[5] 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.[6]

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."[7]

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);[8] 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);[9] or attacks on "the human dignity of others by insulting, maliciously maligning or defaming segments of the population" (Germany);[10] 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);[11] 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).[12] 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.)[13] 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.[14]

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.[15] 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.[16]

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,"[17] and were published in 2010 as an article in the *Harvard Law Review*.[18] 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,*[19] in *R.A.V. v. City of St. Paul,*[20] and in *Collin and the National Socialist Party v. Smith (Village President of Skokie),*[21] and there was a state law enacted in Illinois, waiting to be upheld by the Supreme Court in *Beauharnais v. Illinois.*[22] 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."[23] 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."[24] So does the International Convention on the

Elimination of All Forms of Racial Discrimination (ICERD).[25] 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.[26]

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 monstrance. 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.[27] 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.[28] 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.

2 Anthony Lewis's *Freedom for the Thought That We Hate*

The United States, says Anthony Lewis, is the most outspoken society on earth: "Americans are freer to think what we will and say what we think than any other people" (ix).[1] They can do so without fear of official retaliation. If I had written, for example, in 2008 that George W. Bush was the worst president we had ever had, and that his vice president and former secretary of defense were war criminals, I would not have expected to be arrested for my impudence. That's just business as usual in America. "Today," says Lewis, "every president is the target of criticism and mockery. It is inconceivable that even the most caustic critic would be imprisoned for his or her words" (x).

It wasn't always so. In 1798 Colonel Matthew Lyon, a Republican member of Congress, sent a letter from Philadelphia to a newspaper called the *Vermont Journal* in which he conveyed to readers and constituents his low impression of President John Adams and the current administration:

> As to the executive, when I shall see the efforts of that power bent on the promotion of the comfort, the happiness, and

> accommodation of the people, that executive shall have my zealous and uniform support: but whenever I shall, on the part of the executive, see every consideration of the public welfare swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice; . . . when I shall see the sacred name of religion employed as a state engine to make mankind hate and persecute one another, I shall not be their humble advocate.

Shortly before this letter was published, Congress had passed a Sedition Act making it an offense to bring the president or Congress into disrepute or "to excite against them . . . the hatred of the good people of the United States."[2] Colonel Lyon was arrested and indicted under this legislation for seditious libel. At his trial, he disputed the constitutionality of the Sedition Act—a plea that was peremptorily struck out by the judge (Supreme Court Justice Paterson, riding circuit as Supreme Court justices did in those days). In the early 1800s, the First Amendment was understood by some as admonitory rather than as a legally enforceable restraint upon state and federal lawmakers. Or if it was seen as mandatory, it was thought to prohibit only prior restraints on publication, not criminal proceedings for seditious libel after publication had taken place.

In a curious proceeding, Colonel Lyon then called on the judge himself to testify to the extravagance of President Adams's household, for truth was a defense against charges of seditious libel under the 1798 Act. The judge replied angrily that the fare was plainer at the president's dinner table than at the Rutland Tavern.

The jury convicted Lyon, and the judge sentenced him to four months' imprisonment, from which he could not be released until he had also paid a $1,000 fine.[3]

The marshal charged with Colonel Lyon's imprisonment was a man called Fitch, who seems to have nurtured a long-standing grudge against him. Fitch had Lyon thrown into a tiny, filthy cell reserved mostly for horse thieves and runaway slaves. When Lyon's supporters heard about the conditions of his imprisonment, they rioted and almost tore down the prison. In 1800, the *Vermont Gazette* published an article describing Marshal Fitch as "the oppressive hand of usurped power" and "a hard-hearted savage, who has, to the disgrace of Federalism, been elevated to a station where he can satiate his barbarity on the misery of his victims." This, too, enraged the (Federalist) authorities. The editor of the *Gazette,* Anthony Haswell, was likewise convicted of seditious libel; he was fined $200 and imprisoned for two months.[4]

Why did locking these critics up seem like an appropriate thing to do in the early years of the republic? I am sure no explanation would be complete if it did not mention the volatile combination of wounded vanity and—for the time being—legally unlimited authority. But it would also be a mistake to omit the point that political institutions are sometimes a lot more fragile than they look. This entity—the state—which to us appears so powerful and self-sufficient, depends crucially on the opinion of those over whom it rules, and it requires for its operation a modicum of deference and respect. (Think of the way we still enforce laws against direct contempt of court—against ridiculing judicial officers in their courtrooms.) Murmurings of discontent are one thing. But if expressions of contempt and denunciations of op-

pression and corruption by officials become standard features of the public landscape, then the government's authority is shaken and citizens may start to think they can refuse to cooperate with the authorities or to comply with their directives unless compelled to do so. There is a danger, in other words, that the state will be thrown back on its meager resources for sheer coercion, without any goodwill or voluntary support or any sense of obligation on the part of its citizens. No democratic government in this predicament can do much or last long.

To many people, federal authority seemed weak and precarious in 1798. Public agitation by Colonel Lyon's supporters led to a brief uprising in Vermont, and there was a threat of considerable political violence elsewhere. George Washington was denounced as a thief and a traitor; John Jay was burned in effigy; Alexander Hamilton was stoned in the streets of New York; our hero, Matthew Lyon, attacked a Connecticut Federalist with fire tongs when the fellow spat on him in the House of Representatives; and Republican militias armed and drilled openly, ready to stand against Federalist armies.[5] Over everything, like a specter, hung news of the Jacobin terror in France. It was by no means obvious in those years—though it seems obvious to us now—that the authorities could afford to ignore venomous attacks on the structures and officers of government, or leave the publication of such attacks uncontested in the hope that they would be adequately answered in due course in the free marketplace of ideas. That a government could survive the published vituperations of the governed seemed more like a reckless act of faith than like basic common sense.

That is the premise of making seditious libel an offense, but

the fact that such a law is open to abuse is equally obvious. Pomposity is a standard hazard of political life; and the pain experienced by a politician when his inflated self-esteem is publicly punctured is likely to be out of all proportion to any real danger posed to the viability of the state. Government cannot last long if most people believe it is a criminal kleptocracy; but accusations of malfeasance are standard fare in electoral politics—standard criticisms which politicians in power will go to any lengths to avoid. So a tool designed to protect government as such from public contempt is almost certain to be used for partisan political advantage. That's the dilemma.

It wasn't just political criticism that was punished in the early years of the republic. In 1823, a man was jailed for sixty days in Massachusetts for writing 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."[6] At the time of the founding of the United States, William Blackstone's position—that "[b]lasphemy against the Almighty, . . . denying his being or providence, or uttering contumelious reproaches on our Saviour Christ . . . is punished, at common law by fine and imprisonment"[7]—was regarded as part of our heritage of common law, not just as a peculiarity of the English establishment. "Christianity," said a state court judge in 1824, "is and always has been a part of the common law of Pennsylvania." And that judge went on to suggest that Christianity could not do its work of holding society together if it was exposed to public denunciation. He added that prosecutions for blasphemous libel were perfectly compatible with freedom of conscience and free-

dom of worship, which the law of Pennsylvania also protected, since such prosecutions were directed not at belief but only at the most malicious and scurrilous public revilings of religion.[8]

How did we get from there to here? Anthony Lewis has taught law at Harvard and Columbia, but he does not fall into the lawyer's trap of ascribing the end of the offenses of seditious and blasphemous libel to the heroic actions of the judiciary. The Sedition Act did not last long; it was repealed in 1801. And its abuses were so clear to a subsequent generation that Congress in the 1840s passed bills to repay with interest the fines that Colonel Lyon and Anthony Haswell had incurred. But federal judges seemed perfectly happy to enforce it as long as it lasted. Its demise was the work of elected legislators. When something like seditious libel was revived in an Espionage Act passed in 1917 upon the entry of the United States into the First World War, once again the judges were by no means unenthusiastic. Oliver Wendell Holmes compared the publication of a leaflet denouncing conscription as slavery to a false shout of "Fire!" in a crowded theater, and the Supreme Court unanimously upheld a ten-year prison sentence for the author of the leaflet.[9] The premise was the same: the necessary tasks of government—in this case, military recruitment for war in Europe—could not be performed in an atmosphere polluted by public denunciation.

According to Lewis, it was not until 1931—in other words, 140 years after the passage of the First Amendment—that the Supreme Court began enforcing the constitutional guarantee of freedom of speech (Lewis, 39). It struck down a California law that had forbidden the display of a red flag "as a sign, symbol, or emblem of opposition to organized government."[10] Of course,

even before that year, there had been dissenting voices on the bench in favor of free speech and freedom of the press. Justice Holmes began the long process of reversing his preposterous equation—that criticizing the military was comparable to shouting "Fire!" in a crowded theater—as early as 1919, when he dissented from a Supreme Court decision upholding a twenty-year prison sentence imposed upon Jacob Abrams for throwing leaflets from a building in New York condemning President Woodrow Wilson's dispatch of troops to Russia to fight the Bolsheviks.[11] But there were dissenters in the legislature as well—legislators who opposed the Espionage Act or who spoke out against the Smith Act, passed in 1940 (and still on the books today), which was used in subsequent decades to punish advocates of Marxism-Leninism. If justices like Holmes and Louis Brandeis are now glorified for their dissents, it is because their opinions are cited by a more rights-conscious Court many decades later, not because free speech was safe in the hands of the judiciary at the time.

What do we believe now about free speech that most American judges and politicians did not believe in 1798 or 1823 or 1919? What do we now believe that has made the United States the safest country on earth in which to criticize political leaders or denounce societal shibboleths?

Prosecutions for attacks on Christianity faded away much more quickly than prosecutions for political speech. The logic of prosecuting atheists always sat uncomfortably with the American position on religion. Christian belief might appear vulnerable to public denunciations, and it might seem in need of the law's support—but it wasn't clear that this was support that the law was

entitled to give. The logic of blasphemous libel required courts to find ways of seeing the churches, or Christianity in general, as indispensable supports of government. By the middle of the nineteenth century, American courts found themselves unable to do this, and they struck out prosecutions for blasphemy not on free-speech but on anti-establishment grounds. Since Christianity could not be seen as part of the organized apparatus of social control, it would just have to fend for itself in the unruly marketplace of sacred and profane ideas.

So far as political speech is concerned, I suppose the crucial thing is that we now see the power of the state as much more of a threat to the individual than vice versa. In 1798, federal authority looked precarious; it was at the mercy of public opinion, and public opinion was looking well-nigh ungovernable. In the two centuries since then, we have learned that the state does not need our solicitude or legal protection against criticism. It is strong enough to shrug off our attacks, strong enough to dismiss our denunciations as not worth the effort of suppression. When Justice Holmes finally changed his mind on these matters in the 1919 case that I mentioned earlier, *Abrams v. United States,* he predicated his dissent on the derisory impotence of what he called the defendants' pronunciamentos. "Nobody," 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 government arms" (Lewis, 29). Whatever threat was posed by these "poor and puny anonymities" would be better countered not by the suppression of speech but by more speech—by what Holmes called "the free trade in ideas."

As organized government came to seem less vulnerable, it also came to seem, itself, much more of a threat to the intellectual life of the country, to debate and deliberation among the citizenry and to the dignity and individuality of particular writers and dissenters. From this perspective, it is not the threat to social order that is alarming; it is the massive power that the government can deploy—that the government of this country has deployed in the past and the governments all over the world continue to deploy—to suppress dissent, deflect criticism, and resist exposure of its malfeasances. That is why the First Amendment has come to seem important. And to many people it has come to seem important as a counter-majoritarian device, because it is not just our rulers themselves who seek to suppress dissent. "It is, says Anthony Lewis, "a seeming characteristic of American society that it is periodically gripped by fear" (103)—panic about Jacobin terror in 1798, reactions against political radicalism and Bolshevism in 1919, hysteria about Communist infiltration in the 1940s and '50s, fear of radical Islam in more recent years. "[R]epeatedly, in times of fear and stress, men and women have been hunted, humiliated, punished for their words and beliefs" at the behest of a hysterical public (106). Those who call for these purges may think of themselves as patriots and as defenders of a free society; but their patriotism, in the words of one judge whom Lewis quotes,[12] is cruel and murderous. Like religious fanaticism, "it, too, furnishes its heresy hunters and its witch burners, and it, too, is a favorite mask for hypocrisy, assuming a virtue which it haveth not" (129–130).

Anthony Lewis is a defender of free speech, yet he is aware not only of the contingency of its development in the United States,

but of a number of outstanding areas in which First Amendment freedoms remain controversial. Invasions of privacy, campaign finance, protection of the integrity of jury trials, and the regulation of hardcore pornography are all touched on and illuminated by Lewis's "biography" of the First Amendment. In some of these areas, Lewis is open to the arguments put forward by those who advocate limits on freedom of the press. For example, he is inclined to accept Justice Stephen Breyer's suggestion that sometimes protecting people from press intrusion can promote free speech: statutory restrictions on making private conversations public "encourage conversations that otherwise might not take place" (76).[13] In other cases, however, as in the argument that hardcore pornography is demeaning to women, he is much more dismissive (138).

One of the most difficult areas of modern controversy concerns what is sometimes called "hate speech"—that is, publications which express profound disrespect, hatred, and vilification for the members of minority groups. In 1952, the Supreme Court upheld an Illinois law 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." The case was *Beauharnais v. Illinois,* and the Court refused an invitation on First Amendment grounds to overturn a fine of $200 imposed on the president 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, guns, knives, and marijuana of the negro."[14]

Justice Felix Frankfurter, writing for the majority, described

this pamphlet as a "criminal libel," and he thought this put it beyond the protection of the First Amendment. "Libelous utterances," he said, "are not within the area of constitutionally protected speech." Anthony Lewis doubts that this argument would be accepted today (159). Its basis, he says, has been undermined by the 1964 Supreme Court decision in *New York Times v. Sullivan,* where the Court held that public figures cannot recover damages for libel unless they can prove that a false statement of fact was made maliciously or recklessly. In that case, the *Times* had published an advertisement proclaiming that racist Southern officials were using lawless tactics against the civil rights movement. A city commissioner in Montgomery, Alabama, had sued the newspaper—saying that the advertisement implicitly accused him of lawlessness—and he was awarded $500,000 damages by an Alabama court. The Supreme Court struck down the award on the ground that the 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."[15] 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 that the reasoning in *New York Times v. Sullivan* would protect the defendant in the *Beauharnais* case. The African Americans libeled collectively in the "obnoxious leaflet"[16] that was at issue in *Beauharnais* were not public officials who had taken on the burden of office. They were ordinary citizens who may have thought

they had a right to be protected from scattershot allegations of the most severe criminal misconduct—the "rapes, robberies, guns, knives, and marijuana of the negro." But Lewis is probably right that Joseph Beauharnais's conviction would not be upheld today. A 1969 decision of the Supreme Court,[17] reversing the conviction of an Ohio Ku Klux Klan leader, has held that hate speech, like seditious speech, is protected unless it is calculated to incite or likely to produce imminent lawless action.

Lewis notes that the United States differs from almost every other advanced democracy in the protection it currently gives to hate speech (157). The United Kingdom has long outlawed the publication of material calculated to stir up racial hatred. In Germany, it is a serious crime to display the swastika or other Nazi symbols. Holocaust denial is punished in many countries: the British author David Irving—a man who prides himself on having shaken more hands that shook the hand of Hitler than anyone else alive—was imprisoned until recently in Austria for this offense. New Zealand, Canada, France, and the Scandinavian countries—all use their laws to protect ethnic and racial groups from threatening, abusive, or insulting publications likely to excite hostility against them or bring them into public contempt. Moreover, these restrictions are not widely viewed as violations of individual rights; on the contrary, most countries have enacted them pursuant to their obligations under Article 20(2) of the International Covenant on Civil and Political Rights, which says that expressions of hatred likely to stir up violence, hostility, or discrimination *must* be prohibited by law.

Should the United States continue as an outlier in this regard? Our First Amendment faith is that the best response to a racist

pamphlet is more speech, not less speech. But Lewis says, at the end of his book, that he is not as certain about this answer as he used to be: "In an age where words have inspired acts of mass murder and terrorism, it is not as easy for me as it once was to believe that the only remedy for evil counsels, in [Justice] Brandeis's phrase, should be good ones" (166). I believe he would still oppose anything along the lines of the British legislation which makes expressions of racial or interreligious hatred unlawful even when there is no immediate prospect of violence. But it is worth considering whether the arguments that have supported First Amendment protection in other areas really do support it for this case.

I said earlier that 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 slur of racist denunciation? I said earlier that prosecutions for blasphemous libel came to seem inappropriate when we realized that, however vulnerable the Christian religion may be, it was not something that the law had any business trying to protect. Does that apply to racial minorities? Is their position in society—the respect they enjoy from fellow citizens—a matter of purely private belief, with which the law should have no concern? 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.

In general, prosecutions for speech that threatened the good order of society came to seem inappropriate when we realized that we need not be so panic-stricken as the Federalists were in 1798 about public demonstrations and disorder. But is that true of the system of mutual respect among the members of racial groups? Can we complacently assume that it, too, is immune from serious disturbance, so that we need not worry about the cumulative effect of racist attacks? I have my doubts. 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. We sometimes say that the history of the United States is different in this regard from that of the European countries: their experience with the Holocaust necessarily flavors their attitude to hate speech, whereas Americans can afford to be more relaxed. But racial segregation, second-class citizenship, racist terrorism (lynchings, cross-burnings, fire-bombings of churches) are living memories in the United States—they are no less vivid than the memories of McCarthyism that haunt the defenders of the First Amendment—and those memories of racial terror are nightmarishly awakened each time one of these postings or pamphlets is put out into the public realm.

These hard questions are not intended to dispose of the matter. For the story of First Amendment freedom is not only that government came to seem so strong that it did not need the law's protection against criticism; the story of First Amendment freedom is that the government came to seem so strong that it constituted itself as a menace to individual freedom, and that is why it had to be restrained from interfering with free speech and freedom of the press. And I suppose the worry here is that a government equipped with hate speech codes would become a menace to free thought generally and that all sorts of vigorous dissenters from whatever social consensus the government was supporting would be, as Lewis puts it, "hunted, humiliated, punished for their words and beliefs" (106). Not only that, but as we saw earlier, campaigns against free speech tend to be motivated by public hysteria, and there is no telling what outbreaks of public hysteria would lead to if they had hate speech codes as one of the channels for their expression.

To me, it seems odd to concentrate only on *this* sort of manifestation of public hysteria, on the waves of majoritarian panic that could flow through the channels of the law, as opposed to other ways in which waves of public hysteria can threaten freedom in this society. Surely public hysteria is a danger to be recognized on *both* sides of this debate—both when it manifests itself in repressive laws and when it manifests itself in expressions of racial hatred. Why should we think that there needs to be protection only against the constraining laws and never against the racist expression?

Lewis's settled position, I think, is that we'd do better to swallow hard and tolerate "the thought that we hate" than open our-

selves to the dangers of state repression. I am not convinced. The case is certainly not clear on either side, and Lewis acknowledges that. But it is worth remembering a couple of final points.

First, the issue is not the *thought* that we hate, as though defenders of hate speech laws wanted to get inside people's minds. 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. The old idea of group *libel*—as opposed to hateful thoughts or hateful conversation—makes this clear, and it is no accident that a number of European countries still use that term.

Second, the 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 the racist pamphlets and billboards. It is not harm—if I can put it bluntly—to the white liberals who find the racist invective distasteful. Maybe we should admire some lawyer who says he hates what the racist says but defends to the death his right to say it, yet this sort of intellectual resilience is not what's at issue. The 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.

8 Toleration and Calumny

This final chapter takes a different turn. In the past, I have written about toleration, particularly the seventeenth-century debate about toleration conducted by philosophers like Pierre Bayle, Thomas Hobbes, and John Locke.[1] Until recently, I never thought to make a connection between that debate and the debate about hate speech. But I believe now that there is a connection to be made, and this chapter attempts to set it out. If nothing else, it may help to add a dimension of historical richness to our often flat and colorless constitutional debates about these issues.

Osborne's Case

In 1732, somebody called Osborne (spelled with an "e" or without an "e"—"Osborn"—depending on which law report you read)[2] published and distributed a broadsheet in London. Its title was *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*. In the body of

the paper, Osborne set forth "a particular Account of the whole Transaction," and maintained "that the like Cruelty had often been committed by the Jews." The pamphlet inflamed anti-Semitic sentiment in London. We are told that "Jews were attacked by multitudes in several parts of the city, barbarously treated and threatened with death, in case they were found abroad any more."[3] One of those who was attacked was an attorney called Fazakerly, and Mr. Fazakerly laid an information for libel against Osborne, the author of the broadsheet, supported by affidavits to the effect that "this Paper had so much incensed the Mob against the Jews, that they had assaulted and beat in a most outrageous Manner the Prosecutor, who was a Jew."[4]

The court's initial response was to strike out the action, on the ground that the allegation contained in the paper "was so general that no particular Persons could pretend to be injured by it."[5] The chief justice, Lord Raymond, said that he believed the Court could do nothing in the case, because no particular Jews were able to show to the Court that they were pointed at in the paper more than any others.[6] But eventually the Court was persuaded to entertain the action, if not as a criminal libel, then on public-order grounds. According to one report, the Court was moved precisely by the generality of the charge. The story in Osborne's paper was that this was something "which the Jews have frequently done; and therefore the whole community of the Jews are struck at."[7] Another report says that the Court emphasized the public-order aspect: "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 De-

scription of a Libel, yet it will be pernicious to suffer such scandalous Reflections to go unpunished."[8] A third report has the Court taking a similar line, but even more forcefully: "Admitting an information for a libel may be improper, yet the publication of this paper is deservedly punishable in an information for a misdemeanour, and that of the highest kind; such sort of advertisements necessarily tending to raise tumults and disorders among the people, and inflame them with an universal spirit of barbarity against a whole body of men, as if guilty of crimes scarce practicable, and totally incredible."[9]

It is a remarkable case, because England was not known for its acceptance of Jews as a proper subject of public solicitude in the early eighteenth century. One of the reports we have of Osborne's case is an indirect report from an 1819 decision in which the Lord Chancellor had held that Jewish children were not entitled to seek places in a free school established in Bedford.[10] In that case, the Lord Chancellor mentioned (without comment) a notorious dictum of the great jurist Sir Edward Coke, cited against the Jewish petitioners, to the effect that "[a]ll infidels are in law *perpetui inimici,* perpetual enemies (for the law presumes not that they will be converted, that being *potentia remota,* a remote possibility), for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace."[11] (But Coke's dictum was contested by counsel for the petitioners and powerful dicta were cited against it.)[12] The Lord Chancellor did say that that "it is the duty of every judge presiding in an *English* Court of Justice, when he is told that there is no difference between worshipping the Supreme Being in cha-

pel, church, or synagogue, to recollect that Christianity is part of the law of *England*."

That's the background. So the decision in Osborne's case—convicting someone for anti-Semitic libel or for fomenting anti-Semitic disorder—almost ninety years earlier is all the more remarkable.

In this chapter, I want to begin with Osborne's case and go backwards—back to the idea of a tolerant society that emerged in the late-seventeenth and eighteenth centuries. I want to consider the role that anti-defamation, the sort of public-order-based prohibition on group libel that we see at work in 1732 in Osborne's case, played in contemporary conceptions of toleration.

Conceptions of Toleration

My questions are: How large did the issue of hateful defamation loom in Enlightenment theories of toleration? Were seventeenth- and eighteenth-century *philosophes* committed to the idea that people should refrain not only from violence against one another on religious grounds, but also from expressions of hatred and vituperation? I want to ask about the imagery of a tolerant society that we find in Enlightenment philosophy ranging from Locke and Bayle to Montesquieu, Diderot, and Voltaire: Is a tolerant society just a society free from religious persecution, or is it a society in which people cohabit and deal with one another in spite of their religious differences in an atmosphere of civility and respect, an atmosphere that is not disfigured by grotesque defamations of the sort that we saw in the case of *R. v. Osborne?*

Toleration, we know, is a principle that can be more or less expansive, more or less grudging. Everyone agrees that at its core is a requirement that force or legal sanctions should not be used against people to coerce them to abandon their religious beliefs and practices or adopt those approved by the state. Almost everyone agrees that toleration imposes duties on ordinary members of society as well; they must not press their government to impose penalties or coercion on members of unpopular religions or religious minorities, and they themselves must refrain from acts of violence against people who do not share their faith or worship as they do. That's the core of toleration. But our conception of the state's duty of toleration can be expanded to include not just nonpersecution, but disestablishment or even comprehensive dissociation of state and law from religion—what Richard Hooker called "a wall of separation between church and state."[13] And equally our conception of the citizen's duty of toleration can also be expanded to include not just refraining from religiously motivated violence, but refraining also from religious insult, libel, and vituperation; the citizen might also be conceived to have a duty of nondiscrimination on religious grounds; he might even have, as John Locke argued, a duty of "charity, bounty, and liberality" toward those of other religions, a duty required of us by what Locke called "that natural fellowship" that exists between all men, regardless of their faith.[14] On each of these issues—each of these possible expansions or elaborations of the duty of toleration—there is debate in modern times, and perhaps there was also debate in Enlightenment times, when our modern conceptions of toleration were formed. That's what I want to investigate. What was there in the way of consideration of what we nowa-

days would call religious hate speech in Enlightenment theories of toleration?

Religious hate speech, too, is something that can be understood in a more or less expansive way. It can range from the sort of horrendous blood libel that we see in Osborne's case, through more straightforward but still vicious insults and vituperations, such as the claim that followers of a certain dissident faith are dishonest or promiscuous, all the way to what might possibly be regarded as simple inferences from the speaker's own theology, such as that the followers of a certain faith are God-forsaken or idolaters or damned. In our day, it can include proclamations that followers of Islam are inclined by their faith to be supporters of terrorism.

We can understand the range of religious hate speech along a number of spectrums. (1) The simplest is the one I just mentioned: a spectrum of viciousness or intensity, where the hate speech varies, for example, according to the monstrosity of the content conveyed. (2) Or we can imagine a spectrum strung between two poles—the pole of public order at one end (where religious hate speech may be assimilated to incitement to disorder), and, at the other end, the pole of simple disagreement, where hate speech merges into what is merely the forceful expression of disagreement with another's position. (3) Or we can imagine a different sort of spectrum where an attack on the precepts and practices of a given church is distinguished from an attack on the personality and dignity of the members of the church: one might say "Transubstantiation is nonsense" or one might say "All Catholics are drunkards." We are conscious of some such range in the laws currently administered in the United Kingdom—laws that,

on the one hand, prohibit public expressions of religious hatred when they take an abusive and threatening form, and, on the other hand, privilege (in the words of section 29J) "discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions."[15]

One might imagine that the case for banning hate speech is strongest when the speech in question is at the extreme end of each of these spectrums: it conveys a terrible defamation; it threatens public order; and it attacks the dignity of the person, not just the reputation of his church. Osborne's case illustrates all three extremities. Our hypothesis might be that calumnies and libels of this extreme kind come close to being prohibitable by the principles of mutual toleration, just as laws prohibit physical attacks against people and their property.

The *Philosophes* on Hate Speech

With all this in mind, what does an investigation of the historical texts reveal about Enlightenment models of toleration? What do the *philosophes* say about libels, hate speech, and religious calumnies?

The first thing to notice is that a reading of the Enlightenment literature on toleration reveals nothing on this matter comparable in explicitness or extent to the *philosophes'* discussion of the use of force and legal sanctions by the state against religious minorities. John Locke's *Letter Concerning Toleration* is the most sustained piece of writing on all this in the early modern period —sustained not so much in length (Pierre Bayle's *Philosophical Commentary on . . . Luke 14:23* is much longer) as in the analytic

density of argumentation. The *Letter* devotes a tremendous amount of discussion to the relation between coercion and belief, and a considerable amount of discussion to the philosophical difference between the idea of a church and the idea of civil society; but Locke devotes nothing comparable in the way of space or argument to the question of how we should regard vituperation in the context of religious diversity.

Nothing comparable—but the theme is there if you read the *Letter* carefully. Locke's view of an intolerant society is in part a conception of anger and uproar: "No man is angry with another for an error committed in sowing his land or in marrying his daughter. . . . But if any man do not frequent the church, . . . or if he brings not his children to be initiated in the sacred mysteries of this or the other congregation, this immediately causes an uproar. The neighbourhood is filled with noise and clamour."[16] In characterizing the horrors of an intolerant civil society, Locke talks about the "endless hatreds" between religious groups. He lambastes ministers for what they preach from the pulpit: "[A]ll men, whether private persons or magistrates (if any such there be in his church), [should] diligently endeavour to allay and temper all that heat and unreasonable averseness of mind which either any man's fiery zeal for his own sect or the craft of others has kindled against dissenters."[17] What we need to do is calm the furious vituperations. And Locke intimates "how happy and how great would be the fruit, both in Church and State, if the pulpits everywhere sounded with this doctrine of peace and toleration."

Speaking more specifically of the duties that the principle of toleration imposes upon churches, Locke says: "[N]o church is bound, by the duty of toleration, to retain any such person in

her bosom as, after admonition, continues obstinately to offend against the laws of the society [by which Locke means the church's own laws of faith and worship]. . . . [N]evertheless, in all such cases care is to be taken that the sentence of excommunication, and the execution thereof, carry with it *no rough usage of word or action* whereby the ejected person may any wise be damnified in body or estate."[18] "No rough usage of word or action": this strongly suggests that Locke favors limits on what may be said about excommunicates, as well as on what may be done to them.

Even when Locke is conceding to Jonas Proast, in the later *Letters on Toleration,* that coercion may perhaps work indirectly to promote religion, he still opposes it; and it is interesting that the doubts he expresses include doubts about the use of attacks on people's honor, as well as about attacks on their person and property:

> Loss of estate and dignities may make a proud man humble: sufferings and imprisonment may make a wild and debauched man sober: and so these things may "indirectly, and at a distance, be serviceable towards the salvation of men's souls." I doubt not but God has made some, or all of these, the occasions of good to many men. But will you therefore infer, that the magistrate may take away a man's honour, or estate, or liberty for the salvation of his soul; or torment him in this, that he may be happy in the other world?[19]

That it occurred to Locke that this duty might be a duty upheld by law is evident from the terms of the *Fundamental Consti-*

tutions of Carolina, in whose drafting he had a hand. Article 97 of the 1669 version reads: "No person shall use any reproachful, reviling, or abusive language against the religion of any church or profession, that being a certain way of disturbing public peace, and of hindering the conversion of any to the truth, by engaging them in quarrels and animosities, to the hatred of the professors and that profession, which otherwise they might be brought to assent to."[20] We can't quite infer that this was Locke's view, any more than we can infer Locke's views about slavery from other provisions in the *Constitutions*.[21] Locke was a secretary for the colonial enterprise in the Carolinas, not its lawgiver. But his evident familiarity with a legal prohibition on religious calumny shows that it is not out of the question to attribute this position to him.

So we have two themes from Locke. One is a belief that public expressions of hatred and vilification are typical of an intolerant rather than a tolerant society. And the second is the claim that there is a specific duty—perhaps even a legal duty—to refrain from rough usage of word, as well as rough usage of action, if that is calculated to have a detrimental impact on an individual's person or honor or estate.

A third theme from Locke is one that we have already noticed. For Locke, the duty of toleration is bound up with a general duty of charity, civility, and good fellowship:

> [N]o private person has any right in any manner to prejudice another person in his civil enjoyments because he is of another church or religion. All the rights and franchises that belong to him as a man, or as a denizen, are inviolably to be

> preserved to him. These are not the business of religion. No violence nor injury is to be offered him, whether he be Christian or Pagan. Nay, we must not content ourselves with the narrow measures of bare justice; charity, bounty, and liberality must be added to it. This the Gospel enjoins, this reason directs, and this that natural fellowship we are born into requires of us.[22]

But isn't "charity, bounty, and liberality" just happy talk, not a serious requirement of toleration? Who ever heard of anyone having a *right* to another's "charity, bounty, and liberality"? Well, actually John Locke did believe that, as is evident from the famous doctrine of charity set out in Chapter IV of the *First Treatise*.[23] And I am with historian John Marshall in insisting we should not underestimate either the force or the importance of this strand in Locke's theory.[24] Locke talks of our duty to maintain "love and charity in the diversity of contrary opinions," and adds that by this he means not just "an empty sound, but an effectual forbearance and good will."[25] We may be nervous about this because we worry that a doctrine of charity is to be understood as a specifically Christian doctrine—in the passage just quoted, Locke calls it "an indispensable duty for all Christians"[26]—and we want, if possible, to recover from Locke's work a theory of toleration with a broader foundation than that. But it is far from clear that Locke would endorse such a project.

The three points I have drawn from Locke—(1) public execration as typical of an intolerant society, (2) the claim that there is a specific obligation to refrain from using words to harm people you disagree with, and (3) an affirmative image of peace and char-

ity amid diversity—these themes are developed also in a much longer work, Pierre Bayle's *Philosophical Commentary on These Words of the Gospel, Luke 14.23, "Compel Them To Come In, That My House May Be Full,"* published in 1686, a few years before Locke's *Letter.*

Of the second point, that it is possible to harm people by execration as well as by physical violence, Bayle has no doubt. He knows that religious authorities use this method; on their view, "smiting and slaying Men, blackning 'em by all kind of Calumny, betraying 'em by false Oaths, are all good Actions in a Member of the true, against a Member of a false Church."[27] Bayle talks of slander as "that Pest of Civil Society,"[28] and insists that its use is never justified, any more than murder, theft, or perjury, for the sake of bringing a heretic to salvation: "[R]efraining from the Goods or Good Name of our Neighbor, not swearing a false Oath, not debauching our Neighbor's Wife or his Daughter, not smiting, reviling, or insulting him, are all matters of Obligation; and therefore whatever Benefit he may be suppos'd to reap from our calumniating . . . with regard to Salvation, it's by no means allowable to treat him after this manner."[29] Bayle, like Locke, is in no doubt that execration as well as violence is typical of the horrors of an intolerant society: "Must not this exasperate the Spirits of both sides, kindle a deadly *Hatred* to one another, force 'em to traduce and slander each other, and become mutually wickeder and worse Christians than they were before?"[30]

And when Bayle concocts his affirmative vision of a tolerant society characterized unavoidably by religious diversity, it is a society free of reviling—free of "the furious and tumultuous Outcrys of a Rabble of Monks and Clergymen"—as well as of the

more tangible forms of persecution. The imagery Bayle uses is that of the marketplace or bazaar: "the Diversity of . . . Churches, and Worship, wou'd breed no more Disorder in Citys or Societys, than the Diversitys of Shops in a Fair."[31]

> Did each Party industriously cultivate that Toleration which I contend for, there might be the same Harmony in a State compos'd of ten different Sects, as there is in a Town where the several kinds of Tradesmen contribute to each others mutual Support. All that cou'd naturally proceed from it wou'd be an honest Emulation between 'em which shou'd exceed in Piety, in good Works, and in spiritual Knowledge. . . . Now it's manifest, such an Emulation as this must be the Source of infinite publick Blessings; and consequently, that Toleration is the thing in the world best fitted for retrieving the Golden Age, and producing a harmonious Consort of different Voices, and Instruments of different Tones, as agreeable at least as that of a single Voice.[32]

The marketplace image—not Oliver Wendell Holmes's "marketplace of ideas," but the economic market as an image of tolerant and amicable interchange—is well known from the later Enlightenment as well, in Voltaire's portrayal of the Royal Exchange in London in his *Letters on the English* (1734). Voltaire speaks of the Royal Exchange in London "where the representatives of all nations meet for the benefit of mankind."

> There the Jew, the Mahometan, and the Christian transact together, as though they all professed the same religion, and give the name of infidel to none but bankrupts. There the

> Presbyterian confides in the Anabaptist, and the Churchman depends on the Quaker's word. At the breaking up of this pacific and free assembly, some withdraw to the synagogue, and others to take a glass. This man goes and is baptized in a great tub, in the name of the Father, Son, and Holy Ghost: that man has his son's foreskin cut off, whilst a set of Hebrew words (quite unintelligible to him) are mumbled over his child. Others retire to their churches, and there wait for the inspiration of heaven with their hats on, and all are satisfied.[33]

But all can gather together civilly and do business in the Royal Exchange without hatred, without vituperation.

For his own part, Voltaire added this about spoken expressions of hatred: even though he condemned certain aspects of the religious practice of Muslims, "destest[ing] them as tyrants over women and enemies of the arts," he said "I hate calumny" even more, and added that for this reason he would refrain from defaming "the Turks," as he called them.[34] (I will come back in a moment to this question of whether a prohibition on expressions of hatred can interfere with the vehement expression of disagreement.) The hatred of calumny seems to be a matter of personal ethics, rather than political morality. But Voltaire saw a clear connection between private and public intolerance: "Who is a persecutor? It is he whose wounded pride and furious fanaticism irritate the prince or magistrate against innocent men guilty only of the crime of holding different opinions."[35] Persecution is not just what the state does. Voltaire makes it clear that it includes individuals' use of public denunciations in order to goad the state into the wrongful use of law.

Let us round off our little survey of Enlightenment views on these matters with some material from Denis Diderot's *Encyclopédie*. My reference is to the entry titled *Intolérance*. The striking thing about Diderot's conception of intolerance is that he associates it with hatred and expressions of hatred: "The word 'intolerance' is commonly understood as this ferocious passion that stirs one to hate people that are in the wrong. . . . Instruction, persuasion, and prayer, here are the only legitimate ways to spread religion. Any means that would excite hatred, indignation, and scorn, is impious."[36] Like Voltaire, Locke, and Bayle, Diderot also associates intolerance with the breaking of the ordinary bounds of sociability—the use of ostracism, for example—as well as with more violent means of persecution. "Civil *intolerance* consists in breaking all relations with other men and in pursuing, by violent means of every sort, those whose way of thinking about God and His worship is different from our own. . . . It is impious to expose religion to the odious imputations of tyranny, of callousness, of injustice, of unsociability, even with the aim of drawing back to the fold those who would unfortunately have strayed away from it."[37]

So these are the points I want to stress: on the one hand, the natural association, in the minds of these Enlightenment thinkers, of intolerance with hatred and abuse, as well as with physical persecution; and, on the other hand, the natural association of tolerance with the ordinary bonds of charity and sociability.

Sociability

The latter point, about sociability—the suggestion that public calumnies should be banned because they disrupt ordinary so-

ciable relations among members of the same society—I think is quite important.

The idea is that not only do religious minorities have the right to be secure from attack and from being physically sanctioned for their faith or religious practice; they also have the right to be treated as members of society in good standing, with a status and acceptance that enables them to participate confidently in the ordinary routines and transactions of everyday social life. They don't have to be loved or befriended by those who differ from them on matters of religion. But they must be able to engage in ordinary dealings among people who are, in the circumstances of mass society, strangers to one another—I am thinking of Adam Smith's observation at the beginning of *The Wealth of Nations:* "In civilized society [man] stands at all times in need of the co-operation and assistance of great multitudes, while his whole life is scarce sufficient to gain the friendship of a few persons."[38] And dealings among people on this basis are the currency of ordinary dignity and respect. That's why the Voltaire passage about the Royal Exchange in London is so important.

I think it is a requirement of human dignity that we should deal with one another in this relaxed and civilized way. It may seem strange to associate dignity with dealings so mundane and materialistic; we think of dignity as carrying a sort of shimmering Kantian aura, fitting it for a much more transcendent role in political morality than this. But that's a mistake. The primary habitat of human dignity is the mundane. Philosophically, dignity may be a Kantian conception of immeasurable worth *(Würde),* personality as something noumenal, an end in itself, and so on.[39] But in law, it is a matter of status—one's status as an ordinary member of society in good standing, entitled to the same liber-

ties, protections, and powers that everyone else has—and it generates demands for recognition and treatment which accord with that status. The guarantee of dignity is what enables a person to walk down the street without fear of insult or humiliation, to find the shops and exchanges open to him, and to proceed with an implicit assurance of being able to interact with others without being treated as a pariah.

I believe that this conception of dignity as a matter of ordinary presence—the status of being respected in myriad anonymous interactions as a member of society in good standing—is actually a large part of what is at stake with toleration. The virtue of the passages I have quoted to you from Bayle and Locke, Diderot and Voltaire, is that they emphasize how incomplete a régime of toleration is when it merely restrains coercion and violence, leaving hatred, insult, and ostracism untouched.

It may be worth adding one other point. Peter Gay, in his work on Enlightenment, has emphasized the continuity between Enlightenment thinking about toleration and Enlightenment thinking about peace in international affairs.[40] In international affairs, the analogue of a narrow conception of toleration limited only to nonpersecution and a prohibition on the use of violence or coercion for religious ends would be a conception of peace that was simply an absence of war. I think it is interesting that, by and large, Enlightenment theorists were not satisfied with that image of peace. They looked forward to a more affirmative harmony among nations. The idea that peace could coexist with mutual denunciation among nations, so long as disagreements didn't issue in actual fighting—this possibility, analogous to the idea of those who argue both for religious toleration and for the protection of religious hate speech—would have struck them as absurd.

Exegesis and Excavation

I acknowledge that I have had to dig a little to find these Enlightenment materials. They are not front and center in seventeenth- and eighteenth-century writings on toleration; and, as I said at the beginning of the previous section, they are not discussed in anything like the detail or with anything like the analytic power that Locke and Bayle, for example, devote to the issue of physical coercion.

The fact that one has to excavate in order to find something to support the conclusion that religious hate speech might be as much at odds with toleration as more physical forms of persecution might persuade some people that the *philosophes* didn't really regard public expressions of religious hatred as a matter of concern at all, and that they did not really regard the suppression of religious insult as part of their tolerationist agenda. Their relative silence on the matter might be thought to support the modern "First Amendment position" that suppression of religious insult is not required—indeed, that it is prohibited—by liberal principles.

I think that would be premature. For one thing, there are the hints we have just been talking about and the quite substantial passages that have been unearthed. Something has to be said about them, before we saddle Locke, Bayle, Diderot, and Voltaire with the view that there is nothing intolerant about screaming vile insults or publishing blood libels.

There is also a question about burden of proof. There may be little that is explicit in the work of these authors, so far as a legitimate prohibition on religious hate speech is concerned. Equally, however, there is nothing that appears explicitly to support the

opposite view: that toleration requires religious hate speech to be left unmolested. And fitting that second position—the modern "First Amendment position"—into the rest of what the Enlightenment philosophers say about toleration seems (for my money, at least) to be actually quite difficult. If they are to be saddled with the view that religious hate speech is not to be prohibited, then considerable doubt is cast on their overall claim that toleration augurs in a new area of peace and cooperation in civil society.

Third, whatever is said or not said explicitly, or whatever the default position is taken to be, there is the direction or tendency of their overall arguments to consider. Let me concentrate for a moment on John Locke, because I know his arguments best.

Apart from a specifically Christian argument for toleration at the beginning of the *Letter,* Locke's general position is that power used coercively is quite inappropriate in religious matters. Religion is a matter of belief. Indeed, there is a premium on sincere belief; God is not interested in the insincere variety. Now, sincere belief is not subject to the will; we can't decide what to believe. But coercion works only on the will, the association of sanctions with one course of action making us decide to choose another. Since we cannot decide what to believe, coercion is not an appropriate means to use for religious ends. That's the essence of Locke's case.[41]

How does this apply to insults or libels? Well, considered as strategies to bring about religious change or conversion, they seem to fall before the same Lockean argument. It may be thought that people will give up their deviant beliefs under the lash of public calumny. The cost of maintaining a minority faith

will be simply too high: that may be the thought. But Locke's main argument refutes the proposition that the coercive power of opinion can be effective in this way. It may lead people to conceal their beliefs—to cower in hiding to avoid public expressions of hatred, and the boycotts and exclusions (not to mention the violence) that they intimate. But that won't get them to change their beliefs, because their beliefs are not subject to the will and therefore not vulnerable to this pressure. The best that a torrent of hatred and calumny can do is get them to change their religious behavior. But to aim just at that would be a mockery, Locke says.

In the second, third, and mercifully uncompleted fourth of his *Letters on Toleration,* Locke had to come to terms with an opponent (Jonas Proast) who conceded Locke's main line of argument, but suggested that coercive means applied carefully might lead to a situation in which people's beliefs changed even if they couldn't bring about that change directly. Forcing a change in behavior might result indirectly, and in the long run, in a change in belief. And I suppose the same might be true of calumny. Locke had a lot to say about the details of this argument; but he also indicated a readiness to retreat to a backup position. No doubt anything at all might bring about a given result—our Savior, Locke said, used clay and spittle to cure blindness—but we have to ask whether this particular means was ordained by God for religious conversion. Locke makes a pretty clear case that, in the preaching of Jesus Christ, there was certainly no ordaining of violent means, and it would not be hard to establish that there was no ordaining of abuse or vilification, either.

Now, as it stands, this Lockean argument that I have cobbled together is perhaps a little too quick. It ignores the fact that cal-

umny may be used defensively rather than offensively—to warn vulnerable people who hold the orthodox faith against hobnobbing with infidels and heretics. Maybe the point of publicly damning Jews as baby-killers, or, I don't know, denouncing Anabaptists as sodomites, is to ensure that vulnerable Anglicans steer well clear of them. Locke doesn't address this possibility explicitly. But the whole dynamic of religious argumentation that he imagines eschews virulent expressions of hatred, even as a defensive strategy. The *Letter Concerning Toleration* is dominated by a conviction that such means are vicious and ineffective, certainly compared to less virulent alternatives: "[H]ow many, do you think, by friendly and christian debates with them at their houses, and by the gentle methods of the gospel made use of in private conversation, might have been brought into the church; who, by railing from the pulpit, ill and unfriendly treatment out of it, and other neglects and miscarriages of those who claimed to be their teachers, have been driven from hearing them?"[42] The methods by which the members of a congregation are to be kept in check by their religious leaders are "exhortations, admonitions, and advices,"[43] not raillery and abuse.

In addition, Locke talks specifically about denunciations and rumors of misconduct by various religious sects. Having said that the magistrate may not regulate religious worship, he imagines a response:

> You will say, by this rule, if some congregations should have a mind to sacrifice infants, or (as the primitive Christians were falsely accused) lustfully pollute themselves in promiscuous uncleanness, or practise any other such heinous enor-

> mities, is the magistrate obliged to tolerate them, because they are committed in a religious assembly? I answer: No. These things are not lawful in the ordinary course of life, nor in any private house; and therefore neither are they so in the worship of God, or in any religious meeting.[44]

His view seems to be that either the denunciations are true, in which case what is appropriate is a complaint to the authorities about unlawful conduct, or they are false, in which case they should not be voiced at all.[45] Even when he himself is voicing doubts about the toleration of Roman Catholics, what is remarkable is how careful he is to try to separate denunciations which might genuinely be matters of public concern from those used simply as a form of abuse or as a way of bolstering one's own religious position.[46]

Perhaps the most common use of calumny is not as a means to an end (either the end of drawing people to one's own faith or the end of protecting one's co-religionists from apostasy), but simply as a form of religious self-expression. Almost a century after the end of the period of Enlightenment that we are studying, John Stuart Mill confronted a similar difficulty in his essay *On Liberty*. What is to be done about social sanctions visited by some people upon others whose religion or ethics they despise? Boycotts and ostracism may be frowned upon, but they may also have an important expressive function: "We have a right . . . to act upon our unfavorable opinion of any one, not to the oppression of his individuality, *but in the exercise of ours*. We are not bound, for example, to seek his society; we have a right to avoid it (though not to parade the avoidance), for we have a right to

choose the society most acceptable to us."[47] Maybe something analogous can be said about religious vituperation: we use it not for the oppression of anyone else's individuality, but in the exercise of our own.

Well, if it is just a matter of letting off steam, then I think Locke's arguments for social peace and civility require people to find other outlets. The difficulty arises when what seems like hate speech to the audience seems to the speaker to be just a natural mode of forcefully expressing his own view. It is to this knotty problem that we now turn.

Voltaire on Calumny

Earlier I quoted an observation by Voltaire, from his *Dictionary,* under the heading "Mohammedans." Voltaire said: "I hate calumny so much that I do not want even to impute foolishness to the Turks, although I detest them as tyrants over women and enemies of the arts."[48]

Now, in modern debates about hate speech—about Nazis in Skokie and so on—Voltaire is often quoted to the following effect: "I hate what you say, but I will defend to the death your right to say it." I guess everyone knows by now that Voltaire probably never said or wrote any such thing. Apparently, an English writer named Beatrice Hall, writing under a male pseudonym at the beginning of the twentieth century,[49] used this language in summing up Voltaire's attitude to the burning of a book written by Claude Adrien Helvétius. It was her readers—and, after that, countless opportunists from the American Civil Liberties Union—who made the mistake of attributing the saying to Voltaire

himself.[50] And even if the words were Voltaire's, there is no evidence they were directed particularly to the protection of hate speech. But the passage I have quoted from Voltaire's dictionary has him saying specifically that he detests religious hate speech. He hates "calumny so much" that he intends himself to refrain from casting aspersions on Muslim customs. You can imagine the dictum being applied to the Danish cartoons. (The position here is not quite diametrically opposed to the quotation normally attributed to Voltaire: I suppose he could defend to the death calumnies issued against Muslims by others, even though he hates them and will not issue them himself.)

Still, the passage about Muslims raises a point that we have to confront. Isn't there a danger that, if the principle of toleration extends so far as to ban calumnies, blood libels, insults, religious defamation, and other attacks on people's dignity and honor, such a ban will also inhibit vehement discussion of others' failings, errors, absurdities, or wickedness? People might no longer be able to say what they think—to say, for example, with Voltaire, that they despise the way Muslims treat women—for fear of running afoul of the ban on expressions of racial and religious hatred. And isn't that—you may say—the real reason for confining toleration to a ban on legal sanctions and not extending it generally to prohibit speech acts that diminish the dignity of those whose beliefs and practices one despises? This may be the real reason you don't find a whole lot in Locke and in the other thinkers about banning expressions of hatred: maybe Locke and others do not want the rigors of a tolerationist regime to diminish the amount or intensity of debate and mutual criticism among different religious groups in society.

After all, Locke wants to be able to say, of many of the beliefs for which he urges toleration, "I readily grant that these opinions are false and absurd,"[51] and presumably this is not just a privilege for the philosopher: he wants others to be able to say that, too. But how can he say that if the targeted group takes it as an affront, and if the tolerationist regime cultivates a far-reaching norm of civility designed to protect people against all such affronts? "Every man," says Locke, "has commission to admonish, exhort, convince another of error, and, by reasoning, to draw him into truth."[52] Toleration is not supposed to silence us.

We might take this point even further. Some have said that toleration makes no sense except against a background of strong disagreement. We do not tolerate those of whom we approve or those to whom we are indifferent. We don't tolerate those whom we suspect might have the truth or part of the truth in a pluralistic world. We tolerate those whom we judge wrong, mistaken, or benighted.[53] And surely toleration must permit us to give voice to those judgments. Otherwise it demands too much.

Moral philosophers may be particularly sensitive on this point. I mean the kind who take their own vehemence as a mark of the objective truth of what they say, or who regard the offensiveness to others (especially people in other disciplines) of what they say as an honorable badge of their refusal to accept any scruples based on relativism. My own view (for what it is worth) is that it would be no bad thing if this vehemence and offensiveness were curbed, and if philosophers were required to secure their High Table credibility in other ways.

Even so: apart from philosophical vanity, many people do feel that they are morally and legally required to tolerate practices

and opinions they believe (perhaps rightly) to be wrong. And the question is: Is it not unreasonable to impose limits on what they may say or publish in expression of that belief?

Well, the beginning of wisdom is surely to distinguish between some of the things that may be said or published in pursuance of the tolerator's beliefs and other things that maybe said or published in pursuance of them. John Locke's saying that it is absurd for Jews to deny the divine inspiration of the New Testament is one thing; presumably, Mr. Osborne's saying that Jews kill Christian babies is another. To punish those who spread a blood libel is one thing; to shut down what Locke called "affectionate endeavours to reduce men from errors" is another.[54]

But how to draw the line? Locke summed up his position by saying, "Nothing is to be done imperiously," meaning nothing is to be done by way of sanction. We may express our disagreement with a religious dissenter; but we are not to vituperate him in order to hurt him or in order to punish him. This position anticipates that of John Stuart Mill, who—in response to the problem I mentioned at the end of the previous section—permitted unpleasant reactions to others' depravity "only in so far as they are the natural, and, as it were, the spontaneous consequences of the faults themselves."[55] We may avoid someone's company because the teachings of our own faith tell us to mind the company we keep; but we are not to set out deliberately to organize boycotts or ostracism to punish him or bring him to his senses. Likewise, one can imagine Locke saying that punitive vituperation against others is not necessary for the integrity or reasonable self-expression of a person's own religious faith: Locke's insistence on the Protestant character of individual salvation establishes this.[56]

And forceful disagreement, when it is expressed, should be expressed in terms that can be engaged with intellectually, which is the only means by which belief might possibly be affected. Such interactions may of course involve vigorous debate and contestation. But this will be, in Shaftesbury's words, "a sort of amicable collision": as he put it, "We polish one another, and rub off our corners and rough sides by a sort of amicable collision. To restrain this is inevitably to bring a rust upon men's understandings."[57] It is forceful and effective, but amicable in the sense that it proceeds "without persecution or defamation."[58]

And all this is against the background of a commitment—which Locke shared with Bayle, Voltaire, and Diderot—to the common presence and respectful dignity in civil society of all those engaged in mutual toleration.

Toleration Literature and Hate Speech Literature

The issue I have been examining—the relation between religious toleration as an Enlightenment ideal and religious hate speech, epitomized by the eighteenth-century blood libel that we began with—is not one that features in the modern literature on toleration. There is a very considerable literature on hate speech (and, in England after the 2006 amendments to the Public Order Act, on religious hate speech), but most of it lacks a historical dimension going very far back beyond the passage of the Race Relations Act in the United Kingdom in the mid-1960s and the beginnings of modern First Amendment jurisprudence in the United States after 1919. And there is a very considerable philosophical and historical literature on toleration; but it hardly con-

nects with the hate speech debate at all. Hate speech is discussed without reference to Enlightenment toleration; and the tolerationist theories of Locke and Bayle are discussed without reference to hate speech. I have tried to bridge that gap.

I have shifted the emphasis slightly, from physical sanctions to violent speech; in doing so, I may have taken the discussion of toleration out of the zone with which both the Enlightenment *philosophes* and modern philosophers have been preoccupied. And of course I don't want to minimize the importance of the concerns about legal sanctions and physical coercion—all those "horrid cruelties . . . that have been committed under the name and upon the account of religion"[59]—that, in most people's minds, particularly in the seventeenth century, were the core of what toleration had to address. Of course, the concern about physical sanctions is of paramount importance, and liberating people from the threat of them would be important even if those who were freed from the threat of violence, coercion, and punishment were left hated and despised, ostracized and boycotted, publicly libeled and dishonored. The violent stuff matters. But it is not all that matters under the heading of "toleration."

I also don't want to minimize the possibility of addressing the blood libels and other religious calumnies under the auspices of the threat they pose to public order. That was the key in Osborne's case: what we saw there was that a license to defame was likely to feed passions that would lead to pogrom. The violent potential of insult was well known in the early modern world, so much so that Thomas Hobbes identified a prohibition on offensive declarations as a leading principle of the law of nature, "because all signs of hatred, or contempt, provoke to fight,"[60] and

Machiavelli insisted that "detestable calumnies"—wild accusations put about in a legally unstructured and irresponsible way—were to be repressed by any means necessary, to prevent tumult and preserve order in a republic.[61]

Modern defenders of free speech think that they have defused the problem of hate speech by making concessions under the headings of "public disorder," "incitement," "or fighting words."[62] But what we have seen from the Enlightenment *philosophes* is that public order means more than just the absence of fighting: it includes the peaceful order of civil society and the dignitary order of ordinary people interacting with one another in ordinary ways, in the exchanges and the marketplace, on the basis of arm's-length respect. Above all, it conveys a principle of inclusion and a rejection of the calumnies that tend to isolate and exclude vulnerable religious minorities. "[I]f we may openly speak the truth," said John Locke, "as becomes one man to another, neither Pagan nor Mahometan, nor Jew, ought to be excluded from the civil rights of the commonwealth because of his religion."[63]

We began with one anti-Semitic libel; let us end with another. Montesquieu tells us, in *The Spirit of the Laws* (1748), that "[u]nder the reign of Philip the Tall, the Jews were run out of France, having been accused of allowing lepers to pollute the wells. This absurd accusation certainly should cast doubt on all accusations founded on public hatred."[64] Our temptation is to take hate speech too lightly, to forget what it contains and what its effect can be. In Osborne's case, the effect was rioting and beatings; in the case cited by Montesquieu, the effect was exclusion and banishment. Both involved fundamental assaults on the ordinary dignity of the members of vulnerable religious minorities—their

dignity, equal to that of all other citizens, as members of the society in good standing. Neither type of effect, nor the calumnies that gave rise to them, should be neglected by those who care about the integrity of a well-ordered society. They should certainly not be neglected just because they involve the power of speech.

Notes

1. Approaching Hate Speech

1. Jeremy Waldron, "Free Speech and the Menace of Hysteria," *New York Review of Books* 55 (May 29, 2008). My review is reproduced in this book as Chapter 2.

2. Anthony Lewis, *Gideon's Trumpet: The Story behind Gideon v. Wainwright* (Random House, 1964); and Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (Random House, 1991).

3. Anthony Lewis, *Freedom for the Thought That We Hate* (Basic Books, 2007), 162.

4. Ibid. But I am not an Englishman. I am a New Zealander who emigrated first to the United Kingdom (to Oxford and then to Edinburgh), and then from Scotland to the United States, to teach law first in California, then in New York. I also now teach at Oxford, but on a visa. I am a permanent resident of the United States, but I am still a New Zealander so far as citizenship is concerned.

5. John Durham Peters, *Courting the Abyss: Free Speech and the Liberal Tradition* (University of Chicago Press, 2005).

6. Jeremy Waldron, "Boutique Faith," *London Review of Books* 20 (July 2006), available at www.lrb.co.uk/v28/n14/wald01_.html.

7. Lewis, *Freedom for the Thought That We Hate,* 163.

8. Canada—Criminal Code 1985, Section 319(1): "Everyone who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of . . . an indictable offence and is liable to imprisonment for a term not exceeding two years."

9. Denmark—Penal Code, Article 266b: "Whoever publicly, or with intention to disseminating in a larger circle, makes statements or other pronouncements, by which a group of persons is threatened, derided or degraded because of their race, colour of skin, national or ethnic background, faith or sexual orientation, will be punished by fine or imprisonment for up to two years."

10. Germany—Penal Code, section 130(1): "Whoever, in a manner that is capable of disturbing the public peace: 1. incites hatred against segments of the population or calls for violent or arbitrary measures against them; or 2. assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population, shall be punished with imprisonment from three months to five years."

11. New Zealand—Human Rights Act 1993, section 61(1): "It shall be unlawful for any person—(a) To publish or distribute written matter which is threatening, abusive, or insulting, or to broadcast by means of radio or television words which are threatening, abusive, or insulting; or (b) To use in any public place as defined in section 2(1) of the Summary Offences Act 1981, or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting; or (c) To use in any place words which are threatening, abusive, or insulting if the person using the words knew or ought to have known that the words were reasonably likely to be published in a newspaper, magazine, or periodical or broadcast by means of radio or television,—being matter or words likely

to excite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons."

12. United Kingdom—Public Order Act 1986 section 18(1): "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."

13. Allegations of anti-white hate speech have excited concern, for example, in South Africa, New Zealand, and Australia.

14. For example, in the United Kingdom, in 2006, amendments to the Public Order Act prohibited hate speech against religious groups.

15. See Lewis, *Freedom for the Thought That We Hate,* p. 166. See also Chapter 2, below.

16. Jeremy Waldron, "Free Speech and the Menace of Hysteria," *New York Review of Books* (May 29, 2008), available at www.nybooks.com/articles/21452.

17. The lectures can be viewed at this website: www.law.harvard.edu/news/spotlight/constitutional-law/28_waldron.holmes.html.

18. Jeremy Waldron, "Dignity and Defamation: The Visibility of Hate," 123 Harvard Law Review 1596 (2010).

19. *Virginia v. Black,* 538 U.S. 343 (2003).

20. *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992).

21. *Collin v. Smith,* 578 F.2d 1197 (1978).

22. *Beauharnais v. Illinois,* 343 U.S. 250 (1952).

23. See Canadian Charter of Rights and Freedoms, Article 1, and the Constitution of South Africa, section 36(1).

24. ICCPR Article 20 reads: "1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that

constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

25. ICERD, Article 4(a): "States Parties [to the Convention] . . . [s]hall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination."

26. It is interesting to contrast the response of two signatory states to their obligations under ICERD. In 1994, at the time of the Convention's ratification, the United States entered a reservation: "[T]he Constitution and laws of the United States contain extensive protections of individual freedom of speech. . . . Accordingly, the United States does not accept any obligation under this Convention . . . to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States."

Contrast with this the reservation entered by the government of Australia at the time it ratified the ICERD in 1975: "The Government of Australia . . . declares that Australia is not at present in a position specifically to treat as offences all the matters covered by article 4(a) of the Convention. . . . It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4(a)."

We see here a difference in mentality with regard to the wisdom (or otherwise) of the international community on these matters. For an excellent framework for understanding the tensions between international and national human-rights (and constitutional-rights) provisions, see Gerald Neuman, "Human Rights and Constitutional Rights: Harmony and Dissonance," *Stanford Law Review* 55 (2003), 1863.

27. See Ronald Dworkin, Foreword, in *Extreme Speech and Democracy,* ed. Ivan Hare and James Weinstein (Oxford University Press, 2009), v.

28. See Salman Rushdie, *The Satanic Verses* (Viking Press, 1988). See also Jeremy Waldron, "Religion and the Imagination in a Global Com-

munity: A Discussion of the Salman Rushdie Affair," *Times Literary Supplement* (March 10–16, 1989), 248 and 260; reprinted in Jeremy Waldron, *Liberal Rights: Collected Papers, 1981–91* (Cambridge University Press, 1993), 134, under the title "Rushdie and Religion."

2. Anthony Lewis's *Freedom for the Thought That We Hate*

1. This chapter is an expanded version of my review of Anthony Lewis's book *Freedom for the Thought That We Hate.* The review was published as Jeremy Waldron, "Free Speech and the Menace of Hysteria," in the *New York Review of Books* 55 (May 29, 2008). Page numbers in the text refer to Lewis, *Freedom for the Thought That We Hate: A Biography of the First Amendment* (Basic Books, 2007).

2. This letter is cited by Lewis at p. 11.

3. *Case of Lyon,* Whart. St. Tr. 333, 15 F. Cas. 1183 (C.C.Vt. 1798).

4. *U.S. v. Haswell,* Whart. St. Tr. 684, 26 F. Cas. 218 (C.C.Vt. 1800).

5. See John R. Howe, Jr., "Republican Thought and the Political Violence of the 1790s," *American Quarterly* 19 (1967), 147.

6. *Commonwealth v. Kneeland* 20 Pick. 206 (Mass. 1838).

7. Sir William Blackstone, *Commentaries on the Laws of England,* vol. 4, ch. 4 (Cavendish Publishing, 2001), 46.

8. *Updegraph v. Commonwealth,* 1824 WL 2393 Pa. (1824).

9. *Schenck v. United States,* 249 U.S. 47 (1919).

10. *Stromberg v. California,* 283 U.S. 359 (1931).

11. *Abrams v. United States,* 250 U.S. 616 (1919).

12. Judge George M. Bourquin in the Montana sedition cases. See also Arnon Gutfeld, "The Ves Hall Case, Judge Bourquin, and the Sedition Act of 1918," *Pacific Historical Review* 37 (1968), 163.

13. Justice Breyer in a concurring opinion in *Bartnicki v. Vopper* 532 U.S. 514 (2000).

14. *Beauharnais v. Illinois,* 343 U.S. 250 (1952).

15. *New York Times Co. v. Sullivan* 376 U.S. 254, at 270 (1964).

16. Justice Robert H. Jackson's term in his dissenting opinion in *Beauharnais v. Illinois,* at 287.

17. *Brandenburg v. Ohio,* 395 U.S. 444 (1969).

3. Why Call Hate Speech Group Libel?

1. See, e.g., Heidi M. Hurd and Michael S. Moore, "Punishing Hatred and Prejudice," *Stanford Law Review* 56 (2004).

2. My emphasis. The phrasing is from Canada's Criminal Code 1985, Section 319(1). Consider also the reference to "advocacy of national, racial or religious hatred" in article 20(1) of the International Covenant on Civil and Political Rights.

3. My emphasis. The phrasing is from section 18(1) of the United Kingdom's Public Order Act 1986 (as amended).

4. Robert Post, "Hate Speech," in *Extreme Speech and Democracy,* ed. Ivan Hare and James Weinstein (Oxford University Press, 2009), 123 and 125.

5. Post (ibid., 124n) cites Burke's aphorism, "They will never love where they ought to love who do not hate where they ought to hate," and Stephen's statement, "I think it highly desirable that criminals should be hated [and] that the punishments inflicted on them should be so contrived as to give expression to that hatred" (ibid.). Post also alludes (at 130) to Lord Devlin's infamous claim that "[n]o society can do without intolerance, indignation and disgust."

6. Opponents of hate speech regulation sometimes say that these laws are targeted at what people can say in bars or at the dinner table, and occasionally they cite examples of people being prosecuted for what they thought they were saying just among friends. See, e.g., Carly Weeks, "Conversation Cops Step in to School Students," *Globe and Mail* (Canada), November 19, 2008. Whatever the case with high school and campus codes, it is worth noting that many of the best-drafted hate

speech laws make an exception for conversations conducted in private. Section 18(2) of Britain's Public Order Act 1986 says that while "[a]n offence under this section may be committed in a public or a private place," nevertheless "no offence is committed where the words or behaviour are used by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling."

7. *Kunz v. New York,* 340 U.S. 290, 299 (1951) (Jackson, J., dissenting).

8. See, e.g., Charles R. Lawrence III, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," *Duke Law Journal* (1990), 431, at 455.

9. Catharine A. MacKinnon, *Only Words* (Harvard University Press, 1993), 30.

10. See also Pascal Mbongo, "Hate Speech, Extreme Speech, and Collective Defamation in French Law," in Hare and Weinstein, eds., *Extreme Speech and Democracy,* 221, at 227, for the terms of the article prohibiting defamation of a group. Professor Mbongo classifies much French legislation of this kind as "penal suppression of abuse and defamation on grounds of race and religious belief" (ibid., 229–230).

11. Section 19(1) of Manitoba's Defamation Act prohibits "[t]he publication of a libel against a race, religious creed or sexual orientation, likely to expose persons belonging to the race, professing the religious creed, or having the sexual orientation to hatred, contempt or ridicule, and tending to raise unrest or disorder among the people."

12. See, e.g., Joseph Tanenhaus, "Group Libel," *Cornell Law Quarterly* 35 (1950), 261.

13. Harry Kalven, *The Negro and the First Amendment* (Ohio State University Press, 1965), 7.

14. *Beauharnais v. Illinois,* 343 U.S. 250, 253–254 (1952).

15. See "Note, Statutory Prohibition of Group Defamation," *Columbia Law Review* 47 (1947), 595.

16. My emphasis. This statement of aim is quoted in *Striking a Bal-*

ance: Hate Speech, Freedom of Expression and Non-Discrimination, ed. Sandra Colliver (Human Rights Centre, University of Essex, 1992), at 326.

17. Nadine Strossen, "Balancing the Rights to Freedom of Expression and Equality," in Colliver, ed., *Striking a Balance,* at 302.

18. In Chapter 1 of *Only Words* (a chapter whose title is "Defamation and Discrimination"), Catharine MacKinnon offers a different critique of the use of "defamation" in free-speech issues. In the United States, she says, calling harmful expression "defamation" confirms its protected status as speech; this makes it much more difficult to articulate objections based on direct harm and discrimination (ibid., 11 and 38). This, for MacKinnon, is particularly true of pornography, her main topic in *Only Words.* On the other hand, characterizing her own role in the *Keegstra* case in Canada (*R. v. Keegstra* [1990] 3 S.C.R. 697—a case of anti-Semitic speech by a schoolteacher that I shall discuss in more detail below), MacKinnon made use of the idea of group defamation and connected it affirmatively to discrimination and inequality: "We argued that group defamation is a verbal form inequality takes" (ibid., 99).

19. James Weinstein, "Extreme Speech, Public Order and Democracy," in Hare and Weinstein, eds., *Extreme Speech and Democracy,* 23, at 59.

20. Section 2 of the Alien and Sedition Acts, dated July 14, 1798 (Ch. 74, 1 Stat. 596), states: "[I]f any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for op-

posing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years." (This statute expired in 1801.)

21. But for a useful and reasonably sympathetic account, see John C. Miller, *Crisis in Freedom: The Alien and Sedition Acts* (Little, Brown, 1951).

22. On attempts to have the Alien and Sedition Acts "nullified" at the state level, see Gordon S. Wood, *Empire of Liberty: A History of the Early Republic* (Oxford University Press, 2009), 269–270 (concerning the period 1789–1815).

23. William Blackstone, *Commentaries on the Laws of England,* vol. 4, ch. 4 (Cavendish Publishing, 2001), 46.

24. *Commonwealth v. Kneeland* 20 Pick. 206 (Mass. 1838).

25. *Updegraph v. Commonwealth* 1824 WL 2393 Pa. 1824.

26. *R. v. Curl* (1727) 2 Strange 788, 93 Eng. Rep. 849. See Colin Manchester, "A History of the Crime of Obscene Libel," *Journal of Legal History* 12 (1991), 36, at 38–40. There is a helpful discussion also in Leonard Williams Levy, *Blasphemy: Verbal Offense against the Sacred, from Moses to Salman Rushdie* (University of North Carolina Press, 1995), 306–308.

27. 1826 C & P 414. See also Manchester, "A History of the Crime of Obscene Libel," 44.

28. See the discussion in Chapter 2 of *Lyon's Case,* Whart. St. Tr. 333, 15 F. Cas. 1183 (C.C.Vt. 1798).

29. 4 Cranch C.C. 683, 25 F.Cas. 684 C.C.D.C. 1836. March Term 1836.

30. The book is dated 1596, and its listed title is *A Libell of Spanish*

Lies: Found at the sacke of Cales, discoursing the fight in the West Indies, twixt the English nauie being fourteene ships and pinasses, and a fleete of twentie saile of the king of Spaines, and of the death of Sir Francis Drake. With an answere briefely confuting the Spanish lies, and a short relation of the fight according to truth, written by Henrie Sauile Esquire, employed captaine in one of her Maiesties shippes, in the same seruice against the Spaniard. And also an approbation of this discourse, by Sir Thomas Baskeruile, then generall of the English fleete in that seruice: auowing the maintenance thereof, personally in armes against Don Bernaldino."

31. Civil Code, §45, quoted by Philip Wittenberg, *Dangerous Words: A Guide to the Law of Libel* (Columbia University Press, 1947), 7. The phrase seems to come originally from W. Blake Odgers, *A Digest of the Law of Libel and Slander:* see *Staub v. Van Benthuysen,* 36 La.Ann. 467, 1884 WL 7852, 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. *Odgers on Libel and Slander,* 7, 20."

32. *Ostrowe v. Lee,* 256 N.Y. 36, 39, 175 N.E. 505, 506 (1931), quoting from *Harman v. Delany,* Fitzg. 253, 94 Eng. Rep. 743 (1729): "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."

33. In the case of *Curl* (the 1727 case concerning the libel *Venus in the Cloisters*), this was crucial to an understanding of why Curl's 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," said Reynolds, J., "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." (*R. v. Curl,* 2 Strange 788, 93 Eng. Rep. 849, at 850–851.)

34. Crimes Act 1961, section 211, repealed by Defamation Act 1992, section 56(2).

35. 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," *American Journal of Legal History* 22 (1978), 216.

36. Immanuel Kant, *The Metaphysics of Morals,* trans. Mary Gregor (Cambridge University Press, 1991), 139 (6: 329–330 in the Prussian Academy edition of Kant's works).

37. Section 224a of Division 1 of the Illinois Criminal Code, Ill. Rev. Stat. 1949: "It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots."

38. *Beauharnais v. Illinois,* 343 U.S. 250 (1952).

39. All emphasis, uppercase, and ellipses are in the original.

40. See *People v. Beauharnais* 408 Ill. 512, 97 N.E.2d 343 Ill. (1951).

41. For discussion at the time, see Joseph Tanenhaus, "Group Libel and Free Speech," *Phylon* 13 (1952), 215.

42. *Beauharnais v. Illinois* 343 U.S. 250 (1952), at 274 (Black, J., dissenting).

43. *Beauharnais v. Illinois* 343 U.S. 250 (1952), at 284 (Douglas, J., dissenting).

44. However, for the objection that the court in *Beauharnais* failed to confront the issues in the case using the idea of equality, see MacKinnon, *Only Words,* 81–84.

45. Nadine Strossen, "Balancing the Rights to Freedom of Expression and Equality," in Colliver, ed., *Striking a Balance,* at 303.

46. See *Bevins v. Prindable,* 39 F.Supp. 708, at 710, E.D.Ill., June 17, 1941.

47. *People v. Beauharnais* 408 Ill. 512 (1951), at 517–518. "The libelous and inflammatory language used in said exhibit A was designed to breed hatred against the Negro race and is not of such character as entitles defendant to the protection of freedom of speech guaranteed by the State and Federal constitutions."

48. *Beauharnais v. Illinois* 343 U.S. 250 (1952), at 257–258.

49. Ibid., 292.

50. *Beauharnais v. Illinois,* 343 U.S. 250, 272 (1952) (Black, J., dissenting).

51. *R. v. Osborne,* W. Kel. 230, 25 Eng. Rep. 584 (1732).

52. Ibid., at 585.

53. See *R. v. Osborn,* 2 Barnardiston 138 and 166, 94 Eng. Rep. 406 and 425 for an acceptance of this as group libel. See also the ambiguous account of the same case embedded in the opinion in another case, *In re Bedford Charity,* (1819) 2 Swans 502, 36 Eng. Rep. 696, 717.

54. Joseph Tanenhaus, "Group Libel," *Cornell Law Quarterly* 35 (1949–1950), 261, at 266.

55. *Palmer v. Concord,* 48 N.H. 211 (1868).

56. *Sumner v. Buel,* 12 Johnson 475 (1815), at 478.

57. *People v. Beauharnais,* 408 Ill. 512 (1951) at 517.

58. *Beauharnais v. Illinois,* 343 U.S. 250, 263 (1952) (Frankfurter, J., for the court).

59. In this area, the fact/opinion mantra casts precious little light. It is plain that both the public peace and, in a broader sense, public order as I

understand it can be undermined by expressions of virulent opinion as much as by false imputations of fact.

60. *R. v. Keegstra,* [1990] 3 S.C.R. 697.

61. MacKinnon, *Only Words,* 99.

62. I discuss this case at the beginning of Jeremy Waldron, "Boutique Faith," *London Review of Books,* July 20, 2006 (reviewing John Durham Peters, *Courting the Abyss: Free Speech and the Liberal Tradition*).

63. See Evan P. Schultz, "Group Rights, American Jews, and the Failure of Group Libel Laws, 1913–1952," *Brooklyn Law Review* 66 (2000–2001), at 96.

64. See also Waldron, "Dignity and Rank," *European Journal of Sociology* 48 (2007), 201; and Waldron, "Dignity, Rank and Rights," in *The Tanner Lectures on Human Values,* vol. 29, ed. Suzan Young (University of Utah Press, 2011), 207.

65. See Immanuel Kant, *Groundwork to the Metaphysics of Morals,* trans. Mary Gregor (Cambridge University Press, 1998), 42–43 (4: 435 of the Prussian Academy edition of Kant's works): "In the kingdom of ends everything has either value or dignity. Whatever has a value can be replaced by something else which is equivalent; whatever, on the other hand, is above all value, and therefore admits of no equivalent, has a dignity. Whatever has reference to the general inclinations and wants of mankind has a market value; . . . but that which constitutes the condition under which alone anything can be an end in itself, this has not merely a relative worth, i.e., value, but an intrinsic worth, that is, dignity. Now morality is the condition under which alone a rational being can be an end in himself, since by this alone is it possible that he should be a legislating member in the kingdom of ends. Thus morality, and humanity as capable of it, is that which alone has dignity." (This Kantian sense of "dignity" is somewhat different from the one I mentioned in note 36 above.)

66. As Michael Ignatieff argued, in *Human Rights as Politics and Idol-*

atry (Princeton University Press, 2001), 166, dignity is mainly an individualist idea. True: we do on occasion talk of the dignity of nations or of peoples (see Waldron, "The Dignity of Groups," *Acta Juridica* [Cape Town, 2008], 66). I do not want to rule this out, but this is not what is involved when we talk about group libel.

67. I think, therefore, that it is a serious mistake to suggest, as Robert Post does in "Racist Speech, Democracy, and the First Amendment," *William and Mary Law Review* 32 (1991), at 294, that the difference between the laws of European countries that prohibit group defamation and American law, which on the whole does not, is that the latter tends to view groups as mere "collections of individuals," whose claims are no greater than those of their constituent members. That individualism is characteristic of the approach taken here, though I recognize—as Post does not—that lots of people can be harmed individually by what people say about the group.

68. *President of the Republic of South Africa v. Hugo,* 1997 (4) SA (CC) 1, at §41 (my emphasis).

69. See, e.g., *Dworkin v. Hustler Magazine Inc.,* 867 F.2d 1188, 1200 (9th Cir. 1989); and *Collin v. Smith,* 578 F.2d 1197, 1205 (7th Cir. 1978). On the other hand, one should consider the interesting and not unfavorable comments about *Beauharnais* in *Smith v. Collin,* 439 US 916 (1978), at 919 (Blackmun, J., dissenting from denial of certiorari).

70. Laurence H. Tribe observed, in *American Constitutional Law,* 2nd ed. (Foundation Press, 1988), at 926–927, that "subsequent cases seem to have sapped *Beauharnais* of much of its force."

71. Lewis, *Freedom for the Thought That We Hate,* 159.

72. *New York Times Co. v. Sullivan,* 376 U.S. 254, at 270 (1964).

73. "[O]bnoxious leaflet" is Justice Jackson's term in his dissenting opinion in *Beauharnais v. Illinois,* 343 U.S. 250, at 287 (1952).

74. *New York Times Co. v. Sullivan,* 376 U.S. 254, at 301 (1964).

75. Ibid., at 263–264 and note (1952), cited and approved in *New York*

Times Co. v. Sullivan, 376 U.S. 254, at 268 (1964), by Brennan, J., for the court.

76. *Nuxoll v. Indian Prairie School District,* 523 F3d 688, 672 (7th Circuit, 2008).

77. But see the excellent discussion in Samuel Walker, *Hate Speech: The History of an American Controversy* (University of Nebraska Press, 1994), especially in ch. 5: "The Curious Rise and Fall of Group Libel in America, 1942–1952."

4. The Appearance of Hate

1. Actually the phrase is much older than Rawls's use of it. Denis Diderot used "well-ordered society" several times in "Observations sur le Nakaz," in *Diderot: Political Writings,* ed. John Hope Mason and Robert Wokler (Cambridge University Press, 1992), 87 (§5) and 128 (§81).

2. See John Rawls, *Political Liberalism* (Columbia University Press, 1993), 35 and 43–46. Parenthetical numbers in the text, preceded by *PL,* are references to this work.

3. John Rawls, "Kantian Constructivism in Moral Theory" (1975), in John Rawls, *Collected Papers,* ed. Samuel Freeman (Harvard University Press, 1999), at 355. See also *PL,* 66, suggesting that in a well-ordered society "citizens accept and know that others likewise accept those principles, and this knowledge in turn is publicly recognized."

4. In Rawls, "Kantian Constructivism in Moral Theory," at 355: "Our society is not well-ordered: the public conception of justice and its understanding of freedom and equality are still in dispute."

5. George Wright, "Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection," *San Diego Law Review* 43 (2006), 527, concluded that Rawls has really "not contributed substantially to the underlying logic of genuine respect or civility, in hate speech or any other context." Richard H. Fallon, "Individual Rights and the

Powers of Government," *Georgia Law Review* 27 (1993), at 351–352, argued that "the basic rights that Rawls derives—including rights to freedom of speech and religious autonomy—are so abstract as to settle few practical questions. Does freedom of speech encompass hate-speech directed at racial or religious minorities? . . . To answer questions such as these, a fuller set of considerations must be brought to bear." However, see also the discussion in T. M. Scanlon, "Adjusting Rights and Balancing Values," *Fordham Law Review* 72 (2004), 1485–86, of whether hate speech might be dealt with under the heading of the fair value of liberty. And see the suggestion in Richard Delgado and Jean Stefancic, "Four Observations about Hate Speech," *Wake Forest Law Review* 44 (2009), at 368, that a Rawlsian should approach hate speech through the difference principle: "one of the parties is more disadvantaged than the other, so . . . Rawls's difference principle suggests that . . . we break the tie in the victim's favor."

6. For Rawls's admiration of Kalven, see *PL,* 342–344. Kalven's own discussion of group libel in Harry Kalven, *The Negro and the First Amendment* (Ohio State University Press, 1965), 7–64, is nuanced, thoughtful, and complicated. Though he criticized the decision in *Beauharnais,* Kalven took a sophisticated view of its relation to the decision in *New York Times v. Sullivan.*

7. See *Ferdinand Nahimana v. The Prosecutor,* Case no. ICTR-99-52-A, Appeals Chamber (International Criminal Tribunal for Rwanda), partially dissenting judgment of Judge Meron at 374 (see esp. §§4–5 (pp. 375–376) and §§9–21 (pp. 378–381). See Catharine A. MacKinnon, "*Prosecutor v. Nahimana, Barayagwiza, and Ngeze* at International Criminal Tribunal for Rwanda, Appeals Chamber," *American Journal of International Law* 103 (2009), 97; and (for a different view) Susan Benesch, "Vile Crime or Inalienable Right: Defining Incitement to Genocide," *Virginia Journal of International Law* 48 (2008), 485.

8. Richard Delgado and Jean Stefancic, *Understanding Words That Wound* (Westview, 2004), 142.

9. Catharine MacKinnon, *Only Words* (Harvard University Press, 1993), 17.

10. Ibid., 25–26.

11. I have learned a great deal from Professor MacKinnon's discussion of pornography and her characterizations of the overlap (and the differences) between hate speech and pornography issues. I have also learned a great deal about the general character of this debate from the way in which MacKinnon's opponents have distorted and evaded the force of her arguments. I am grateful to MacKinnon for a number of helpful conversations on these issues.

12. Edmund Burke, *Reflections on the Revolution in France,* ed. J. C. D. Clark (Stanford University Press, 2001), 241 and 239.

13. Political aesthetics is taken very seriously in Ajume Wingo's excellent book, *Veil Politics in Liberal Democratic States* (Cambridge University Press, 2003), the first chapter of which has an admirable account of the presence and importance of monuments in modern society.

14. This is the paradox noted by Karl Marx in "On the Jewish Question," in *Nonsense upon Stilts: Bentham, Burke, and Marx on the Rights of Man,* ed. Jeremy Waldron (Methuen, 1987), 138–139.

15. Doreen Carvajel, "Sarkozy Backs Drive to Eliminate the Burqa," *New York Times,* June 23, 2009, quotes the president of France 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." Since Sarkozy spoke, a ban on the wearing of the burqa in public has come into effect in France.

16. I am grateful to Wendy Brown for this way of putting it.

17. West's Code of Georgia §16-11-38: "Wearing masks, hoods, etc." There are exceptions for gas masks, masquerade costumes, and safety devices.

18. See the discussion in Wayne R. Allen, "Klan, Cloth and Constitution: Anti-Mask Laws and the First Amendment," *Georgia Law Review* 25 (1991), 819.

19. For these terms, see John Rawls, *A Theory of Justice,* rev. ed. (Harvard University Press, 1999), 7–8.

20. See ibid., 109–112, on the circumstances of justice. On "limited strength of will," see H. L. A. Hart, *The Concept of Law,* rev. ed. (Clarendon Press, 1994), 197–198.

21. Rawls, *A Theory of Justice,* 211.

22. Ibid..

23. See Emile Durkheim, *The Division of Labor in Society,* trans. Lewis Coser (Free Press, 1997), 61. For an application to hate speech regulation of the Durkheimian idea of the expressive function of law, see Thomas David Jones, *Human Rights: Group Defamation, Freedom of Expression and the Law of Nations* (Martin Nijhoff, 1998), at 88.

24. My reference here to the fundamentals of justice is similar to, but not quite the same as, Rawls's idea of "constitutional essentials" (*PL,* 214 and 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.

25. David Bromwich, *Politics by Other Means: Higher Education and Group Thinking* (Yale University Press, 1994), 157. See also George F. Will, *Statecraft as Soulcraft* (Touchstone Books, 1984), 87.

26. For a fine discussion of the details—the "microaggressions"—of racism, see Patricia Williams, *Seeing a Color-Blind Future: The Paradox of Race* (Farrar, Straus, and Giroux, 1998).

27. *R. v. Keegstra* [1990] 3 SCR 697.

28. See Stephen L. Darwall, "Two Kinds of Respect," *Ethics* 88 (1977), 36; and Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Harvard University Press, 2006), esp. 122–123.

29. Darwall, "Two Kinds of Respect," 38.

30. MacKinnon, *Only Words,* 25.

31. Catharine A. MacKinnon, "Pornography as Defamation and Discrimination," *Boston University Law Review* 71 (1991), 793.

32. Ibid., 802–803. MacKinnon's reservations about the defamation model follow immediately in the article I am quoting—"When pornography's reality is examined against the terms of group defamation as a legal theory, some of the theory fits, but much of it does not" (ibid., 803)—and they can be seen also in MacKinnon, *Only Words,* at 11 and 38.

33. MacKinnon, "Pornography as Defamation and Discrimination," 802.

34. On the distinction between public goods whose ultimate payoff is collectively consumed and public goods that redound ultimately to the benefit of individuals, see also Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986), 199; and Jeremy Waldron, "Can Communal Goods Be Human Rights?" *Archives Européennes de Sociologie* 27 (1987), 294, reprinted in Waldron, *Liberal Rights: Collected Papers, 1981–1991* (Cambridge University Press, 1993). On public goods like security that have both aspects, see Jeremy Waldron, "Safety and Security," *Nebraska Law Review* 85 (2006), 454, reprinted in Waldron, *Torture, Terror and Trade-Offs: Philosophy for the White House* (Oxford University Press, 2010).

35. William Peirce Randel, *The Ku Klux Klan: A Century of Infamy* (Chilton Books, 1965), 224, quoted in Cedric Merlin Powell, "The Mythological Marketplace of Ideas: *R.A.V., Mitchell,* and Beyond," *Harvard Blackletter Law Journal* 12 (1995), at 32.

36. Quoted in Philippa Strum, *When the Nazis Came to Skokie: Freedom for Speech We Hate* (University Press of Kansas, 1999), 15.

37. See Derek Parfit, *Reasons and Persons* (Oxford University Press, 1984), ch. 3, entitled "Five Mistakes in Moral Mathematics."

38. For a discussion of the idea of self-application, see Henry M. Hart and Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law,* ed. William N. Eskridge and Philip P. Frickey (Foundation Press, 1994), 120–121.

39. See, e.g., Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986), pp. 295–301.

40. Rawls, *A Theory of Justice,* 109ff.

5. Protecting Dignity or Protection from Offense?

1. The intransitive sense involves violating a rule—as in the Book of Common Prayer's confession at Morning Prayer: "We have offended against thy holy laws."

2. See Jeremy Waldron, "Dignity, Rank and Rights," in *The Tanner Lectures on Human Values,* vol. 29, ed. Suzan Young (University of Utah Press, 2011), 207.

3. I have discussed this in Jeremy Waldron, "Inhuman and Degrading Treatment: The Words Themselves," *Canadian Journal of Law and Jurisprudence* 22 (2010), at 283–284; reprinted in Jeremy Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (Oxford University Press, 2010), ch. 9, esp. 311–313.

4. *Regina (Burke) v. General Medical Council* (Official Solicitor intervening) [2005] QB 424, at §178.

5. *Lynch v. Knight* (1861) 11 Eng. Rep. 854 (H.L.) 863. See also Geoffrey Christopher Rapp, "Defense against Outrage and the Perils of Parasitic Torts," *Georgia Law Review* 45 (2010), 107.

6. *Wilkinson v. Downton* [1897] 2 QB 57, *Molien v. Kaiser Foundation Hospitals,* 27 Cal.3d 916, 616 P.2d 813 (1980).

7. See, e.g., *R.A.V. v. City of St. Paul* 505 U.S. 377 (1992) at 414

(White, J., concurring): "The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." See also Nadine Strossen, "Regulating Racist Speech on Campus: A Modest Proposal?" 1990 *Duke Law Journal* 484, at 497–498: "Traditional civil libertarians recognize that [racist] speech causes psychic pain. We nonetheless agree with the decision of the Seventh Circuit in *Skokie* that this pain is a necessary price for a system of free expression."

8. This paragraph is adapted from something I wrote long ago, in a discussion of the views of John Stuart Mill—a discussion that began by thinking about the phenomenology associated with someone's being disturbed by viewing pornography. See Jeremy Waldron, "Mill and the Value of Moral Distress," *Political Studies* 35 (1987), at 410–411; reprinted in Jeremy Waldron, *Liberal Rights: Collected Papers, 1981–1991* (Cambridge University Press, 1993), at 115–116. I said there that it is wrong to assume we can disentangle, in someone's reaction to pornography, the elements of disapproval, the perception of threat, the perception of insult, the perception of symbol or representation, the vehemence of moral condemnation, the feeling of outrage, the elements of pity, contempt, outrage, pain, offense, sublimated guilt, uncomfortable pleasure, and so on. And so I tried to emphasize how sensitive we must be not to discount the importance of some of these feelings simply because we are uneasy about others.

9. See *Whitehouse v. Lemon* [1979] 2 WLR 281; *Whitehouse v. Gay News Ltd* [1979] AC 617; and *Gay News Ltd and Lemon v. United Kingdom* 5 EHRR 123 (1982), App. no. 8710/79.

10. See Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, 1996), 1–15. See also Jeremy Waldron, "Thoughtfulness and the Rule of Law," *British Academy Review* 18 (July 2011), available also online at ssrn.com/abstract=1759550.

11. See, e.g., Charles R. Lawrence, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," *Duke Law Journal* 431 (1990), at 452–456. There Professor Lawrence writes eloquently about "the immediacy of the injurious impact of racial insults," the "visceral emotional response"—the "instinctive, defensive psychological reaction" of rage, flight, or paralysis, the "state of semi-shock, nauseous, dizzy," that more or less precludes any speech as a reaction.

12. *Kunz v. New York,* 340 U.S. 290, 299 (1951) (Jackson, J., dissenting).

13. See *Aguilar v. Avis Rent-a-Car System, Inc.*, 980 P.2d 846 (Cal. 1999), which upheld an injunction prohibiting use of racial epithets directed at Latino employees in their workplace. See also Lawrence, "If He Hollers Let Him Go." For a good though not uncritical discussion of campus speech codes, see Jon B. Gould, *Speak No Evil: The Triumph of Hate Speech Regulation* (University of Chicago Press, 2005).

14. I am most grateful to Joseph Singer for pressing this point in discussion after the Holmes Lectures at Harvard in 2009. See also Cynthia Estlund, "Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment," *Texas Law Review* 75 (1997), 687.

15. Stephen Sedley, *Ashes and Sparks: Essays on Law and Justice* (Cambridge University Press, 2011), 400–401. I am grateful to Sedley for some discussion of these issues.

16. William Blackstone, *Commentaries on the Laws of England* (London: Cavendish Publishing, 2001), vol. 4, ch. 4, p. 46.

17. *Whitehouse v. Gay News Ltd and Lemon* [1979] AC 617, at 665.

18. *R. v. Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* [1991], 1 All ER, 306.

19. Religious and Racial Hatred Act 2006 (U.K.), sect. 1.

20. Criminal Justice and Immigration Act 2008 (U.K.), sect. 79(1): "The offences of blasphemy and blasphemous libel under the common law of England and Wales are abolished."

21. This is the definition given in the new section 29A which the 2006 statute inserted into the U.K.'s Public Order Act of 1986.

22. Public Order Act, sect. 29J, as amended by the 2006 statute.

23. This last case is particularly important for people in detention, whose lives and schedules of worship are utterly under the control of others. At Guantánamo Bay and elsewhere, the religious beliefs of Muslims have been perceived by their captors and interrogators as an opportunity for inflicting inhumane treatment, in order to break the spirit of those from whom they want to elicit information. Korans have been abused, for example, ripped up and flushed down a toilet in front of a detainee, eliciting from him a maddening combination of suffering, outrage, and heartbreak, which is thought to be exploitable as a "softening-up" process for interrogation. I believe that the deliberate infliction of this sort of distress is wrong and unlawful, and I have written about these abusive practices elsewhere. See Jeremy Waldron, "What Can Christian Teaching Add to the Debate about Torture?" *Theology Today* 63 (2006), at 341; reprinted in Waldron, *Torture, Terror and Trade-Offs,* 273–274. But the specific concerns about dignity, hate speech, and group libel that I am exploring in this book do not encompass these things.

24. See Jeremy Waldron, "The Dignity of Groups," *Acta Juridica* (Cape Town, 2008), 66.

25. Corinna Adam, "Protecting Our Lord," *New Statesman,* February 13, 2006 (originally published July 15, 1977): "'I simply had to protect Our Lord,' Mrs. Mary Whitehouse told me, in the Old Bailey coffee-bar, on the first day of the blasphemy trial." She was referring to a poem by James Kirkup that described necrophiliac acts performed upon the body of Jesus after his crucifixion.

26. However, there seems to have been a recent shift, as indicated in a recent Reuters news story. See Robert Evan, "Islamic Bloc Drops U.N. Drive on Defaming Religion," March 25, 2011, available online at in.reuters.com/article/2011/03/24/idINIndia-55861720110324 (accessed May 30,

2011): "Islamic countries set aside their 12-year campaign to have religions protected from 'defamation,' allowing the U.N. Human Rights Council to approve a plan to promote religious tolerance on Thursday. Western countries and their Latin American allies, strong opponents of the defamation concept, joined Muslim and African states in backing without vote the new approach that switches focus from protecting beliefs to protecting believers."

27. Jonathan Turley, "The Free World Bars Free Speech," *Washington Post,* April 12, 2009.

28. This is in section 29J, "Protection of Freedom of Expression," which the 2006 statute inserts into Part 3A of the Public Order Act.

29. See Lorenz Langer, "The Rise (and Fall?) of Defamation of Religions," *Yale Journal of International Law* 35 (2010), 257.

30. Originally published in the Danish newspaper *Jyllands-Posten* as Flemming Rose, "Muhammeds Ansigt" [Muhammed's Face], September 30, 2005.

31. Meital Pinto, "What Are Offences to Feelings Really About? A New Regulative Principle for the Multicultural Era," *Oxford Journal of Legal Studies* 30 (2010), 695, at 721.

32. I am grateful to Henning Koch for this point. See also Stéphanie Lagoutte, "The Cartoon Controversy in Context: Analyzing the Decision Not to Prosecute under Danish Law," *Brooklyn Journal of International Law* 33 (2008), 379, at 382.

33. But compare Ronald Dworkin, "The Right to Ridicule," *New York Review of Books,* March 23, 2006. Though Dworkin bitterly opposes laws against fomenting religious hatred, he began this article by saying: "The British and most of the American press have been right, on balance, not to republish the Danish cartoons that millions of furious Muslims protested against in violent and terrible destruction around the world. Reprinting would very likely have meant—and could still mean—more people killed and more property destroyed. It would have caused many British and American Muslims great pain because they would have been

told by other Muslims that the publication was intended to show contempt for their religion, and though that perception would in most cases have been inaccurate and unjustified, the pain would nevertheless have been genuine."

34. I argued this a long time ago in Jeremy Waldron, "A Right to Do Wrong," *Ethics* 92 (1981), 21; reprinted in Waldron, *Liberal Rights,* ch. 3.

35. See Jeremy Waldron, "Too Important for Tact," *Times Literary Supplement* (London), March 10–16, 1989, at 248 and 260; reprinted in Waldron, *Liberal Rights,* at 134 (chapter entitled "Rushdie and Religion").

36. Book of Job 1:6–12.

37. Public Order Act, section 29J, as amended by the 2006 statute.

38. See Jeremy Waldron, "Cultural Identity and Civic Responsibility," in *Citizenship in Diverse Societies,* ed. Will Kymlicka and Wayne Norman (Oxford University Press, 2000), for a broader argument against identity politics, along these lines.

39. I said, in that earlier work (ibid., 160): "It is widely—I think correctly—believed that this liberal task of securing proper respect for all the interests that demand it becomes immeasurably more difficult when identity is associated with culture whilst retaining the flavour of rights. It is hard enough to set up a legal framework that furnishes respect for persons as individuals, and which ensures that the interests and freedoms basic to individual identity are not sacrificed for the sake of the common good. But if respect for an individual also requires respect for the culture in which his identity has been formed, and if that respect is demanded in the uncompromising and non-negotiable way in which respect for rights is demanded, then the task may become very difficult indeed, particularly in circumstances where different individuals in the same society have formed their identities in different cultures."

40. C. Edwin Baker, "Harm, Liberty, and Free Speech," *Southern California Law Review* 70 (1997), 979, at 1019–20.

41. See *Employment Division of Oregon v. Smith,* 494 U.S. 872 (1990),

in which the Supreme Court considered whether generally applicable narcotics laws required strict scrutiny in light of their impact on the petitioner's sacramental use of peyote. See also Religious Freedom Restoration Act 1993 (codified at 42 U.S.C. §2000bb), in which Congress purported to insist on strict scrutiny for cases like this, in defiance of the Supreme Court decision in *Smith.*

42. Rebecca Mason, "Reorienting Deliberation: Identity Politics in Multicultural Societies," *Studies in Social Justice* 4 (2010), 7.

43. I am particularly grateful to Timothy Garton Ash for pressing me on this point.

44. For a brusque critique of dignity talk, see Steven Pinker, "The Stupidity of Dignity," *New Republic,* May 28, 2008.

45. Arthur Schopenhauer, *The Basis of Morality,* trans. Arthur Brodrick Bullock (Swan Sonnenschein, 1903), 129: "For behind that imposing formula they concealed their lack, not to say, of a real ethical basis, but of any basis at all which was possessed of an intelligible meaning; supposing cleverly enough that their readers would be so pleased to see themselves invested with such a 'dignity' that they would be quite satisfied."

46. Christopher McCrudden, "Human Dignity in Human Rights Interpretation," *European Journal of International Law* 19 (2008), 655, at 678.

47. See Immanuel Kant, *Groundwork of the Metaphysics of Morals,* ed. Mary Gregor (Cambridge University Press, 1998), 42–43 (4: 434–435 of the Prussian Academy edition of Kant's works); Pope John Paul II's encyclical *Evangelium Vitae* (March 25, 1995), para. 3; Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011), 191ff.; Jeremy Waldron, "Dignity and Rank," *Archives Européennes de Sociologie* 48 (2007), 201.

48. Nor am I suggesting that it be used as a judicial principle: compare the debate in Canada about the use of dignity as a guiding principle

in discrimination law. Recently the Supreme Court of Canada had occasion to say that dignity is "an abstract and subjective notion . . . confusing and difficult to apply" (*R. v. Kapp* [2008] SCC 41 at §22). But the court emphasized that this does not mean the concept is useless in our understanding of the values that law protects.

49. James Weinstein and Ivan Hare seem to assume—wrongly, in my view—that this is what the dignitarian case for hate speech legislation must presuppose. See "General Introduction: Free Speech, Democracy, and the Suppression of Extreme Speech Past and Present," in *Extreme Speech and Democracy,* ed. Ivan Hare and James Weinstein (Oxford University Press, 2009), 1, at 6–7.

50. Of course, the human-dignity principle is used as a constitutional principle in other contexts, such as in American Eighth Amendment jurisprudence: see *Trop v. Dulles,* 356 U.S. 86 (1958), at 100 (Warren, C.J., for the Court); and *Gregg v. Georgia* 428 US 153 (1976), at 173 and 182–183 (plurality opinion). But I am not relying on that here.

51. There is a good critique of McCrudden's analysis in Paolo G. Carozza, "Human Dignity and Judicial Interpretation of Human Rights: A Reply," *European Journal of International Law* 19 (2008), 931.

52. Ronald Dworkin talks about free speech "and the dignity it confirms" in his foreword to Hare and Weinstein, eds., *Extreme Speech and Democracy,* viii.

53. David Feldman, "Human Dignity as a Legal Value: Part 1," *Public Law* [1999], 682, speaks (at 685) of "[t]he perplexing capacity of dignity to pull in several directions."

54. In other contexts, the notion of dignity is present on both sides of a human-rights argument: consider the French "dwarf-throwing" case, where the Conseil d'Etat said that closing down the exhibition was a legitimate way of protecting human dignity, while the dwarf in question claimed that his dignity was compromised by this paternalistic intrusion into his ability to contract for the use of his body for entertainment pur-

poses. See the decision in *Commune Morsange-sur-Orge* CE, Ass., 27 October 1995, 372, and the decision of the U.N. Human Rights Committee in the same case, under the title *Wackenheim v. France,* U.N. Human Rights Committee, 75th session, July 15, 2002 (2002). Again, there is no contradiction here.

6. C. Edwin Baker and the Autonomy Argument

1. For Baker's claims about free-speech absolutism, see C. Edwin Baker, *Human Liberty and Freedom of Speech* (Oxford University Press, 1989), 161ff. See also C. Edwin Baker, "Harm, Liberty, and Free Speech," *Southern California Law Review* 70 (1997), 979. At 981: "[T]he thesis of this article is that the harmfulness of a person's speech itself never justifies a legal limitation on the person's freedom of speech."

2. Holmes's exact words in *Schenck v. U.S.*, 249 U.S. 47 (1919), at 52, were these: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre."

3. But there was an incident in 1913, recorded in Woodie Guthrie's ballad "1913 Massacre," in which a provocateur shouted "Fire!" at a party given for the children of striking miners in Calumet, Michigan. In the ensuing stampede, seventy-three people were killed, most of them children. See Larry D. Lankton, *Cradle to Grave: Life, and Work and Death at the Lake Superior Copper Mines* (Oxford University Press, 1991). This has been cited as the background to Justice Holmes's famous image: see Baker, "Harm, Liberty, and Free Speech," at 982–983.

4. See Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986), 380: "[H]as autonomy any value qua autonomy when it is abused? Is the autonomous wrongdoer a morally better person than the non-autonomous wrongdoer? Our intuitions rebel against such a view. It is surely the other way round. The wrongdoing casts a darker shadow on its perpetrator if it is autonomously done by him." See also the discussion in Jeremy Waldron, "Autonomy and Perfectionism in Raz's *The*

Morality of Freedom," *Southern California Law Review* 62 (1989), 1097. But as far as I know, Raz himself does not apply this doctrine to the case of hate speech. This may be on account of a view that he also holds: that even if autonomy has no value when exercised in the choice of an option that is morally wrong, still we cannot trust our lawmakers to distinguish correctly between right and wrong options.

5. This insistence on the gravity of the harm that is in prospect is doubly justified, because in the best-drafted hate speech regulations, legislators go out of their way to concentrate on the most serious cases and install various filters—such as the requirement in the United Kingdom that no prosecution may be brought under the racial-hatred provisions without the consent of the attorney general. See Public Order Act 1986 (U.K.), section 27(1).

6. See, e.g., Ronald Dworkin, Foreword, in *Extreme Speech and Democracy,* ed. Ivan Hare and James Weinstein (Oxford University Press, 2009), vi.

7. A similar conclusion is reached by Martha Minow, "Regulating Hatred: Whose Speech, Whose Crimes, Whose Power?" *UCLA Law Review* 47 (2000), 1261–62: "[T]oo often, the advocates of the First Amendment ignore or try to minimize the ways in which slurs and bias-based comments both produce psychological damage for individuals and perpetuate the dehumanization of members of particular groups (which in turn can invite further degradation and violence). . . . Acknowledging such harms might seem threatening to those who believe that protection for freedom of expression and thought is or should be absolute. Yet, it is only honest to acknowledge the harms first, and then decide what to do."

8. Robert Post, in his article "Racist Speech, Democracy, and the First Amendment," *William and Mary Law Review* 32 (1991), at 278–279, talks about the need for "serious engagement with the question of why we really care about protecting freedom of expression." He writes (and I agree with him): "What is most disappointing about the expanding lit-

erature proposing restrictions on racist speech is the palpable absence of that engagement. The most original and significant articles in the genre concentrate on uncovering and displaying the manifold harms of racist communications; the harms of regulating expression are on the whole perfunctorily dismissed. . . . I agree, of course, that the question of regulating racist speech ought not to be settled simply by reference to present doctrine. But it is equally important that the question ought not to be settled without serious engagement with the values embodied in that doctrine." Post's own work is a model in this regard, not only for his engagement with free-speech values but also for his open and sustained engagement with the arguments in favor of the regulation of hate speech.

9. See, e.g., Alexander Tsesis, "Dignity and Speech: The Regulation of Hate Speech in a Democracy," *Wake Forest Law Review* 44 (2009), 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. . . . When harassing expression is disguised as political expression it adds nothing to democratic debate." See also Mari J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," *Michigan Law Review* 87 (1989), 2320.

10. C. Edwin Baker, "Autonomy and Hate Speech," in Hare and Weinstein, eds., *Extreme Speech and Democracy,* at 143.

11. Laurence H. Tribe, *American Constitutional Law* (Foundation Press, 1988), 790, quoting the U.S. Supreme Court in *Police Department of Chicago v. Mosley,* 408 U.S. 92, 95–96 (1972).

12. For a helpful discussion of the antinomies surrounding this distinction, see R. George Wright, "Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction," *University of Miami Law Review* 60 (2006), 333.

13. Public Order Act 1986, section 18(1): "A person who uses *threatening, abusive or insulting words or behaviour,* or displays any *written mate-*

rial 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" (my emphasis). However, a later savings clause, section 18(5), does seem to emphasize adverbial elements that are independent of content: "A person who is not shown to have intended to stir up racial hatred is not guilty of an offence under this section if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting."

14. Geoffrey Stone, "Content-Neutral Restriction," *University of Chicago Law Review* 54 (1987), at 56–57. See also Geoffrey R. Stone, "Content Regulation and the First Amendment," *William and Mary Law Review* 25 (1983), at 208–212.

15. I dwelt on this in more detail with regard to the impact of cross-burning, in the latter part of Chapter 4.

16. Stone, "Content-Neutral Restriction," at 55, citing Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Greenwood Press, 1979), 27.

17. *R. v. Keegstra* [1990] 3 SCR 697.

18. See the discussion in Vincent Blasi, "Holmes and the Marketplace of Ideas," *Supreme Court Review* (2004), 1.

19. Ibid., 6–13. See also Darren Bush, "The 'Marketplace of Ideas': Is Judge Posner Chasing Don Quixote's Windmills?" *Arizona State Law Journal* 32 (2000), 1107; and Paul H. Brietzke, "How and Why the Marketplace of Ideas," *Valparaiso University Law Review* 31 (1997), 951.

20. Ivan Hare and James Weinstein, "General Introduction," in Hare and Weinstein, eds., *Extreme Speech and Democracy,* 6.

21. Dworkin, *Taking Rights Seriously,* 198 (my emphasis).

22. Ibid., 191ff.

23. Cf. Dworkin's celebrated "Lexington Avenue" example (ibid., 269).

24. Compare Charles Taylor's "fiendish defense of Albania" (saying

that although Albania has restrictions on freedom of worship, it balances that by having fewer traffic lights) in his essay "What's Wrong with Negative Liberty?" *in The Idea of Freedom: Essays in Honour of Isaiah Berlin* (Oxford University Press, 1979), 183.

25. Baker, "Harm, Liberty, and Free Speech," 992.

26. Immanuel Kant, *Groundwork to the Metaphysics of Morals,* ed. Mary Gregor (Cambridge University Press, 1997), 41–42 (4:433–435 of the Prussian Academy edition of Kant's works).

27. C. Edwin Baker, "Autonomy and Informational Privacy, or Gossip: The Central Meaning of the First Amendment," *Social Philosophy and Policy* 21 (2004), at 224.

28. See Baker, "Autonomy and Hate Speech," 142–146; Baker, "Autonomy and Informational Privacy, or Gossip," 205ff.; Baker, "Harm, Liberty, and Free Speech," 979ff.; and Baker, *Human Liberty and Freedom of Speech,* ch. 4.

29. Baker, "Autonomy and Informational Privacy, or Gossip," at 225–226.

30. See the discussion in Jeremy Waldron, "One Law for All: The Logic of Cultural Accommodation," *Washington and Lee Law Review* 59 (2002), 3, at 3–35.

31. Baker, "Harm, Liberty, and Free Speech," 1019–20.

32. Baker, "Autonomy and Hate Speech," 143.

33. For a review of the conventional theories, and for some valuable proposals, see T. M. Scanlon, "A Theory of Freedom of Expression," in his collection *The Difficulty of Tolerance: Essays in Political Philosophy* (Cambridge University Press, 2003), 6.

34. Baker, "Harm, Liberty, and Free Speech," 990–991.

35. On the idea of performatives, see J. L. Austin, *How To Do Things with Words* (Oxford University Press, 1975).

36. The example is from John Stuart Mill, *On Liberty* (Penguin Books, 1985), ch. 3.

37. Baker, "Harm, Liberty, and Free Speech," 991–992.
38. Ibid., 992–993.

7. Ronald Dworkin and the Legitimacy Argument

1. See, e.g., Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Greenwood Press, 1979). Meiklejohn's position is that "the principle of the freedom of speech springs from the necessities of the program of self-government" (26–27), but he elaborates it at considerable length without really producing a sharp and compelling argument. See also Robert C. Post, *Constitutional Domains: Democracy, Community, Management* (Harvard University Press, 1995).

2. For example, James Weinstein, "Extreme Speech, Public Order, and Democracy," in Ivan Hare and James Weinstein, eds., *Extreme Speech and Democracy* (Oxford University Press, 2009), at 23, 28, and 38.

3. Ronald Dworkin, Foreword, in Hare and Weinstein, eds., *Extreme Speech and Democracy,* v–ix. See also Ronald Dworkin, "A New Map of Censorship," *Index on Censorship* 35 (2006), 130.

4. Dworkin, Foreword, viii.
5. Ibid., vii.
6. Ibid.
7. Ibid., viii.
8. Ibid.

9. Ibid., vi. Dworkin says this also about claims concerning the effects of pornography: compare his attack on Catharine MacKinnon's claims about pornography in Chapters 8 and 9 of Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press, 1996). Though Dworkin concedes that pornography is "often grotesquely offensive" to women (218), he asserts that "no reputable study has concluded that pornography is a significant cause of sexual crime" (230). For Professor MacKinnon's rebuttal of Dworkin's assertion,

see her letter in the *New York Review of Books,* March 3, 1994, responding to an *NYRB* article by Dworkin which he used as the basis for a chapter in *Freedom's Law.*

10. I will discuss issues about incitement in Chapter 8 below.

11. Dworkin, Foreword, viii.

12. Dworkin, *Freedom's Law,* 219.

13. Consider the remarks in Isaiah Berlin, "Two Concepts of Liberty," in his collection *Liberty,* ed. Henry Hardy (Oxford University Press, 2002), 171–173, about the importance of facing up to the moral reality of both terms in any situation of trade-off or sacrifice. It is true that in some contexts, Dworkin has argued that liberals are forbidden from considering reasons of a certain kind. For example, he suggests that a person's "external" preference that another be treated with less than equal respect should to be counted alongside other preferences in a utilitarian calculus; see Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977), 235–238. But the reasons he proposes to dismiss from consideration here cannot possibly be brought within the ambit of that argument. They are simply reasons concerning the causation of certain diffuse harms; they do not embody prejudices or any other disqualifying element.

14. See Dworkin, Foreword, vii: "[W]e must protect it even if it does have bad consequences and we must be prepared to explain why."

15. In his book *Law's Empire* (Harvard University Press, 1986), 190–192, Dworkin recognizes that these two elements may come apart. But mostly he deals with them together.

16. Public Order Act 1986 (U.K.), Parts 3 and 3A.

17. See, e.g., Race Relations Act, 1976, section 70.

18. Dworkin, Foreword, viii.

19. Cf. John Stuart Mill, *On Liberty* (Penguin Books, 1985), ch. 2, p. 81: "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 see-

ing that unless the reasons are good for an extreme case, they are not good for any case."

20. See text accompanying note 7 above.

21. Robert C. Post, "Racist Speech, Democracy, and the First Amendment," *William and Mary Law Review* 32 (1991), at 290 (my emphasis).

22. Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press, 2006), 97.

23. Public Order Act 1986 (U.K.), section 18(1)(a).

24. Ibid., section 18(5).

25. Racial Discrimination Act 1975 (Commonwealth of Australia), section 18d.

26. Mill, *On Liberty,* ch. 2, p. 106.

27. Ibid.

28. Ibid., ch. 2, pp. 99 and 106.

29. Ibid., ch. 2, p. 108.

30. See Ivan Hannaford, *Race: The History of an Idea in the West* (Woodrow Wilson Center Press, 1966), for the history of disputation on these issues. And consider this example: in 1907, the Clarendon Press at Oxford published the following in a two-volume treatise on moral philosophy by the Reverend Hastings Rashdall, concerning trade-offs between high culture and the amelioration of social and economic conditions: "It is becoming tolerably obvious at the present day that all improvement in the social condition of the higher races of mankind postulates the exclusion of competition with the lower races. That means that, sooner or later, the lower well-being—it may be ultimately the very existence—of countless Chinamen or negroes must be sacrificed that a higher life may be possible for a much smaller number of white men." Hastings Rashdall, *The Theory of Good and Evil: A Treatise on Moral Philosophy,* 2nd ed. (Oxford University Press, 1924), vol. 1, 237–238.

31. Of course, there are still some discussions of race—for example, of the kind initiated in the "bell curve" controversy: see Richard Herrnstein

and Charles Murray, *The Bell Curve: Intelligence and Class Structure in American Life* (Free Press, 1994).

32. But see Post, "Racist Speech, Democracy, and the First Amendment," 291, for a sense of how careful we need to be here.

33. See Waldron, "Dignity and Defamation," *Harvard Law Review* 123 (2010), 1596, at 1646–52.

34. It is not merely the fact that serious debate has died away on these topics. We regard them as settled also in the sense that we have erected whole swaths of social policy on their settlement. The falsity of the racist's claim, for example, is one of the fundamentals of our scheme of justice, not only in the sense that we take it for granted but in the sense that we feel entitled to build great edifices of law and policy on its foundation—education policy, strategies for equal opportunity, permanent mechanisms for securing equal concern and respect. And we most emphatically do not think we have to regard these edifices as temporary, liable to be dismantled next year or the year after, depending on how the debate about race comes out. We treat the falsity of the claim about race as one of the fundamentals of our approach to justice, and we distinguish it now from contestable elements like economic equality, affirmative action, progressive taxes, social provision in the public realm, and so on—all of which *are* the subject of vital and ongoing debate whose suppression would give rise to a genuine problem of legitimacy for current social policy.

35. The account that follows summarizes the argument in Post, "Racist Speech, Democracy, and the First Amendment."

36. See Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999), 302–306, for a discussion of what it means for everything to be "up for grabs."

37. Robert Post, "Hate Speech," in Hare and Weinstein, eds., *Extreme Speech and Democracy,* at 128, quoting from *Wingrove v. U.K.* (1997) 24 EHRR 1, 7.

38. Section 2 of the act provided for the exemption of ninety peers from this provision, and arrangements were made for the ninety to be elected from among the body of more than a thousand hereditary peers, making the House of Lords in part a representative assembly (rather than a plenary assembly) of peers for the first time in its history. Life peers, on the other hand, continue their membership of the House of Lords on a nonrepresentative basis: all life peers are members of the House.

39. This is based on comments by Professor Stone to the author, in conversation.

40. *Dennis v. United States,* 341 U.S. 494 (1951). On the Sedition Act, see the discussion in Chapter 2 above.

41. See, for example, Waldron, *Law and Disagreement,* pp. 211–312; and Jeremy Waldron, "The Core of the Case against Judicial Review," *Yale Law Journal* 115 (2006), 1346.

8. Toleration and Calumny

1. See Jeremy Waldron, "Locke, Toleration and the Rationality of Persecution," in *Justifying Toleration,* ed. Susan Mendus (Cambridge University Press, 1988), reprinted in Waldron, *Liberal Rights: Collected Papers, 1981–1991* (Cambridge University Press, 1993); "Toleration and Reasonableness," in *Reasonable Tolerance: The Culture of Toleration in Diverse Societies,* ed. Catriona McKinnon and Dario Castiglione (Manchester University Press, 2003); *God, Locke, and Equality: Christian Foundations of Locke's Political Thought* (Cambridge University Press, 2002), 217ff.; and "Hobbes and Public Worship," in *Nomos XLVIII: Toleration and Its Limits,* ed. Melissa Williams and Jeremy Waldron (New York University Press, 2008).

2. *R. v. Osborne,* W. Kel. 230, 25 Eng.Rep. 584 (1732); or *R. v. Osborn,* 2 Barnardiston 138 and 166 (94 Eng.Rep. 406 and 425).

3. This description is taken from an observation on Osborne's case in another case concerning Jews, *In re Bedford Charity,* 2 Swans. 471, at 532; 36 Eng.Rep. 696 (1819), at 717.

4. Ibid. Fazakerly appears to have been a most prolific attorney. He is mentioned in the English Reports hundreds of times.

5. *R. v. Osborne,* W. Kel. 230, 25 Eng.Rep. 584 (1732).

6. *R. v. Osborn,* 2 Barnardiston 138, 94 Eng.Rep. 406.

7. *R. v. Osborn,* 2 Barnardiston 166, 94 Eng.Rep. 425.

8. *R. v. Osborne,* W. Kel. 230, 25 Eng.Rep. 584 (1732).

9. *In re Bedford Charity,* 2 Swans. 471, at 532; 36 Eng.Rep. 696 (1819), at 717.

10. Ibid., at 502 note 4; at 717. It's a law report within a Law Report.

11. Ibid., at 502; at 705, citing Calvin's Case, 7 Co. Rep. 17a, 77 Eng. Rep. 397 (1609).

12. Counsel for the petitioners argued as follows (*In re Bedford Charities,* 512; 707): "It is painful to comment on the doctrine cited from Lord *Coke's* report of *Calvin's* case; a doctrine disgraceful to the memory of a great man. . . . That passage has never been cited without reprobation. In *The East India Company v. Sandys,* Sir *George Treby* condemned it in the strongest terms. 'I must take leave to say that this notion of Christians not to have commerce with infidels is a conceit absurd, monkish, fantastical, and fanatical.'"

They cited in a footnote the opinion of Coke's contemporary Lord Littleton, who insisted (1 Salkeld 47; 91 Eng.Rep. 46) that "Turks and Infidels are not *perpetui inimici,* nor is there a particular enmity between them and us; but this is a common error founded on a groundless opinion . . . ; for though there be a difference between our religion and theirs, that does not oblige us to be enemies to their persons; they are the creatures of God, and of the same kind as we are, and it would be a sin in us to hurt their persons."

They also cited Chief Justice Willes in *Omichund v. Barker,* Willes, 538, at 542; 125 Eng.Rep. 1310 at 1312 (1727), to the effect that "[t]his no-

tion, though advanced by so great a man [Coke], is, I think, contrary not only to the Scripture, but to common sense and common humanity; and I think that even the devils themselves, whose subjects he says the heathens are, cannot have worse principles; and besides the irreligion of it, it is a most impolitic notion and would at once destroy all that trade and commerce from which this nation reaps such great benefits."

13. My American friends tell me this phrase was invented by Thomas Jefferson. But Richard Hooker used it in *Ecclesiastical Polity* almost two centuries before Jefferson did, and Hooker used it in a way that indicated it was in common circulation in Elizabethan times. (Hooker, of course, opposed the idea.)

14. John Locke, *A Letter Concerning Toleration,* ed. Patrick Romanell (Bobbs Merrill, 1955), 24.

15. Public Order Act 1986, section 29J.

16. Locke, *Letter Concerning Toleration,* 29.

17. Ibid., 28.

18. Ibid., 23 (my emphasis).

19. John Locke, *A Second Letter Concerning Toleration* (Awnsham and Churchill, 1690), 7–8.

20. John Locke, "The Fundamental Constitutions of Carolina," in *Locke: Political Essays,* ed. Mark Goldie (Cambridge University Press, 1997), 179. I am most grateful to Teresa Bejan for this reference. (Bejan tells me that rules of this sort were not uncommon in Tudor England and contemporary America.)

21. For a discussion, see Waldron, *God, Locke, and Equality,* 202–204.

22. Locke, *Letter Concerning Toleration,* 24.

23. John Locke, *Two Treatises of Government,* ed. Peter Laslett (Cambridge University Press, 1988), I, §42, p. 170.

24. John Marshall, *John Locke, Toleration and Early Enlightenment Culture* (Cambridge University Press, 2006), 656–657: "Although political scientists nowadays tend to pass by Locke's arguments in the *Letter* for toleration on the basis of charity . . . , there is no question that for

Locke, as for his contemporaries arguing for toleration, the duty of charity was a crucial argument for toleration, as charity was the most important duty of Christianity."

25. Locke, "Pacific Christians," in *Locke: Political Essays,* 305.

26. Ibid.

27. Pierre Bayle, *Commentaire philosophique sur ces paroles de Jésus-Christ, "Contrain-les d'entrer"; ou, Traité de la tolérance universelle* (1686); translated in 1708 as *Philosophical Commentary on These Words of the Gospel, Luke 14.23, "Compel Them To Come In, That My House May Be Full,"* ed. John Kilcullen and Chandran Kukathas (Liberty Press, 2005), 363.

28. Ibid., 317.

29. Ibid., 312. Bayle criticizes the common practice of "giving things very hard names o' purpose to create a horror for 'em" (ibid., 205). And the theme is continued in his sarcastic comment against those who say that sometimes law is needed to act against the pride of heretics. Bayle says: "Why not force those, who make an ill use of their Youth and Beauty, to take Pouders or Potions to destroy their Complexion and Vigor, or get defamatory Libels against 'em publickly dispers'd, that they might never dare shew their faces abroad?" (ibid., 359).

30. Ibid., 104.

31. Ibid., 209.

32. Ibid., 199–200.

33. Voltaire, *Lettres philosophiques sur les Anglais* (1734); translated as *Letters on England,* trans. Leonard Tancock (Penguin Books, 1980), 41 ("Letter VI: On the Presbyterians").

34. Voltaire, "Mahométans," in *Dictionnaire philosophique* (1764); translated as "Mohammedans," in *Voltaire's Philosophical Dictionary* (Nu-Vision Publications, 2008), 145.

35. Voltaire, "Persecution," in *The Philosophical Dictionary,* quoted in David George Mullan, ed., *Religious Pluralism in the West* (Blackwell, 1998), 187–188.

36. Denis Diderot, *Political Writings,* trans. and ed. John Hope Mason

and Robert Wokler (Cambridge University Press, 1992), 29. The last sentence of this quotation is replaced by an ellipsis in this edition, but can be found online at quod.lib.umich.edu/cgi/t/text/text-idx?c=did;cc=did;rgn=main;view=text;idno=did2222.0000.564.

37. Denis Diderot, *Political Writings,* 29.

38. Adam Smith, *The Wealth of Nations,* ed. Edwin Cannan (University of Chicago Press, 1976), book I, ch. 2, p. 18.

39. Immanuel Kant, *Grundlegung zur Metaphysik der Sitten* (1785); translated as *Groundwork of the Metaphysics of Morals,* ed. Mary Gregor (Cambridge University Press, 1998), 42–43 (4: 434–435 of the Prussian Academy edition of Kant's works).

40. Peter Gay, *The Enlightenment: The Science of Freedom* (W. W. Norton, 1969), 398–406.

41. See Waldron, "Locke, Toleration and the Rationality of Persecution."

42. Locke, Second *Letter Concerning Toleration,* 23.

43. Locke, *Letter Concerning Toleration,* 23.

44. Ibid., 39.

45. I differ here from John Marshall, who reads this passage as showing that Locke was willing to echo common denunciations of religious promiscuity; see Marshall, *John Locke, Toleration and Early Enlightenment Culture,* 706ff.

46. On the complexities of Locke on the toleration of Roman Catholics, see the discussion in Waldron, *God, Locke, and Equality,* 218–223.

47. John Stuart Mill, *On Liberty* (Penguin Books, 1982), 144 (my emphasis). See also the extended discussion in Jeremy Waldron, "Mill as a Critic of Culture and Society," in an edition of John Stuart Mill, *On Liberty,* ed. David Bromwich and George Kateb (Yale University Press, 2002), 224.

48. Voltaire, "Mahométans," 145.

49. S. G. Tallentyre, *The Friends of Voltaire* (G. P. Putnam's Sons, 1907), 199.

50. See John Durham Peters, *Courting the Abyss: Free Speech and the Liberal Tradition* (University of Chicago Press, 2005), 156–157.

51. The context is: "If a Roman Catholic believe that to be really the body of Christ which another man calls bread, he does no injury thereby to his neighbour. If a Jew do not believe the New Testament to be the Word of God, he does not thereby alter anything in men's civil rights. If a heathen doubt of both Testaments, he is not therefore to be punished as a pernicious citizen. . . . I readily grant that these opinions are false and absurd. But the business of laws is not to provide for the truth of opinions, but for the safety and security of the commonwealth and of every particular man's goods and person." Locke, *Letter Concerning Toleration,* 45.

52. Ibid., 19.

53. I actually don't accept this as a definitional move. Many thinkers in the Enlightenment tradition based what they called "toleration" in part on principles of relativity or uncertainty or indifference toward religious belief; and I don't think much is gained in modern philosophical debate by saying they used the word "toleration" wrongly. What we may say is that the case for toleration is usually thought to require that practices and beliefs should not be persecuted even if they are (or turn out to be) wrong; but we don't necessary postulate their wrongness as a starting point. So toleration need not necessarily commit us to finding an outlet for the condemnation that it presupposes.

I mention this because it helps a bit with what Bernard Williams and others have called "the paradox of toleration." See Bernard Williams, "Toleration: An Impossible Virtue?" in *Toleration: An Elusive Virtue,* ed. David Heyd (Princeton University Press, 1996), 18. According to Williams, toleration seems to commit us, by way of presupposition, to the judgment that a given practice or belief is wrong or mistaken; and it seems to commit us, as a matter of principle, to refrain from doing what we would ordinarily do in regard to stuff that is wrong or mistaken—namely, try to stamp it out.

54. Locke, *Letter Concerning Toleration,* 46: "I would not have this understood as if I meant . . . to condemn all charitable admonitions and affectionate endeavours to reduce men from errors, which are indeed the greatest duty of a Christian. Any one may employ as many exhortations and arguments as he pleases, towards the promoting of another man's salvation. But . . . [n]othing is to be done imperiously."

55. Mill, *On Liberty,* 144. See also the discussion in Waldron, "Mill as a Critic of Culture and Society," at p. 224.

56. Locke, *Letter Concerning Toleration,* 46: "[S]eeing [as] one man does not violate the right of another by his erroneous opinions and undue manner of worship, nor is his perdition any prejudice to another man's affairs; therefore, the care of each man's salvation belongs only to himself."

57. Lord Shaftesbury, 3rd Earl of Shaftesbury (Anthony Ashley Cooper), *Characteristics of Men, Manners, Opinions, Times* (1711), ed. Lawrence E. Klein (Cambridge University Press, 1999), 31.

58. From a sermon preached by Bartholomew Stosch, court chaplain, before the Brandenburg Landtag in 1653, and printed by the Elector's special order in 1659; quoted in Oliver H. Richardson, "Religious Toleration under the Great Elector and Its Material Results," *English Historical Review* 25 (1910) 93, at 94–95.

59. John Locke, *A Third Letter for Toleration to the Author of the Third Letter Concerning Toleration* (Awnsham and Churchill, 1792), 104.

60. Thomas Hobbes, *Leviathan,* ed. Richard Tuck (Cambridge University Press, 1996), ch. 14.

61. Niccolò Machiavelli, *Discourses on Livy,* trans. Harvey Mansfield and Nathan Tarcov (University of Chicago Press, 1996), 27 (I, 8). See also the excellent discussion in David Cressy, *Dangerous Talk: Scandalous, Seditious, and Treasonable Speech in Pre-Modern England* (Oxford University Press, 2010). Cressy remarks that sixteenth- and seventeenth-century Englishmen "knew from the Bible, from literature, from legal proceedings, and from everyday discourse that speech could provoke violence,

discord, unhappiness, or sedition. An oath or a slur, an insult or a curse, a joke or a lie, could all intensify divisions within communities and erode the fabric of society" (6).

62. For example, they are not unhappy with John Stuart Mill's condemnation, in the essay *On Liberty* a century or so later, of the public expression of an opinion that "corn dealers are starvers of the poor . . . when [that opinion is] delivered orally before an excited mob assembled before the house of a corn dealer." Mill, *On Liberty,* 119.

63. Locke, *Letter Concerning Toleration,* 56.

64. Montesquieu, *The Spirit of the Laws,* trans. and ed. Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone (Cambridge University Press, 1989), 193 (book XII, ch. 5).