Speech, Counter-Speech:

An Argument for Countering Hate Speech with Free Speech, Not Laws

The individual right to free speech and the idea that all people are created equal stand as two of America's most cherished ideals, and for good reason. For, though America has often failed to live up to the legal and moral standards demanded by them, these two ideals represent the philosophical foundation upon which American society is built and upon which our hopes for a better, more egalitarian future rest. As such, they have often served as a powerful catalyst for shaping and reshaping American society in profoundly positive ways. There are times, however, when the desire to preserve the right to free speech might seem to run counter to the goal of promoting tolerance and inclusion. In these cases, when the interests of liberty appear to butt up against the interests of equality, and the right to speak one's mind seems to stand at odds with the common moral duty to treat others with dignity and respect, which principle should be given precedence? Should the individual right to free speech always win out, or are there times when it should be sacrificed in the interest of civility and respect? Should government be given the power to make laws that punish or prohibit speech that is deemed hateful or offensive? These are the questions that lie at the heart of one of the most important social issues of our time—hate speech. In recent years, this issue has been the subject of intense public debate, and there are a wide range of opinions regarding what, if anything, should be done about it. Many people argue that, in order to protect the rights and dignity of individuals who are members of historically oppressed groups, speech should be subject to more stringent laws and regulations than those that already exist. Of those who favor more stringent regulation, many argue that those who engage in the expression of hate

speech should be subject to criminal prosecution because hate speech is, in itself, an act of violence. On the other hand, there are also many people who oppose efforts to regulate hate speech, insisting that it would stifle debate about important social issues and create massive potential for the government to censor those who hold unpopular views. It is the position of this writer that, while we do have a compelling interest, both as individuals and as a society, to promote equality and secure the equal rights and dignity of all people, the best way to achieve this goal is to protect freedom of speech and encourage robust public debate as a means of challenging hateful expressions of speech. In this paper I will seek to show that this is, in fact, the best approach to the problem of hate speech by first examining the development of the modern conception of free speech before moving on to try and set some boundaries around the concept of hate speech, i.e., what it is, what it is not and what its potential harms are. I will then present a condensed version of philosopher Jeremy Waldron's argument in favor of hate speech laws, given in *The Harm in Hate Speech*, before offering my own critique of that argument and some general objections to the idea of regulating speech in a liberal democratic society such as ours. Now that the basic structure of this paper has been laid out, let us get started.

Perhaps it is best to begin our examination by stating that, for the purposes of this paper, the term *free speech* should be understood as a term that encompasses all forms of self-expression, including non-speech forms of expression such as art, clothing and hand gestures. Having made this clarification, let us begin at the beginning, so to speak. The individual right to free speech was first codified into American law with the ratification of the US Bill of Rights in December of 1791, but for most of the nation's early history it stood as a general guiding

principle rather than it being the concrete and well-defined legal concept that exists in the present (Kahn, 71). In fact, it was not until 1919 that the U.S. Supreme Court heard its first cases involving the issue of free speech (Freedom). Much of the Court's thought in these early free speech cases was influenced by the ideas of John Stuart Mill, who argued that free expression can only be justifiably restricted by the state in cases where it will prevent harm being inflicted upon the interests of some individual, but even then, the fact that harm is being inflicted upon the interests of one person may not be sufficient to justify the censorship of another (86). Mill's ideas regarding the importance of free speech played an essential role in the development of the concept known as the *marketplace of ideas,* which emerged out of the early Supreme Court cases involving the freedom of speech (Schultz & Hudson). Essentially, the theory surrounding this concept stipulates that the manner in which the *marketplace of ideas* functions is analogous to the way that goods are exchanged in a free market, and as such, the free and open exchange of ideas will enrich and improve the lives of individuals living in free speech societies in much the same way that the free and open exchange of goods enriches the lives of individuals in free market societies. Thus, advocates of the *marketplace of ideas* theory argue that the value of a given idea should be determined by its ability to compete with other ideas for acceptance rather than by the dictates of government (Schultz & Hudson). Based on this rationale, the Supreme Court has generally adopted a *laissez-faire* approach to free speech against which it has carved out narrow and specific exceptions where speech is not protected, such as libel, slander, inciteful speech, national security interests, and obscenity. The most relevant of these categories to the issue of hate speech is the inciteful speech exception which includes the legal concept of *fighting words* that originated out of the 1942 case *Chaplinksy v.*

New Hampshire. The Court has modified and refined its definition of *fighting words* many times through the years, but in its current iteration, as defined in *Cohen v. California (1971)*, the term roughly refers to abusive labels and slurs that would likely provoke an ordinary citizen to violent action. (Supreme Court, 20). The Court's inclusion of the phrase *ordinary citizen* significantly limits the types of speech that fall under the *fighting words* exception, leaving only abusive language that would likely provoke violence when exchanged directly, and face to face (Clark). To illustrate the point of just how narrow the *fighting words* exception is, consider *Gooding v. Wilson,* which was decided the year after *Cohen*. The appellee, Wilson, while assaulting two police officers, shouted "you sonofabitch, if you ever put your hands on me again, I'll cut you all to pieces" (Supreme Court, 534) and various similar threats at them. He was subsequently convicted under a Georgia statute prohibiting the use of "opprobrious words" (518) and abusive language toward another person. However, in its decision, the Supreme Court ruled that Wilson's threats did not fall under the doctrine of *fighting words* and overturned that conviction on the basis that the Georgia statute was too broad (528). Given the outcome of *Gooding* it seems clear that insults of a lewd, vulgar, and profane nature are protected under the First Amendment. The Court's protection of free speech was bolstered even further in *R.A.V. v. St. Paul* (1992), when it ruled that even speech that falls under the *fighting words* exception can only be restricted on the basis of time, place, and manner of communication...not on the basis of its content (Supreme Court, 386). In other words, the government can impose noise limits on speech, how many people can gather in a given place to hear the speech, and even time restrictions etc., but it cannot restrict the content of the speech. So we see that, over the course of the past century, free speech jurisprudence has been

built up layer by layer as the Court has repeatedly clarified and reaffirmed its commitment to the defense of free speech, and all of this has combined to create the robust protections that we enjoy today. Now that we have explored the development of the legal conception of free speech as it stands today, let us move on to address the concept of hate speech.

Strictly speaking, America possesses no standard definition of the term hate speech. Unlike in other nations that have laws regulating hate speech, it is not a legal term of art in the United States. Nevertheless, there does seem to exist a common conception of hate speech which might be stated as: speech expressing discriminatory or hateful views toward historically oppressed groups (Strossen,12). While this definition is far too imprecise to be useful in a legal context, it does seem to capture the meaning of the term as those who favor hate speech legislation seem to understand it. Thus, it will suffice for our purposes, and the definition posited above should be understood as the intended meaning of the term *hate speech* when it is used through the remainder of this paper. Also, as I stated in the opening paragraphs, it is important to remember that, in this paper, the term hate speech is not limited to spoken words; it also refers to any written words, music, and images that might express hateful or discriminatory views. Now that we have a stipulative definition for the term hate speech, let us turn our attention to examining arguments for each side of the debate.

With respect to those who advocate for regulating hate speech, one of the more persuasive arguments is given by the philosopher Jeremy Waldron in his book *The Harm in Hate Speech*. Waldron argues that primary harm of hate speech lies in the fact that it denies the dignity and equal social standing of those who are the subject to it and this, in turn, denies them of any assurance that they will be treated justly by their social peers (85). One of the key

components of Waldron's argument is his distinction between what he terms as *group libel,* which sets out to defame or denigrate certain characteristics of a group in written word, and mere hateful spoken words. He argues that, while spoken hate speech should not be regulated by law, written *group libel* is much more serious and should be subject to regulation because it becomes a permanent part of the social environment (47-52). I highlight Waldron's argument for hate speech regulation because of the targeted solution it offers to the problem of hate speech. Even so, there are still problems with it. For example, Waldron deems the motivation of the speaker to be irrelevant to the determination of whether particular speech should be classified as hate speech (35). He argues that it is not the motivation or intent behind speech that makes it hate speech, but rather it is the possible effect that the speech might have on those it is targeted toward. Later in the book, Waldron also asserts that the harm involved in hate speech has nothing to do with feelings, going so far as to say that "protecting feelings against offense is not an appropriate objective for the law" (106). Given that there are already laws in place that protect historically oppressed groups from discrimination in practice, it seems reasonable to surmise that the negative effects of hate speech would be almost exclusively limited to its psychological effects. I wish to clarify here that I fully acknowledge the potential of hate speech to wreak havoc on mental health, and my intention is not to dismiss or belittle the seriousness of the psychological effects of hate speech. I simply wish to point out that the way that a person feels about speech that is directed toward them is generally responsible for determining the effect that the speech will have on them. If speech causes a negative emotional reaction in a person, then it stands to reason that it will likely have a negative effect on their psychology, and likewise in the opposite case. Therefore, it seems implausible for

Waldron to claim that regulating hate speech has nothing to do with protecting feelings because the emotions that a person feels regarding speech directed toward them is inextricably linked to the way that the person is affected by that speech. Moreover, Waldron's disregarding of the speaker's intention becomes highly problematic in light of the fact that he declares hate speech to be "performative" (166), meaning that it should be viewed as an action, or with regard to *group libel* in particular*,* a criminal action. But if we treat *group libel* as a criminal act, which is what Waldron suggests that we should do, then it seems unjust to dismiss the speaker's intent as irrelevant because criminal law demands that general criminal intent be established in order to convict a person of the crime for which they have been charged. (Mens Rea).

Although there are persuasive aspects to Waldron's argument, it still seems to suffer from the same weakness that all arguments for hate speech regulation suffer from- a reliance on subjective perception. By and large, the determination of what constitutes hate speech and what does not most often depends on the perception of the person or group that the speech is directed at, regardless of the intentions of the speaker. In a very real sense, hate speech regulations privilege the perceptions of one person or group over the perceptions of another, and in that way, they serve to perpetuate the same sort of group preferences that they are meant to address, only in reverse. Also, by limiting hate speech to speech that is specifically targeted toward historically oppressed groups and their members, which is what the vast majority of the arguments in favor of hate speech laws do, it would create a situation where it is legally acceptable to express thoughts about one people group that, if expressed about other groups, would be against the law. Thus, through hate speech laws, the differential treatment of

certain groups, based on characteristics that the members of those groups may or may not share, would be codified into law, which seems like a bit of a backwards move. At minimum, we might say that such a move would be contrary to the goal of creating a more just and equal society.

Equality and justice are noble causes, so it is rather easy to sympathize with the aims of those who favor hate speech laws, but ultimately, hate speech laws fail to address the very problem that they are supposed to be meant to address—hatred. Society can create laws that prohibit people from expressing certain hateful and offensive views, but those laws have no power to prevent people from thinking or believing hateful ideas. So, whatever increase in equality and civility that might be brought about by instituting laws against hate speech, it would be shallow and coerced rather than genuine. Perhaps more seriously, however, is the very real risk that hate speech laws could result in people who hold objectionable views becoming more detached from the mainstream of American thought than they already are which, in turn, might cause those people to become more extreme in their beliefs. So then, if hate speech laws are not the answer to the problem of hate speech what is? This is the question that we will now turn our attention to answering.

It is important to keep in mind here that it is individuals belonging to historically marginalized and oppressed groups who tend to suffer the most harm from hate speech. These are individuals who, for much of history, have been forced to stand on the outside margins of society, having little power to affect change within the established order or seek redress for the injustices that they have suffered. Consequently, it has been these same individuals who, when they have dared to question or speak out against the established order in an effort to lay claim

to equal rights and equal standing in society, have had their speech suppressed by it. Even today one of the most common claims made about the United States by members of historically marginalized groups is that racism and discrimination are inherent in its political and legal institutions, and that may in fact be true. But, true or not, it raises the question of whether it is actually a good idea to give the power to censor and suppress, not merely the time and manner in which certain ideas can be expressed but also the content of those ideas, to a government whose institutions are deemed to be inherently discriminatory by a considerable percentage of the population. If a particular government has a history of trying to suppress the views of certain minority groups in the past, and said government still remains systemically racist today, then what reason does anyone have to believe that said government will not unleash its power to censor and suppress the very people that hate speech laws are meant to protect? There are plenty of examples of countries who have implemented hate speech laws under the guise of protecting people who belong to certain social groups, but then many of the first people who end up being prosecuted under that law are members of those groups. That was the case when Britain passed it first law against hate speech in 1965. The *Race Relations Act* was intended to prevent racial discrimination against minority immigrant groups, yet some of the first people who were tried under the law were black immigrants accused of inciting hatred toward whites (Twomey, 239). In 1992, the Canadian Supreme Court issued a decision in *R. v. Butler,* which prohibited certain kinds of pornography on the basis that it depicted women in demeaning ways (R. v. Butler). Obviously, the Court's decision was intended to protect the interests of women, but in practice the law did the opposite, as it has often been cited as the justification for Canadian authorities to censor women, and members of the LBGTQ community,

whose expressions of sexuality happened to fall outside the bounds of what those in power declared to be acceptable (Strossen, 121-122). So, while hate speech laws may seem like a good idea in the abstract, we see that there really is no guarantee that, once implemented, they will not be used to interfere with the rights of the very people that they are supposed to protect. I submit to you, then, that the most effective way to protect the freedom of speech for *all* people, while also promoting the ideals of equality, justice and tolerance, is to counter hate speech with free speech.

Earlier, I mentioned the fact that, though it is possible to prohibit a person from expressing hateful and offensive ideas, society cannot force that person to stop thinking and believing those ideas. Perhaps the idea might go unexpressed, but it still exists in the mind, and the only way to get it out is to convince that person to replace it with another idea that is less hateful or, preferably, not hateful at all. The most effective way to get a person to exchange an idea that they currently hold with a new idea is through persuasion, not coercion. They must be persuaded that the new idea is the better idea, and that requires the person who seeks to persuade to be: 1) willing to listen to opposing points of view, and 2) able to offer a well reasoned rebuttal. So, if our goal in society is to get people to actually treat each other with respect and not to merely create the appearance of a civil and tolerant society, then it seems that the best and most effective way to approach hate speech is with well-reasoned and persuasive free speech. Some might object to this approach and say that there are some people who just will not be persuaded by reason. I suppose that is true, but by and large, I believe people to be rational creatures, and in most cases, people who express offensive ideas seem to do so out of ignorance or misperception rather than hate. But, even if there are some people

who refuse to be persuaded by argument, there are at least some minds changed by the persuasion of freely expressed rational arguments, whereas no minds are changed by coercive bans and threats of prosecution.

Lastly, one point that people tend to lose sight of in the issue of free speech versus hate speech is that the First Amendment only prohibits government and public institutions from placing restrictions on speech; it does not prevent us as individuals, or as a society from imposing restrictions on speech that we find objectionable. This is an important point to remember because, if we look at society, we see that we do impose restrictions on views that we find offensive or hateful. We question the credibility of the people who express them, and in certain cases we stop listening to what they have to say altogether. But that is exactly the way that the *marketplace of ideas* is supposed to work. Granted, it is not a perfect system, but if we look at the progress that has been made over the last few decades with respect to public opinion on issues of civil rights, gender equality, LGBTQ rights etc., I think we see that the *marketplace of ideas* does work. Opinions are being shifted, and significantly so, toward a more diverse and inclusive conception of society. Minds are actually being changed through the use of reason and argument, and that should always be the goal in a democratic society. True and lasting social progress requires that we protect the right of every person to speak freely and honestly, even if we find what they say to be offensive.

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