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You Can't Say That

By MICHAEL W. McCONNELL

THE HARM IN HATE SPEECH

By Jeremy Waldron

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The United States is almost alone among Western liberal democracies in not punishing what is called hate speech — oral or written messages that “incite hatred” against a person or group on the basis of their race, religion, sex, ethnicity or sexual orientation. Canada, Britain, Denmark, Germany

and New Zealand have such laws, and the International Covenant on Civil and Political Rights purports to require signatory nations to pass them. In the American constitutional tradition, by contrast, even detestable speech is permitted so long as the speaker does not threaten violence or incite others to it. The Supreme Court’s recent decision upholding the right of the Westboro Baptist Church to engage in hateful picketing of military funerals in opposition to toleration of homosexuality (“God Hates Fags,” one sign said) is a ready example. That case would almost certainly have come out differently in other liberal democracies.

In his engaging new book, “The Harm in Hate Speech,” the legal philosopher Jeremy Waldron urges Americans to reconsider that tradition. Although he regards it as “unlikely” that hate speech legislation “will ever pass constitutional muster in America,” he hopes to persuade Americans to take more seriously the damage such speech does, and to overcome the “knee-jerk, impulsive and thoughtless” arguments that, he says, “often” characterize American debates on the issue.

Waldron begins with the premise that in a “well-ordered society” not only must all people be protected by the law; they are entitled to live in confidence of this protection. “Each person . . . 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.” Hate speech undermines this essential public good. “When a society is defaced with

anti-Semitic signage, burning crosses and defamatory racial leaflets,” Waldron says, this assurance of security “evaporates. A vigilant police force and a Justice Department may still keep people from being attacked or excluded,” but the objects of hate speech are deprived of the assurance that the society regards them as people of equal dignity.

Even when the hate speech comes from isolated fringe elements, themselves despised by a majority of the public, Waldron tells us, we should not regard the harm as insignificant. “Precisely because the public good that is under attack is provided in a general, diffuse and implicit way,” he explains, “the flare-up of a few particular incidents can have a disproportionate effect.”

That, then, is the harm in hate speech. Waldron expects his readers to regard these harms as an argument for passing laws on the European model.

Readers should be skeptical of this recommendation — not “knee-jerk, impulsive and thoughtless,” but skeptical. Begin with Waldron’s analytical method, which is to describe examples of the sort of speech he hopes to ban without telling us whether these examples are true or fictional, how often they occur or whether they would actually transgress the standards of the laws he suggests. For instance, he begins the book with an emotional account of a Muslim man out walking with his two children “on a city street in New Jersey,” confronting a sign saying: “Muslims and 9/11! Don’t serve them, don’t speak to them and don’t let them in.” Naturally we feel for the children, and for the father, and wish they did not have to suffer this indignity. But was this an actual case? If so, why does Waldron not provide a citation? And does Waldron think this nasty sign would be punishable under his recommended statute? He doesn’t say — but if so, the standard for “inciting hatred” is pretty low.

Nor does Waldron tell us whether there was any counterspeech that mitigated the sign’s effects. Most publicized incidents of hate speech in the United States — cross burnings, homophobic leafleting, talk-radio ugliness and so forth — seem to produce an outpouring of opposition that probably strengthens rather than weakens the victim’s assurance of security.

Suppose that an author set out to generate public support for laws allowing

the White House or the military to ban publication of photographs of the United States military that are quite likely to incite deadly attacks on soldiers and other Americans abroad — like the photographs from Abu Ghraib. This author might write a book entitled “The Harm in Publishing Photographs of Military Misdeeds.” Stirring up deadly violence is presumably no less harmful than stirring up hatred. But I doubt that Waldron, or most readers, would be convinced. Why?

One reason is that bans on speech touching on issues of public concern — as most hate speech does — can be abused for political ends. Waldron asks his readers to imagine the platonic ideal of hate speech laws, but in actual operation these laws have a terrible track record of being used by politically powerful factions to suppress speech that criticizes them. It is hard to find a case anywhere in the world where speech in support of dominant ideologies is punished for the protection of the weak. The opposite is frequently the case. Here are some real, non-hypothetical examples:

In 2009, a member of the Belgian Parliament was convicted of distributing leaflets with the slogans: “Stand up against the Islamification of Belgium,” “Stop the sham integration policy” and “Send non-European job-seekers home.”

In 2006, protesters were convicted of distributing leaflets to Swedish high school students saying homosexuality was a “deviant sexual proclivity,” had “a morally destructive effect on the substance of society” and was responsible for the development of H.I.V. and AIDS.

In 2008, a French cartoonist was convicted of publishing a drawing of the attack on the World Trade Center in a Basque newspaper with the words: “We have all dreamed about it. . . . Hamas did it.” The European Court of Human Rights affirmed all three convictions, rejecting defenses based on freedom of speech.

In Poland, a Catholic magazine was fined \$11,000 for inciting “contempt, hostility and malice” by comparing a woman’s abortion to the medical experiments at Auschwitz. The Dutch politician Geert Wilders was temporarily barred from entering Britain as a “threat to public policy, public security or public health” because he made a movie that called the Koran a “fascist” book and described Islam as a violent religion. In France,

Brigitte Bardot was convicted of publishing a letter to the interior minister stating that Muslims were ruining France. And Canada's human rights tribunal, which has harassed magazines for anti-Muslim statements and for republishing the famous Danish Muhammad cartoons, has been so hostile to freedom of the press that efforts are under way to repeal that nation's hate speech laws.

Contrary to Waldron's apparent assumption, few people in the United States doubt that hate speech inflicts real harm on vulnerable minorities, any more than they doubt that lies about political candidates injure our democratic process; that vicious protests at the funerals of fallen soldiers inflict severe emotional injury on their families; that persistent use of extremely violent video games by adolescents aggravates antisocial behavior; that unlimited corporate and labor union contributions to candidates add to the appearance of political corruption; that public profanity degrades our culture; that raucous anti-abortion protests disturb patients seeking to end their pregnancies; or that the publication of state secrets undermines national security. This speech is all constitutionally protected — not because we doubt the speech inflicts harm, but because we fear the censorship more.

Michael W. McConnell, a former federal judge, teaches First Amendment law at Stanford Law School, directs Stanford's Constitutional Law Center and is a senior fellow at the Hoover Institution.