“‘Hate Speech’ and Incitement to Violence”
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Extreme Speech and Democracy

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Hate Speech

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The OED teaches us the connection between hate speech and the overall theme of this volume, *Extreme Speech*. ‘Hate,’ we learn, is ‘an emotion of extreme dislike or aversion; detestation, abhorrence, hatred.’ A draft OED addition of December 2002 defines ‘hate speech’ as ‘speech expressing hatred or intolerance of other social groups, especially on the basis of race or sexuality.’ To prohibit hate speech, then, is to forbid expression of ‘extreme’ intolerance or ‘extreme’ dislike. The qualification ‘extreme’ is prerequisite because intolerance and dislike are necessary human emotions which no legal order could pretend to abolish. We should be intolerant of injustice and we should dislike the needless suffering of the innocent.

When do these otherwise appropriate emotions become so ‘extreme’ as to deserve legal suppression? What, for example, are we to make of Walt Whitman’s exhortation to ‘hate tyrants,’ or Charles William Eliot’s inaugural Address as President of Harvard College, in which he observed that ‘Americans, as a rule, hate disabilities of all sorts, whether religious, political, or social?’ Is it wrong for Americans to hate tyrants or to hate rules that exclude persons on the basis of religion, political belief, or social class? Perhaps, as an American presidential candidate once remarked when accepting the nomination of the Republican Party, ‘Extremism in the defense of liberty is no vice; moderation in the pursuit of justice is no virtue.’

Hatred, in its proper place, would seem socially desirable. The great English philologist William Jones, for example, once wrote to a correspondent that 'I hate favouritism.' Jones believed that while the 'tender passions' like 'love, pity, desire' 'produce in the arts what we call the beautiful,' 'the terrible passions,' like 'hate, anger, fear... are productive of the sublime.' Edmund Burke, who knew something about the sublime, observed that 'They will never love where they ought to love, who do not hate where they ought to hate.' And Burke would not let the matter stop there. In speeches on the impeachment of Warren Hastings, Burke avowed that 'Some say, you ought to hate the crime and love the criminal. No, that is the language of false morality; you ought to hate the crime and criminal, if the crime is of magnitude.'

The indispensability of hatred to law was a major theme of the great Sir James FitzJames Stephen, who believed that 'the infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offense, and which constitutes the moral or popular as distinguished from the conscientious sanction of that part of morality which is also sanctioned by the criminal law.' Love and hatred, Stephen wrote, 'imply each other as much as convex and concave.' He considered 'unqualified denunciations' of hatred to be 'as ill-judged as unqualified denunciations of sexual passion.'

Christian pieties to the contrary notwithstanding, hatred is plainly an extreme and troublesome human emotion, 'deeply rooted in human nature,' that can serve constructive social purposes. When the law seeks to suppress hate—and hence hate speech—it is not because hate 'ought to be proscribed. It is instead because the law is intolerant of hatred when it is expressed in particular circumstances. But what are these circumstances?

The oldest and most venerable legal prohibition of hate is that contained in the law of sedition libel, which prohibits 'all writings... which tend to bring into hatred or contempt the King, the Government, or the constitution as by law established.' Seditious libel was to be suppressed because, as Machiavelli advised in the first English translation of The Prince, rulers ought to 'take a care not to incur contempt or hatred.' Law traditionally condemned hatred in analogous circumstances: it punished speech expressed 'with a view... to bring into hatred and contempt the administration of justice,' for example, and also defamatory speech 'tending to expose' a person 'to public hatred, contempt, or ridicule.'

After a century of attempted genocides, law today tends to condemn the expression of hatred in the context of religious, racial, or ethnic groups. The International Covenant on Civil and Political Rights (ICCPR), for example, prohibits 'any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.' The International Convention on Elimination of All Forms of Racial Discrimination (ICERD) condemns speech attempting to justify or promote racial hatred and discrimination in any form. The American Convention on Human Rights prohibits 'any advocacy of national, racial, or religious hatred that constitutes incitement to lawless violence.' Canadian legislation prohibits the 'promotion of hatred... towards any section of the public distinguished by colour, race, religion, or ethnic origin.' The German penal code forbids speech that 'incites hatred against parts of the population' in a manner 'liable to disturb public peace.'

All legal attempts to suppress hatred, whether of racial groups or of the King, must face a profound conceptual difficulty. They must distinguish hatred from ordinary dislike or disagreement. Even those who believe that hatred should be punished because it is 'extreme' would readily concede that disagreement, even disagreement that stems from dislike, ought to be protected because it is the lifeline of politics. What Habermas calls communicative action cannot proceed at all without contestation and disagreement. But when does normal dislike become punishable hatred? To appreciate the difficulty, consider the 1792 conviction of Thomas Paine for seditious libel on the ground that the Rights of Man brought 'into hatred and contempt' the 'present Sovereign Lord the King and the Parliament of this kingdom, and the constitution, laws, and government
thereof.\textsuperscript{24} We now regard \textit{The Rights of Man} as an example of normal disagreement, not hatred.

How can we distinguish critique that is too extreme, that ought to be condemned as hatred, from mere disagreement?\textsuperscript{25} The problem arises just as much in the context of contemporary hate speech regulation as it does in the context of seditionist libel. Is speech attacking Islamic fundamentalism for its homophobia and suppression of women hate speech or critique? Is it hate speech or critique to attack the Catholic Church for its pedophilic priests or for its position on abortion? Are the criticisms of African Americans by William Julius Wilson\textsuperscript{26} or Shelby Steele\textsuperscript{27} or Louis Farrakhan\textsuperscript{28} hate speech or critique? Is the pacifist argument that ‘Soldiers are murderers’\textsuperscript{29} hate speech or critique?

\textsuperscript{24}J. Ridgway (ed.), \textit{The Speeches of The Hon. Thomas Erskine}, Vol. II (London: S. Groom, 1810), 5. The jury convicted even before the closing arguments. Stephen summarizes Erskine’s famous defence as:

A man who publishes what he really believes to be true from a desire to benefit mankind, does not act from a bad motive, however erroneous his opinions may be, and however harshly they may be expressed. Therefore, no publication of any opinions really entertained is criminal unless the publisher wishes to injure mankind.

See n. 10 above, 364. Stephen comments: ‘Practically the inference would be that there ought to be no prosecutions for seditionist libel at all unless the matter published obviously tended to provoke people to commit some definite crime, or unless it contained definite attacks upon individual character. This is not unlike the conclusion at which we have in practice arrived in these days.’

\textsuperscript{25}We should recall in this context the famous remarks of Lord Chesterfield to the House of Lords, supposedly written by Samuel Johnson:

One of the greatest blessings, my Lords, we enjoy is liberty; but every good in this life has its alloy of evil: licentiousness is the alloy of liberty; it is an abomination, an execration; it is a speck upon the eye of the political body, but which I can never touch but with a gentle, with a trembling hand, lest I destroy the body, lest I injure the eye upon which it is apt to appear.

There is such a connection between licentiousness and liberty, that is not easy to correct the one, without dangerously wounding the other: it is extreme hard to distinguish the true limit between them: like a changeable silk, we can easily see there are two different colours, but we cannot easily discover where the one ends, or where the other begins.

Quoted in Ridgway (n. 24 above), 148–49.


\textsuperscript{27}S. Steele, \textit{The Content of Our Character: A New Vision of Race in America} (New York: St Martin’s Press, 1990), 50. Blacks come ‘to the mainstream in the first place with a lower stock of self-esteem’ that makes for a kind of ‘opportunity aversion’ which ‘minimizes opportunity to the point where it can be ignored. In black communities the most obvious entrepreneurial opportunities are routinely ignored. It is often outsiders or the latest wave of immigrants who own the shops, restaurants, cleaners, gas stations, and even the homes and apartments. Education is a troubled area in black communities for numerous reasons, but certainly one of them is that many black children are not truly imbued with the idea that learning is virtually the same as opportunity.’

\textsuperscript{28}See ‘Black Power, Poul and Fragrant’, \textit{The Economist}, 12 October 1985, 25. Farrakhan’s ‘basic message . . . is to call on America’s large black underclass to stop accepting a position at the bottom of the pile. Stop depending on drugs and drink, he says, and try to be self-reliant; look after your children; clean up the slum where you live; have love for yourself, your family, your community.’

\textsuperscript{29}3 BVerFGE 266 (1995).

\textsuperscript{30}S. Johnson, \textit{A Dictionary of the English Language} (London: W. Strahan, 1756).

\textsuperscript{31}Commissioners on Criminal Law, \textit{Sixth Report} 83 (1841).

\textsuperscript{32}\textit{R. v. Raimes & Foote} (1883) 15 Cox CC 231, 236.

\textsuperscript{33}\textit{R. v. Bradlaugh} (1883) 15 Cox CC 217, 230.

\textsuperscript{34}Ibid., 231.

\textsuperscript{35}\textit{R. v. Raimes & Foote} (1883) 15 Cox CC 238.


Moderns are rightly embarrassed by the notion that simple disagreement can be taken as conclusive evidence of extremism or hatred. We tend to regard the capacity to deny each other’s ‘self-evident truths’ as constitutive of dialogue, which alone can justify the validity of ideas. Laws that punish the bare assertion of some propositional truth, like those which punish Holocaust denial or the assertion of racial inferiority, are rare and always problematic. Almost all regulations of hate speech therefore define hate speech as including in terms of expressions of dislike or abhorrence and in terms of some additional element that is thought to identify the unique presence of extreme hate and hence to justify legal intervention. Although hate speech regulations come in innumerable varieties, this additional element comes in roughly two distinct kinds: sometimes it emphasizes the manner of speech and sometimes it emphasizes the likelihood of causing contingent harm like violence or discrimination.

In the first variation, hate speech legislation conceives itself as punishing speech not merely because of its content, but because of its style of presentation. Hate speech is defined as speech that is formulated in a way that insults, offends, or degrades. The distinction between content and style is apparent in the history of English blasphemy law, which for centuries prohibited expression that offered ‘some indignity unto God himself.’\textsuperscript{30} As with seditionist libel, British law originally defined blasphemous speech on the basis of its substantive content. It punished as an offence any general denial of the truth of Christianity, without reference to the language or temper in which such denial is conveyed.\textsuperscript{33} About the middle of the 19th century, however, British blasphemy law began to evolve.

In 1883, Lord Coleridge explained that whatever the ‘old cases’ may have said ‘the mere denial of the truth of Christianity is not enough to constitute the offence of blasphemy.’\textsuperscript{33} He defined the crime of blasphemous libel instead as the publication of communications ‘calculated and intended to insult the feelings and the deepest religious convictions of the great majority of the persons amongst whom we live.’\textsuperscript{33} The point of blasphemy regulation was thus altered so that the law would prevent ‘outrages to the general feeling of propriety amongst the persons amongst whom we live.’\textsuperscript{34} ‘If the deficiencies of controversy are observed, even the fundamentals of religion may be attacked without the writer being guilty of blasphemy.’\textsuperscript{35} This was essentially the status of the crime of blasphemous libel until its recent repeal.\textsuperscript{36} The crime prohibited ‘any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ, or the Bible,’ but
provided that opinions hostile to Christianity may be expressed in a ‘decent and moderate’ manner.  

Much hate speech regulation follows an analogous logic. It permits statements about race, nationality, and religion, so long as such speech maintains a ‘decent and moderate’ manner. It penalizes speech that inflicts ‘outrages to the general feeling of propriety among the persons amongst whom we live.’  

38 The question, therefore, is how law can distinguish between, on the one hand, speech which respects ‘the decencies of controversy,’ and, on the other hand, speech which is outrageous and therefore hate inducing. If this distinction is not determined by the substantive content of the speech, how can it be drawn? I suggest that the distinction can be maintained only by reference to ambient social norms which allow us to distinguish speech that is outrageous from speech that is respectful.  

Sociologists teach us that social norms can be very important to the identities of persons. They are, so to speak, internalized into the very identity of persons who have been well-socialized into a culture. The best description of this process of socialization is by the American theoretician George Herbert Mead, who wrote:

What goes to make up the organized self is the organization of the attitudes which are common to the group. A person is a personality because he belongs to a community, because he takes over the institutions of that community into his own conduct. He takes its language as a medium by which he gets his personality, and then through a process of taking the different roles that all the others furnish he comes to get the attitude of the members of the community. Such, in a certain sense, is the structure of man’s personality...The structure, then, on which the self is built is this response which is common to all, for one has to be a member of a community to be a self.  

40 For the sake of terminological simplicity, I shall use the term ‘norms’ to refer to the group attitudes that we all carry around in us all the time and that form the foundation and possibility of our very selves, and I shall use the term ‘community’ to refer to the form of social organization that is created and sustained by such norms.

It is by reference to norms that a well-socialized person in any culture can tell whether any given communication is ‘extreme,’ meaning that the communication violates essential standards of civility and hence is vulnerable to legal sanction. The law commonly enforces social norms of this kind, as for example when it prohibits defamation, invasions of privacy, intentional infliction of emotional distress, flag burning, and so on.

We should note five aspects of these norms. First, norms are not merely subjective; they are instead ‘intersubjective’, because they refer to attitudes and standards that persons have a right to expect from others. So, for example, when Charles Taylor refers to ‘dignity’ as rooted in ‘our sense of ourselves as commanding (attitudinal) respect,’  

41 he means, first, that dignity depends upon communal norms that define respect as between persons in a given community, and, second, that the right to dignity is not merely subjective, but involves claims that members of a community place upon other members of the community by virtue of the shared norms of the community.

Second, norms are not merely instilled during processes of primary socialization in the family, but are also continuously reinforced through forms of social interaction that sociologists like Erving Goffman have demonstrated pervade every aspect of ordinary social life. When these forms of social interaction are disrupted, so are the identities of well-socialized members of a culture. If others act in ways that persistently violate the norms that define my dignity, I find myself threatened, demeaned, perhaps even deranged. The health of our personality, therefore, depends in no small degree upon the observance of community norms.

Third, the totality of a culture’s norms defines its distinctive shape, its unique identity.  

42 There is thus a reciprocity between individual identity and the cultural identity of a community. Fourth, norms are shared and yet evolve over time. Norms are like a language that conveys meaning because of common expectations but that nevertheless changes over time. Fifth, precisely because norms evolve, they are intrinsically contestable. There are constant struggles over the developing meaning of shared standards and expectations. As a consequence, cultures tend to establish institutions that offer authoritative interpretations of norms: schools are one such institution; another is the law.  

To quickly summarize this line of thought, I suggest that ‘community’ identifies a particular way in which social organization is created, which is by internalizing norms into the identities of persons. Because some such internalization must occur for a person to have a ‘self,’ community is a primary form of social organization. Healthy human beings always inhabit a community, which they value as they value themselves. But because norms are always in a historical process of evolution, the norms that define community are always threatened, always slipping away, which is why societies have institutions, like schools and the law, to enforce and stabilize norms. Hate speech regulation, like the regulation in preceding centuries of seditious libel, blasphemy, contempt of court, or defamation, exemplifies the aspiration of law to enforce norms that it regards as especially important for community and personal identity.
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Patrick Devlin offered the classic expression of the assumptions underlying this aspiration. Devlin famously argued that law should be used to enforce the organic norms that define a society’s culture:

[S]ociety means a community of ideas, without shared ideas on politics, morals, and ethics no society can exist... If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought... A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.

Once we understand, however, that norms enforced by law are not fixed and singular in the way that Devlin imagines, but instead are constantly evolving, we can also see that law must continuously choose what kind of community it will sustain. It must always decide whether to reinforce existing norms or to allow for the growth of new norms.

Anthropologists of law express this point by noting that culture is ‘never a closed, entirely coherent system but contains within it polyvalent, contestable messages, images, and actions’. Culture is a site of social differences and struggles, so that it is impossible ‘to conceive of cultural identity apart from the arenas of contest in which questions of identity arise and are performed’. Law that seeks to enforce the ‘common morality’ of society must thus intervene into controversies about norms. Law is not innocent in the manner imagined by Devlin. It is rarely a question of whether we shall inhabit a common community with a common morality; it is usually instead a question of what kind of community we shall inhabit and of what kind of morality we shall hold in common.

This suggests that whenever law chooses to enforce cultural norms, as for example by enforcing norms that distinguish hate speech from normal disagreement, law hegemonically imposes a particular vision of these norms. Hate speech regulation imagines itself as simply enforcing the given and natural norms of a decent society, à la Devlin; but from a sociological or anthropological point of view we know that law is always actually enforcing the mores of the dominant group that controls the content of law. For every Machiavelli who urges law to prohibit speech that induces hatred of the state, there is a Walt Whitman who urges us to ‘hate tyrants’.

48 234 Parl. Deb. H.C. (5th Ser.) 555 (1930) (remarks of Mr. Kingsley Griffith); see also ibid., 499:
We have writers today who can commit the offence of blasphemy with impunity, if the offence of blasphemy is an attack on the Christian religion. There are men like Sir Arthur Keith, Mr. H. G. Wells, Mr. Bertrand Russell, Mr. Aldous Huxley, and others who are able to attack the Christian religion without any danger whatever of their being prosecuted, while poor men, expressing the same point of view more bluntly and crudely, expose themselves to fine and imprisonment. That is a thoroughly unsatisfactory state of the law. After all, if one conceives the right to attack religion... one has to concede to the people who care to do this thing the right to choose their style of doing it. Different styles are needed for different circumstances and different audiences. I do not suppose the kind of style that would go down in a select circle in the West End would be effective amongst the democracy of the East End.

49 (remarks of Mr. Thursfield); see also ibid., 558 (remarks of Mr. Lansbury). When the law purports to impose what it regards as a ‘natural’ distinction between liberty and license, between proper discussion and abuse, it tends to justify itself like this:
There are no questions of more intense and awful interest than those which concern the relations between the Creator and the beings of his creation; and although as a matter of discretion and prudence, it might be better to leave the discussion of such matters to those who, from their education and habits, are most likely to form correct conclusions, yet it cannot be doubted that any man has a right, not merely to judge for himself on such subjects, but also legally speaking to publish his opinions for the benefit of others. When learned and acute men enter upon these discussions with such laudable motives, their very controversies, even where one of the antagonists must necessarily be mistaken, so far from producing mischief, must in general tend to the advancement of truth, and the establishment of religion on the firmest and most stable foundations. The very curiosity and folly of an ignorant man, who professes to teach and enlighten the rest of mankind are usually so gross as to render his errors harmless; but be this as it may, the law interferes not with his blunders so long as they are honest ones, justly considering that society is more than compensated for the partial and limited mischiefs which may arise from the mistaken endeavours of honest ignorance, by the splendid advantages which result to religion and to truth, from the exertions of free and unfettered minds. It is the mischievous abuse of this state of intellectual liberty which calls for penal censure. The law visits not the honest errors, but the malice of mankind. A willful intention to pervert, insult, and mislead others, by means of licentious and contumelious abuse applied to sacred objects, or by willful misrepresentations or artful sophistry, calculated to mislead the ignorant and unwise, is the criterion and test of guilt. A malicious and mischievous intention, or what is equivalent to such an intention, in law, as well as morals, a state of apathy and indifference to the interests of society, is the broad boundary between right and wrong.

If it can be collected from the circumstances of the publication, from a display of offensive levity, from contumelious and abusive expressions applied to sacred persons or subjects, that the design of the author was to occasion that mischief to which the matter which he published immediately tends, to destroy or even to weaken men’s sense of religious or moral obligations, to insult those who believe, by casting contumelious abuse and ridicule upon their doctrine, or to bring the established religion and the form of worship into disgrace and contempt, the offense against society is complete.

In n. 14 above, 362–63.
 Suppressing speech that is highly offensive to religious groups is the aim of the blasphemy statutes that characterize most European states. Even so tolerant a state as Denmark possesses a blasphemy statute that punishes 'any person who, in public, ridicules or insults the dogmas or worship of any lawfully existing religious community.' These laws serve the same sociological function as Denmark's hate speech statutes, which punish 'any person who, publicly ... makes a statement ... insulting or degrading a group of persons on account of their race.' Both statutes necessarily distinguish speech that merely expresses disagreement from speech that degrades. Neither statute punishes speech that expresses critique, but each sanctions speech that insults.

I suggest that Danish statutes must draw this distinction by reference to the social norms that in Denmark define respect. But once we understand that even in Denmark such norms are contested, we can also see that both blasphemy and hate speech regulation must necessarily enforce social norms that represent the well-socialized intuitions of the hegemonic class that controls the content of the law. This would be true even in a society that purported to adopt a 'multicultural' perspective enforcing norms of respect among disparate groups. European legal systems tend to be quite comfortable using law to enforce such hegemonic community norms.

By contrast, the First Amendment to the United States Constitution prohibits the punishment of blasphemous speech as well as hate speech. This is because the American First Amendment tends to regard speech necessary for the maintenance of democratic legitimacy, which I shall call 'public discourse,' as a unique domain in which the state is constitutionally prohibited from enforcing community norms. Most customary legal efforts to enforce such norms—the torts of defamation, invasion of privacy, intentional infliction of emotional distress, outrageous or indecent speech, or the crimes of seditious libel or flag burning—are subject to severe constitutional restrictions.

We may ask why the United States Constitution prohibits the enforcement of community norms within public discourse, especially since such enforcement is ordinarily regarded as a common and necessary task of the legal system. The explanation offered by our Supreme Court is that in the United States public discourse is an arena for the competition of many distinct communities, each trying to capture the law to impose its own particular norms. The Court has therefore interpreted the Free Speech Clause of the First Amendment in a manner analogous to the Amendment's Establishment Clause, which requires government to be neutral as between the many different religious sects that in America have sought to control the state. Since the 1940s, the Supreme Court has been reluctant to allow the state to enforce community norms in public discourse. In effect the First Amendment pressures the state to be neutral with respect to the many competing communities that seek to control the law by enforcing their own particular ways of distinguishing decency from indecency, critique from hatred.

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

The essential characteristic of these liberties is, that under their shield many types of life, character, opinion, and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds.

In America, unlike Europe, constitutional protections for freedom of speech have been interpreted to create a 'marketplace of communities' as well as a marketplace of ideas. Respect for the equality of diverse communities underlies the American constitutional conclusion that social norms of civility, which always reflect the view of some particular community, may not be used to regulate speech within public discourse. American constitutional law is concerned to protect public discourse as a sphere that remains equally open to all communities, to all potential visions of the good and the decent. It is for this reason that the American First Amendment holds that in public discourse 'one man's vulgarity is another's lyric.'

The second major justification for hate speech regulation does not purport to enforce community norms. There is a large class of hate speech legislation that seeks to distinguish speech expressing extreme abhorrence that is likely to cause harmful effects, like discrimination or violence, from speech with identical content that is not likely to produce such empirical effects. The former is suppressed as hate speech; the latter is not. This is the form of hate speech regulation that is embodied...
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in the German statute I mentioned earlier as well as in the American Convention on Human Rights. Such regulation imagines itself as preventing actual, contingent, measurable harms.

Of course every legal system suppresses speech that causes evil consequences. But there is always an important preliminary question about how tightly the causal connection between speech and its possible effects must be drawn before speech can constitutionally be sanctioned. In the United States, content-based restrictions on speech in public discourse cannot be imposed merely on the ground that speech might tend to cause future harm. Speech is often provocative and challenging... [But it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

The justification for this unusual legal rule is the fear that permitting a more lax causal connection would invite the government to fabricate pretexts for suppressing speech. A classic historical example of such abuse was the suppression of the advocacy of Communist doctrine on the grounds that such advocacy might cause a future revolution. In the early years of the 20th century, suppression of dissident speech was justified on the basis of what later became known as the 'bad tendency' test, which permitted the censorship of speech that had the general tendency to cause social harms. The stringent requirement that speech must have a very tight causal connection to contingent empirical harms before it can be suppressed emerged when this 'bad tendency' test was repudiated.

There is no doubt that speech which conveys messages of extreme abhorrence may be causally related to harmful effects, like violence or discrimination. But in most cases such speech merely has the tendency to cause these harmful effects. Hate speech regulation that suppresses speech because of this bad tendency would not be permitted in the United States, because the causal connection between the speech and its consequences would be too attenuated to pass constitutional muster. In most countries, by contrast, speech that causes harm can be regulated even if the causal connection between speech and harm is very loose. Most countries have not repudiated the bad tendency test.

That having been said, it is striking that in its actual operation the hate speech regulation reaches only a very tiny subset of speech that actually has the tendency to cause the harmful effects of discrimination and violence. Take, for example, the claim that hate speech can be regulated because it causes discrimination against...
as disorderly and provocative. This is because the maintenance of social norms is essential to the maintenance of social order.

Just as 19th-century Britons experienced the denial of Christian truths as inherently likely to cause violence, so we experience hate speech as inherently likely to cause violence. It should be obvious, however, that this experience does not demonstrate the connection between hate speech and the empirical, contingent fact of violence. It instead underscores the subjective sense of disorder that arises whenever social norms of propriety or civility are violated. Of course we could regulate hate speech like any other incitement to commit a crime, like any speech that creates a clear and present danger of imminent illegality. But hate speech regulation is distinctive in that it seeks to repress speech merely because it has ‘the tendency’ to produce violence or disorder. Law that seeks to suppress speech with this ‘tendency’ is in reality law that seeks to suppress violations of essential social norms.

If we were truly serious about prohibiting speech that might cause actual racial or ethnic or national violence, we would proscribe much more than what is currently classified as hate speech. We would proscribe all manner of cinema, novels, and popular entertainment. That hate speech regulation does not reach anywhere near so far suggests that, sociologically speaking, hate speech regulation is most essentially about suppressing speech that violates civility norms. We may tell a story about the connection between hate speech and violence, but the actual shape of the law suggests that we are instead using law to enforce norms of propriety in sensitive areas like race, nationality, and ethnicity. Even the branch of hate speech regulation that purports to turn on objective and empirical facts, like the causation of discrimination or violence, turns out on closer inspection to participate in the venerable tradition of using law to enforce essential community norms.

When law uses community norms to restrict participation in public discourse, it limits the capacity of persons to contribute to the formation of ‘that public opinion which is the final source of government in a democratic state’. This may have negative social consequences if a society is heterogeneous and encompasses distinct communities with distinct norms, such that the law’s exclusions are perceived to be hegemonic and unjustified. To the extent that in any given society free participation in public discourse is necessary for the maintenance of democratic legitimacy, these consequences may include the loss of democratic authority. Under such conditions the enforcement of community norms in public discourse, which the law undertakes in order to promote normative social solidarity of the kind theorized by Devlin, can have the countervailing effect of undermining democratic cohesion.

Different societies will negotiate these possible unoward consequences differently in light of the imperatives and burdens of their own histories. They will differently balance the use of law to sustain essential norms of civility against the use of law to safeguard the capacity of members of diverse domestic cultures freely to express themselves in public discourse. It is in this light that I believe we should assess the rather stark differences between European and American jurisprudences of hate speech.

To explain these differences is the work of comparative sociology. I am no sociologist, but I would offer two hypotheses for further exploration. The first is that highly ingrained and idiosyncratic American values like individualism and mistrust of government combine to put intense pressure on public discourse to legitimate governmental authority in the United States. It is possible that the American First Amendment is so highly speech protective because public discourse in the United States has the extraordinarily difficult task of ensuring democratic legitimacy in a climate of comparatively severe suspicion and distrust. Nothing like this climate would seem to exist in Europe, where democracy is a comparative newcomer to millennia-old forms of highly deferential structures of political governance. European habits of deference to political authority are to American eyes conspicuously evident in the tolerance accorded to a European Union that everyone agrees suffers from great democratic deficits. This toleration would be all but inconceivable in the United States. If this contrast is correct, it suggests that European states do not experience the same pressure to keep the communicative public sphere open to individual participation as does the United States, because democratic legitimation is a less pressing issue in Europe.

The contrast between European and American hate speech regulation should be understood not only in terms of the relative need to maintain democratic legitimation in Europe and America, but also in terms of the relative imperative on the two continents of sustaining community identity. Nations will negotiate the tension between democracy and community in light of a felt necessity to enforce shared community norms prerequisite for maintaining social solidarity. My second hypothesis is that this latter necessity is experienced quite differently in the United States than in Europe.

In the United States deeply engrained norms of individualism, which drive what I earlier referred to as the marketplace of communities, tend to undermine common norms of civility, most certainly in the area of speech regulation. This is not true in Europe, as Jim Whitman demonstrates. Whitman argues that European law ‘levels up’ by extending ‘historically high-status norms throughout the population’, whereas American law ‘levels down’ by enabling a ‘free and
aggressive display of disrespect' that expresses a uniquely American understanding of 'the political constitution of our form of egalitarian society'.

There are several possible explanations for this difference. It could be that in Europe elite norms retain a hegemonic status that they have lost in America, perhaps because of our populism, or because of our ethnic diversity. Or it could be that American norms of discourse affirmatively valorize disrespect so that, in Whitman’s words, ‘[i]t is important to us, as political actors in everyday life, to refuse to show respect’. Whatever the explanation, I suggest that Americans feel far less pressure to use law to protect the norms at issue in hate speech regulation than do their European counterparts, because American community identity depends far less on the maintenance of these norms than does European community identity.

The distinct approaches adopted by Europe and America toward the legal regulation of hate speech no doubt reflect both the different role that public discourse plays in underwriting democratic legitimation in the two continents, and also the distinctly different levels of commitment that citizens of the two continents experience with regard to the felt imperative of maintaining norms of respect constitutive of social solidarity.

79 Ibid.