HATE SPEECH AND DOUBLE STANDARDS

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ABSTRACT

Many European states ban the public expression of hateful speech directed at racial and religious minorities, and an increasing number do so for anti-gay speech as well. These laws have been subjected to a wide range of legal, philosophical, and empirical investigation, but this paper explores one potential cost that has not received much attention in the literature. Statutory bans on hate speech leave democratic societies with a Hobson's choice. If those societies ban incitements of hatred against some vulnerable groups, they will inevitably face parallel demands for protection of other such groups. If they accede to those demands, they will impose an ever-tightening vice on incontrovertible free expression values; if they do not, they will send clear signals of unequal citizenship to those groups excluded from the laws' protection. This paper elaborates this dilemma via exploration of a range of contemporary European legal responses to homophobic and Islamophobic speech.

KEYWORDS: *Hate Speech, Freedom of Speech, Civil Liberties, Islamaphobia, Homophobia*

IN MARCH 2015, an English court convicted street preacher Michael Overd under the Public Order Act for publicly quoting Leviticus 20:13 in the course of denouncing homosexuality as sinful, while simultaneously acquitting him (under the same Act) for characterizing the Prophet Muhammed (peace be upon him) as

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a pedophile (Bingham 2015).[1] Overd's conviction was subsequently quashed, but the initial holding illustrates a central dilemma of the European approach to hate speech regulation. Statutory bans on hate speech leave democratic societies with a Hobson's choice. If those societies ban incitements of hatred against some vulnerable groups, they will inevitably face parallel demands for protection of other such groups. If they accede to those demands, they will impose an ever-tightening vice on incontrovertible free expression values; if they do not, they will send clear signals of unequal citizenship to those groups who are excluded from the laws' protection. The Overd trial calls attention to the democratic costs on both sides of this dilemma. Once England had banned public expression of racial and religious hatred, it faced a compelling case for doing the same with anti-gay hatred. Indeed, a growing number of European states have regulated such speech acts, sending an important message of equal citizenship to European gays and lesbians, but with the significant cost of infringing on core exercises of religious speech. Meanwhile, most European states have refrained from banning certain widespread forms of Islamophobic speech, thereby signaling to many European Muslims that they are not yet equal citizens.

THE HATE SPEECH DEBATE

In the second half of the twentieth century, European legislatures repeatedly banned the public expression of some forms of hateful speech, and international lawyers drafted multiple treaties, conventions, and resolutions calling on signatory states to adopt similar bans (Bleich 2011, 19–22; Heinze 2009). As Eric Heinze has noted, "[a]ll Western European states have [such] . . . bans . . . [and they all] share some core similarities, particularly insofar as they incorporate international and European norms requiring or authorizing bans on some forms of expression" (2007, 296). Despite this "common core of norms" (again quoting Heinze 2007, 296), these European hate speech laws vary across two key dimensions. First, some statutes ban only incitement to violence against members of vulnerable groups, while

1. The June 2014 public statement for which Overd was convicted was: "If a man sleeps with a man, they have both committed an abomination." The July 2014 public statement for which he was acquitted was: "Noone has salvation unless you have Jesus Christ. You claim heaven on the back of Buddha, you're going straight to hell. You claim heaven and paradise on the back of the teachings of Islam, you're hell bound. If you believe the Prophet Mohammed was truly a prophet, you're hell bound. He's a liar and deceiver just like you and me folks. He had a wife at the age of nine. In this country that's paedophilia. That's a wicked immorality to have sex with a girl at the age of nine." Both statements were delivered with the aid of a megaphone in Taunton Centre.

others reach more broadly in banning incitement to hatred and/or discrimination, and others more broadly still in banning group-based defamation, degradation, or abuse. Second, some limit their coverage to racist speech, while others include speech that is hateful on additional grounds such as religion or sexual orientation. Virtually all of these regulations have faced legal challenges based on constitutional or quasi-constitutional free expression principles, but European judges have by and large upheld them in both their narrower and their broader forms, though particular applications have sometimes been enjoined.[2]

Meanwhile, in the 1980s and '90s, critical race theorists in U.S. law schools endorsed and elaborated the European arguments in support of hate speech bans, making a case for their migration to U.S. law. In a series of influential essays—the most notable of which were reprinted in a 1993 edited volume that continues to be widely cited—Richard Delgado, Charles R. Lawrence III, and Mari J. Matsuda argued that racist hate speech, considered from the victims' perspective, has the capacity to inflict injuries on members of vulnerable minority groups. As such, judges should balance the constitutional values of free expression and equal protection against one another, and the latter should often win out (Delgado 1982; Lawrence 1990; Matsuda 1989; Matsuda, et al. 1993; see also Delgado and Stefancic 2004).

In 2009, Jeremy Waldron built on these arguments in a widely noted set of Holmes Lectures at Harvard Law School, subsequently revised and published as *The Harm in Hate Speech* (2012). In this book, Waldron's key move is to define hate speech as a form of group defamation and to compare the libel of members of vulnerable minority groups with other forms of libel that are (or have been) heavily regulated in many legal systems. With regard to seditious libel, for example, Waldron notes that we stopped regulating such speech in the United States and Britain when we realized that the state was not so vulnerable as to need such protection. Since racial and religious minorities remain pretty vulnerable in many democratic societies, hate speech regulations—understood as prohibitions on group libel—may be more justifiable. On Waldron's account, prohibitions on libelous statements directed against individual members of vulnerable minorities are important components of salutary legislative efforts to combat discrimination against such minorities. Waldron builds here on U.S.based critical race theory, but his primary interest is in defending the legitimacy of hate speech statutes in Europe. As he notes, these

2. Note, for example, Jersild v. Denmark, Application no. 15890/89 (ECtHR 1994), in which the European Court of Human Rights affirmed convictions of the members of an extremist group who appeared in a televised interview, though it reversed the conviction of the Danish journalist who interviewed them.

statutes often use the language of group libel or defamation and are often located within broader statutory regulations of discrimination (Waldron 2012, 39–40).

Waldron repeatedly emphasizes that the goal of these statutes is not to protect people from offense, but to protect them from published assaults on their dignity, which ought to be understood as harms to society as a whole as well as to the individual targets of the hateful speech acts (2012, 105–130). In his words, "to protect people from offense or from being offended is to protect them from a certain sort of effect on their feelings. And that is different from protecting their dignity and the assurance of their decent treatment in society" (2012, 107). In Waldron's view, "[t]he key to the matter is not to try to extirpate offense, but to drive a wedge between offense and harm, while at the same time maintaining an intelligent rather than a primitive view of what it is for a vulnerable person to be harmed in these circumstances" (2012, 129–30).

Waldron's defense of hate speech bans has been challenged on a number of grounds, including the conventional civil libertarian conviction that democratic governments should rarely be allowed to silence speech acts on the basis of their viewpoint (Baker 2012; Dworkin 2009, 2012; K. Malik 2012). We are sure today—most of us—that racism is intolerable, but were 1950s Americans—most of them—any less sure that Communism was intolerable? Giving ourselves leeway to ban speech that we *know* to do more harm than good may well provide similar leeway to our progeny to ban speech that they *know* to be equally harmful. And if history is any guide, some such certainties will prove mistaken in the end. Most civil libertarians do not worry that our current conviction that racism is intolerable will turn out to be mistaken, but nor do they trust the leaders of present and future democratic states to mark out additional categories of intolerable speech. Likewise, many civil libertarians consider homophobia just as intolerable as racism, but it is clear that a substantial portion of the world's population disagrees with them. Whenever LGBT rights advocates persuade enough people in any given society to their view of the matter, they can outlaw the public expression of homophobic as well as racist speech. But why would religious believers who denounce homosexuals as sinners think of such bans as anything other than efforts by the state to silence their unpopular views?

Moreover, even within the core of ostensible consensus that racism is intolerable, significant questions of application arise. French prosecutors and judges are convinced that the statutory ban on provocation of "discrimination, hatred or violence toward a person or group of people on grounds of their origin, their belonging or their not belonging to an ethnic group, a nation, a race or a certain religion"

authorizes criminal prosecution for peaceful advocacy of sanctions against Israel.[3] Needless to say, this view is not universally held. On the basis of such applications, a number of critics have challenged Waldron's account by emphasizing that in actual practice, hate speech bans often sweep too broadly into the realm of legitimate political speech (Greenwald 2015b; Heinze 2006). Others have emphasized that such bans tend to draw further attention to the speech that they are attempting to silence; to be disproportionately used against the very minority groups whom they are ostensibly designed to protect; to encourage social groups to prosecute disagreements amongst one another in court, thereby increasing inter-group hostility; and to be unnecessary and hence "inappropriate for democratic societies that are sufficiently stable, mature and prosperous to be able to protect internal security and vulnerable individuals through other means, without having to ban ideas from public deliberation" (Heinze 2007, 298–99; see also Ahdar and Leigh 2005, 385–6; Baker 2012, 72–79; Greene 2012; Weinstein 1999). On this last point, the appropriateness of hate speech bans might be analogized to the use of military courts to try civilians. Such courts may sometimes be necessary in an immediate theater of war, but as the U.S. Supreme Court has held, they are of dubious legitimacy when and where civilian courts remain open and operating.[4] Likewise, where a robust sphere of speech by government and civil society is able to effectively counter the public expression of hateful speech, the case for statutory bans on such speech seems weaker. In light of both the principled and pragmatic critiques that have been raised against hate speech regulation, Corey Brettschneider has argued that democratic states should not use their coercive capacities to silence hateful speech, but should use their expressive and funding capacities to counter and discourage it (2012; see also Heinze 2006, 578–81; 2013).

Some careful empirical scholars have dismissed the pragmatic concerns with hate speech bans as overstated (Bleich 2011; Gelber and McNamara 2015; see also Parekh 2012), but one argument that has not received adequate attention is that such laws "inevitably create two tiers of citizens—those who are protected from offensive speech, and those left unprotected from equally offensive speech" (Heinze 2006, 555).[5] As a result of such distinctions, hate speech regulations sometimes send signals of unequal citizenship to relatively powerless groups who are

3. Appeal no. 1480020 (Court of Cassation, Criminal Chamber 2015).

4. Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866).

5. In a thoughtful summary of, and response to, six standard arguments against hate speech bans, Bhikhu Parekh does not mention this one (2012, 47–54).

not included within the scope of their protection. That is, the legal protection of some vulnerable minorities from abusive speech is itself a message of unequal status directed toward other vulnerable minorities who do not receive such protection. Moreover, this defect is inextricable from the grounds on which hate speech bans are often defended. Consider Bhikhu Parekh's observation that "[w]hen hate speech is allowed uninhibited expression, its targets rightly conclude that the state either shares the implied sentiments or does not consider their dignity, self-respect, and well-being important enough to warrant action" (2012, 44). If this claim is persuasive, then state policies that protect some targets of hateful speech but not others are likely to signal that the state considers some people's dignity, self-respect, and well-being more important than others'.

To sum up the argument so far, the hate speech debates have proceeded on both consequentialist and deontological grounds. That is, opponents and proponents of hate speech regulation have offered competing accounts of the effects of democratic societies' decisions to enact and enforce such regulations (or their decisions not to do so), and they have also offered competing accounts of the fundamental democratic and/or dignitarian legitimacy of those decisions. With some frequency, the debate has proceeded on what may best be understood as hybrid consequentialist/deontological grounds, with proponents arguing that hate speech bans signal to members of vulnerable groups their equal status in democratic societies. Note, for example, Julie Suk's observation that the purpose of the French Holocaust denial law is not to suppress expression of Holocaust denial—which can be freely found in the Bibliothèque Nationale de France—but to express the state's disapproval of these ideas (2012, 153; see also Parekh 2012). This claim is consequentialist in form—legislative bans on hate speech will have the salutary effect of communicating a message of inclusion to vulnerable members of society—but is usually best understood as deontological at its root—because the value and effectiveness of this communication are typically assumed rather than demonstrated. In this paper, I argue that the hybrid case in favor of hate speech bans ought to be balanced against a parallel hybrid claim in opposition—namely, that legislative bans on hate speech communicate a message of exclusion to members of vulnerable groups who are left outside the scope of the bans' protection.

HATE SPEECH AND DOUBLE STANDARDS

The unequal coverage provided by existing hate speech regulations is potentially redressible in either of two ways. One option is an across-the-board, First-Amendment-style legal tolerance for public expressions of hatred. The second is a

continual incremental expansion of the scope of hate speech laws. If restrictions on hateful speech are understood as a form of antidiscrimination law, then all targets of such speech—like all victims of other forms of discrimination—will be incentivized to seek the protection of such laws. And if we fail to extend such protection to groups with legitimate claims, we send a signal of unequal citizenship to the members of those groups. Misogynist speech, for example, can be just as vile and denigrating as other forms of hate speech, and its exclusion from most existing hate speech laws has prompted recent calls for reform (Citron 2014). As a result of such dynamics, hate speech laws (like other antidiscrimination laws) are likely to be the focus of repeated calls for expansion over time.

Of course, countervailing calls from libertarians and others may create significant uncertainty as to whether, when, and how such expansion will actually unfold, but in post-war Western Europe, the political demands of vulnerable minorities have repeatedly led to incremental expansion, with hate speech laws drawn initially to protect racial minorities and subsequently expanded to protect other groups. Legislative restrictions on anti-Semitic speech (including Holocaust denial) are now widespread, and European lawmakers face regular calls to restrict Islamophobic and homophobic speech as well (Belavusau 2013, 166–200; Bleich 2011; Haraszti 2012; Kahn 2004; Langer 2014; Leigh 2009).

As such, I argue that democratic societies should be prepared to tolerate racist and anti-Semitic speech, unless they are willing to extend their intolerance to cover speech that incites hatred against Muslims and gays. I rest this claim not primarily on grounds of principled consistency, but on a pragmatic concern for how best to integrate diverse groups of citizens into contemporary democratic polities. Waldron himself emphasizes this concern throughout his Holmes Lectures, but he does not acknowledge one of its clear implications. If one key goal of hate speech policy is to better integrate vulnerable minorities into the democratic societies in which they live—by signaling to them that they are indeed welcome as full and equal members—then it must be the members of these vulnerable groups who decide which speech acts are the objectionable ones. If those decisions are made solely by European legislators and judges, and if those lawmakers fail adequately to attend to the understandings of the targets of hateful speech, then the signal will not work. Of course, European Muslims are as internally diverse as any other sizeable social group, so there is no "Muslim position" on free expression or any other complex policy or legal issue (K. Malik 2009, 121–3). But when democratic states ban racist and anti-Semitic speech, they send an important signal to racial minorities and Jews that their presence in these polities is valued and will be protected. And if they repeatedly refuse demands from their Muslim and LGBT members to expand

the scope of these bans to cover published caricatures of the Prophet Muhammad (PBUH) and religious denunciations of homosexuality as sinful, they will repeatedly signal that these groups are not full and equal members. On the other hand, if these polities respond to such demands by expanding their existing laws, these expansions would curb the liberty of religious expression—for both secular critics of Islam and Christian critics of homosexuality—to a degree that most democratic polities would (or should) find intolerable. As Heinze has put it, "[h]ate speech bans can only succeed either through enormous measures of censorship or through discriminatory selection of target categories or individuals" (2009, 279).

Waldron sometimes references homophobic and Islamophobic speech together with racist speech as proper subjects of regulation (2012, 65), but he devotes very little attention to homophobic speech and he generally tries to draw a sharp line between racist hate speech and religious dissent. On his account, the publication of racist epithets should be banned; the publication of blasphemous images should be tolerated (2012, 111–26). Waldron does not say on which side of this line he would place anti-gay readings from scripture, but he does indicate that legislators should be "vigilant" in ensuring that regulation of racist assaults on dignity does not lead to regulation of all speech that leads an identifiable group of citizens to take offense (2012, 114). He insists that this line is fundamentally clear, but some readers of his account remain unpersuaded. Brian Leiter (2012) notes that Waldron's own rhetorical asides repeatedly illustrate that the harm in hate speech does in fact include psychological/emotional offense on the part of its targets. And Heinze observes that European judges have sometimes drawn the line differently than Waldron, as when the European Court of Human Rights (ECtHR) interpreted the European Convention on Human Rights (ECHR) "as protecting 'the religious feelings of believers' from 'provocative portrayals of objects of religious veneration.' "[6]

The legal distinction between harm and offense is a longstanding one—indeed, it marks the core of Anglo-American libel law—but its social meaning when translated from the individual to the group libel context—i.e., when enacted into legislative bans on hate speech—is to signal that some harms to some groups are worthy of legal redress, while others are not. This sort of legal distinction is routine, but in this context, it tends to signal (or at least to be read as signaling) that some vulnerable groups are treated more favorably than others. For many European Muslims, the chief examples of public speech acts that they experience as harms are images (and especially offensive caricatures) of the Prophet Muhammad (PBUH); for many

6. Heinze (2006, 558), quoting Otto-Preminger-Institut v. Austria, Application no. 13470/87 (ECtHR 1994).

European gays, the chief examples are anti-gay readings of Leviticus. From their perspective, if we are in the business of banning hateful speech, then these examples are prime candidates. But restrictions on this sort of anti-Muslim and anti-gay speech would inevitably trench on serious commentary on matters of public concern.

Again, with regard to the scope of legal protection for free speech, the double-standard complaint could be addressed by either leveling up or leveling down. In contemporary Europe, national legislatures could choose to extend the same sort of bans to Islamophobic and homophobic speech that they have extended to racist and anti-Semitic speech or they could choose to relax their existing bans on racist and anti-Semitic speech. This latter course is politically unlikely, but it remains theoretically available. Likewise, the ECtHR could, in theory, try to nudge member states in either direction. In other words, ECtHR judges could find in ECHR Article 10's free expression provision a mandate that states provide greater freedom to express hateful ideas than they currently do.[7] Or they could rely on Article 14's antidiscrimination provision and/or Article 17's prohibition on abuse of rights to mandate that states extend their existing regulations of some hateful speech acts to cover additional such acts directed against similarly vulnerable groups.[8] The ECtHR's rights jurisprudence is tempered by a "margin of appreciation" for the legal norms of member states, but if something approaching continent-wide consensus began to emerge (in either direction), the Court could use its quasi-constitutional role to push holdout states to fall into line. In other words, it could seek to ensure that racist and anti-Semitic speech acts are suppressed no more than other, equally harmful speech acts targeting European Muslims and gays, either by cutting back on existing bans

7. Article 10 expressly provides that "[e]veryone has the right to freedom of expression," though it also notes a number of public purposes that sometimes justify restrictions on that freedom, including "the protection of the reputation or rights of others."

8. Article 14 provides that "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." Article 17 provides that "[n]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein." See Aksu v. Turkey, Application nos. 4149/04 41029/04 (ECtHR 2012) (dissenting opinion of Judge Gyulumyan); Glimmerveen and Hagenbeek v. the Netherlands, Application nos. 8348/78 and 8406/78 (Commission decision of 11 October 1979); Norwood v. UK, Application no. 23131/03 (ECtHR 2004); Garaudy v. France, Application no. 65831/01 (ECtHR 2003); Kasymakhunov and Saybatalov v. Russia, Application no. 26261/05 (ECtHR 2013); and Perinçek v. Switzerland, Application no. 27510/08 (ECtHR 2015) (dissenting opinion of Judge Silvis).

on racist and anti-Semitic speech or by developing new bans on Islamophobic and homophobic speech, depending which way the consensus had developed.

To date, what has actually emerged in practice is a complex and inconsistent pattern of both legislative restrictions and judicial evaluations of those restrictions—a pattern that cannot readily be defended and that may leave some vulnerable members of European societies feeling aggrieved. For example, a number of states have banned Holocaust denial, and European judges have sustained these bans. In *Garaudy v. France* (2003), the ECtHR held that

> Denying the reality of clearly established historical facts . . . does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National–Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. . . . Such acts are incompatible with democracy and human rights because they infringe the rights of others.[9]

But when some states have extended such bans to cover denials of other crimes against humanity—most notably, the Ottoman Empire's 1915 genocidal campaign against Armenians—European judges have invalidated such broader bans. In *Perinçek v. Switzerland* (2015), a Grand Chamber of the ECtHR noted that "many of the descendants of the victims of the events of 1915 and the following years—especially those in the Armenian diaspora—construct [their] identity around the perception that their community has been the victim of genocide." The Grand Chamber noted further that the Swiss prosecution of Doğu Perinçek for publicly denying those genocidal events was intended to protect the "dignity" of the Armenian victims of 1915 and their present-day descendants, but the Court nonetheless held that the Swiss criminal ban on Armenian genocide denial was not "necessary in a democratic society" and hence was invalid under ECHR Article 10.[10] In sup-

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9. Garaudy v. France, Application no. 65831/01 (ECtHR 2003). See also Witzsch v. Germany (no. 1), Application no. 41448/98 (ECtHR 1999); Schimanek v. Austria, Application no. 32307/96 (ECtHR 2000); Witzsch v. Germany (no. 2), Application no. 7485/03 (ECtHR 2005); Gollnisch v. France, Application no. 48135/08 (ECtHR 2011); Holocaust Denial Case, (1994) 90 BVerfGE 241. See generally Bleich (2011, 44–61); Kahn (2004).

10. Perinçek v. Switzerland, Application no. 27510/08 (ECtHR 2015), para. 156. Note also Decision no. 2012647 DC (French Constitutional Council 2012).

port of this judgment, the Court indicated that Perinçek's statements, "read as a whole and taken in their immediate and wider context, cannot be seen as a call for hatred, violence or intolerance towards the Armenians," though it acknowledged that in cases involving Holocaust denial, such incitement has "invariably been presumed."[11] The Court's principal justification for this differential treatment was that historical memory laws are more readily defensible when enacted by states that have a close historical and geographic nexus with the genocidal crimes at issue. This nexus is present with regard to German or French laws governing Holocaust denial; it is absent with regard to the Swiss law governing Armenian genocide denial.[12]

The *Perinçek* case illustrates the difficult choice facing European judges in such disputes, which explains why the Grand Chamber was closely divided, resolving the case by a vote of 10–7. The seven dissenting judges argued that because ECtHR jurisprudence allows the criminalization of Holocaust denial, it is difficult to justify forbidding the criminalization of Armenian genocide denial. But the ten-judge majority argued that allowing criminalization in the latter context would unduly limit discussion of important matters of public concern. Both of these claims are persuasive.

Similar dilemmas have played out in the context of Islamophobic and homophobic speech, which are the focus of the remainder of this article. A steadily increasing number of European states have banned homophobic speech, and the ECtHR has so far allowed enforcement of these bans in ways that—at least from a U.S. First Amendment perspective—trench on clear free expression values. In other words, for European LGBT persons, current legal trends signal a message of inclusion, but these acts of inclusion have come at the cost of severe restrictions on the religious expression of Christian (and Muslim) opponents of homosexuality. Meanwhile, most European states have banned some forms of Islamophobic speech, but not the ones to which European Muslims themselves most object. The failure of these bans to cover published caricatures of the Prophet Muhammad (PBUH) has been a chief source of the double-standard complaint, an effect that has been exacerbated by the ECtHR's broad tolerance of enforcement of other speech-restricting laws against European Muslims themselves. As a result, for European Muslims, existing law sends a clear signal of unequal citizenship.

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11. Perinçek v. Switzerland, Application no. 27510/08 (ECtHR 2015), para. 234, 239.

12. For a critique of such nexus arguments, see Kahn (2014).

ISLAMOPHOBIC (AND ISLAMIST) SPEECH

For at least the past decade, Islamophobic speech has occupied the epicenter of global free speech conflict. Following the September 2005 publication of the infamous cartoons caricaturing the Prophet Mohammed (PBUH) by the Danish newspaper *Jyllands-Posten*, a variety of Muslim organizations in Europe and around the world accelerated their preexisting efforts to appeal to both national legal institutions and international human rights bodies to regulate speech that blasphemes or defames the Islamic faith (Kahn 2011; Klausen 2009; Langer 2014). While some of this outrage was drummed up by leaders of Muslim states seeking to needle Western governments and/or stoke their own popularity at home (Klausen 2009), it is clear that Muslim objections to Western depictions of the Prophet (PBUH) are sincere, deeply rooted, and long felt, with the first such controversy dating to 1925 (Langer 2014).

Some European states regularly prosecute Islamaphobic speech acts. The most well-known examples include the repeated French prosecutions of Brigitte Bardot and Marine Le Pen for harsh criticisms of Muslim religious practices; the Dutch prosecution of Geert Wilders, a sitting member of Parliament, for repeated public denunciations of Islam; and the English prosecution of Mark Anthony Norwood for displaying a small sign in the window of his flat declaring "Islam out of Britain—Protect the British people" (Bleich 2011, 29–36; Brettschneider 2012, 2; Nossiter 2015; Weinstein 2009, 44–52).[13] Norwood was convicted of a "racially or religiously aggravated" violation of the Public Order Act, which prohibits the display of "any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby."[14] At the time, England had no explicit ban on religious hate speech, but in 2006, Parliament prohibited the use of threatening words, behavior, or display of written material intended to stir up religious hatred. On Erik Bleich's account, this legislative change was motivated in part by the fact that English courts were using the 1965 Race Relations Act to protect Jews and

13. Note also Ugeskrift for Retsvæsen 2004.734 H, 158/2003 (Denmark S. Ct. 2004); Soulas and Others v. France, Application no. 15948/03 (ECtHR 2008); Féret v. Belgium, Application no. 15615/07 (ECtHR 2009).

14. Public Order Act 1986, 1986 Chapter 64, sec. 5(1)(b), http://www.legislation.gov.uk/ukpga/1986/64. As provided by the Crime and Disorder Act 1998, "racially or religiously aggravated" instances of this offense are subject to increased sentences. Norwood appealed his conviction to the ECtHR, which found his application inadmissible in Norwood v. United Kingdom, Application no. 23131/03 (ECtHR 2004).

Sikhs—religious minorities defined at least partly on ethnic/racial lines—but not to protect other religious groups. This double standard was particularly acute in the case of British Muslims, because post-9/11 anti-terrorism legislation had led to increased policing of Islamist expression by Muslims themselves (Bleich 2011, 23–29; see also Ahdar and Leigh 2005, 379–80).

Despite legislative changes like the 2006 Racial and Religious Hatred Act in Britain, the years following publication of the Danish cartoons in 2005 witnessed virtually no success for Muslim appeals to national and international legal institutions to restrict the publication of caricatures of the Prophet (PBUH). Muslim governments and NGOs repeatedly sought to persuade Western states to include Islam within the protections of their existing blasphemy or hate speech laws or to create a new legal concept of religious insult or defamation of religion. But Danish prosecutors declined to indict the editors or cartoonists at *Jyllands-Posten* for blasphemy or hate speech, and the Danish courts then rejected a private defamation complaint (Langer 2014, 64–73). When the French satirical magazine *Charlie Hebdo* reprinted all of the cartoons in February 2006 (also adding a number of new ones of its own), the French courts likewise held that relevant provisions of defamation and hate speech law had not been violated (Langer 2014, 73–77). Similar disputes played out elsewhere, but on Lorenz Langer's comprehensive account, "[i]n no Western jurisdiction did courts or legal proceedings bring the redress sought by Muslim applicants" (2014, 83). Indeed, a debate that had begun in various national legislatures and international human rights bodies several years before publication of the Danish cartoons culminated in October 2008 with a recommendation from the Venice Commission that the crime of blasphemy should be abolished and that "it is neither necessary nor desirable to create an offence of religious insult (that is, insult to religious feelings) simpliciter, without the element of incitement to hatred as an essential component" (McGonagle 2012, 496; see also Appiah 2012; Klausen 2009, 53–79; Langer 2014). As a result, and to paint with a broad brush, the existing state of European law is that public expressions of religious hatred are often prohibited under the same or similar statutes as public expressions of racial hatred, but publications like *Jyllands-Posten* and *Charlie Hebdo* remain free to caricature and satirize religious icons and doctrines of all faiths.

Whether or not this distinction is defensible on theoretical grounds, its enactment in law has the effect of signaling to many European Muslims that the speech acts which they find most hateful and offensive are permissible, and hence that their deeply held interests and identities are less worthy of protection than others'. This signal of unfairness is exacerbated by the fact that European Muslims have themselves run afoul of racial and religious hatred laws (when their speech acts are read

as inciting hatred against adherents of other religions), bans on homophobic speech (when they join conservative Christians in preaching that homosexuality is sinful) and anti-terrorism laws (when their speech acts are read as glorifying terrorism) (Ahdar and Leigh 2005, 381; Greenwald 2015a, 2015b; Leigh 2007, 252–6, 2009, 382).

Indeed, following the January 2015 terrorist attack on the offices of *Charlie Hebdo* and a Kosher grocery store in Paris, the French celebration of the magazine's right to mock the powerful and powerless alike was juxtaposed—strangely, at least from a U.S. First Amendment perspective—with aggressive policing by French authorities of other forms of expression. In the very moment when so much of France was declaring "Je suis Charlie," comedian Dieudonné M'bala M'bala was convicted for writing on Facebook, "Je me sens Charlie Coulibaly." Playing on the widespread use of "Je suis Charlie" as a statement of solidarity with the victims, Dieudonné (as he is widely known in France) was referring to one of the perpetrators of the January 2015 terrorist attacks, Amedy Coulibaly. Dieudonné was convicted under a November 2014 anti-terrorism law that authorized sentences of up to seven years in prison and fines of up to 100,000 euros, but he was given a suspended sentence of two months (Breeden 2015). Within weeks of the attacks, French courts had meted out criminal sentences in scores of additional such cases under the November 2014 law, including sentences of six months for a French-Tunisian man who shouted support for the attackers as he drove past a police station—"They killed Charlie and I had a good laugh. In the past they killed Bin Laden, Saddam Hussein, Mohammed Merah and many brothers. If I didn't have a father or mother, I would train in Syria."—and four years for a man who praised the attackers while being arrested for driving under the influence of alcohol (Carvajal and Cowelljan 2015; Chrisafis 2015). Dieudonné's crime was "apology of terrorism," but as Chrisje Brants and Eric Heinze have argued, "bans on glorifying terrorism [have increasingly] become akin to conventional hate speech bans, insofar as such bans would penalize even those utterances that are not made pursuant to any specific terrorist act, but purely because they express views that are deemed . . . to be dangerous, intolerant or provocative" (Heinze 2007, 295; see also Brants 2007).

Such speech-related prosecutions of French Islamists predated both the *Charlie Hebdo* attacks and the 2014 anti-terrorism law. Dieudonné himself has been charged at least 38 times with violating French bans on inciting racial hatred, denying the Holocaust, and threatening public order (Edinger 2008; Rubin 2014; Stille 2014, 2015; Waintrater 2005). In 2001, French cartoonist Denis Leroy was convicted of complicity in condoning terrorism for publishing, two days after the 9/11 attacks, a rendering of the planes hitting the World Trade Center in New York City, with a caption appearing to praise the attackers: "WE HAVE ALL DREAMT OF IT . . . HAMAS

DID IT." (The caption was a parody of a well-known advertising slogan in France: "You have dreamt of it . . . Sony did it.") Muslim expression is further curtailed by the French prohibition on wearing head scarves in schools (which dates to 2004) and wearing burqas anywhere in public (which dates to 2011). The ECtHR upheld Leroy's conviction and has repeatedly upheld the French bans on religious dress.[15]

This conflict has played out elsewhere in Europe as well. No cartoonists or newspaper editors faced legal penalties for publishing caricatures of the Prophet (PBUH), but four British Muslims who protested against the cartoons outside the Danish Embassy in London were convicted and sentenced to four to six years in prison for inciting violence and/or racial hatred (Bleich 2011, 39; Evans 2007; Langer 2014, 81).

Surely the signal sent by these legal responses is that members of European society have the freedom to mock Islam but not to advocate radical Islamism (or to wear a burqa). Likewise, that Europeans have the freedom to mock Islam but not to mock minorities on the basis of race. This complaint about a double standard has been regularly voiced by European Muslims; indeed, on Jytte Klausen's account, it was "a constant refrain in the cartoon controversy." The lesson drawn from the conflict by many European Muslims was that "the Danish state and the newspaper did not extend the same protection against prejudice and defamation to Muslims as to Christians. It was not an antiliberal argument but an argument about the entitlements Muslims have in liberal democracies" (2009, 88, 130, see also 61–62).

The double-standard argument has received attention from a variety of Western commentators (Garton Ash 2006; Greenwald 2015b, 2015c; K. Malik 2015; Saletan 2012; Stille 2014, 2015), but with the notable exception of Eric Heinze's work, it has not been integrated into the scholarly literature on the legitimacy of hate speech bans. Waldron's response, often echoed by European lawyers, is to distinguish between incitements to hatred of racial and religious groups (which should be prohibited) and criticism of religious beliefs and practices (which should be allowed) (Waldron 2012; see also Carvajal and Cowelljan 2015; Kahn 2011; Stille 2015). Waldron explicitly endorses the non-prosecution of *Jyllands-Posten* for the cartoon depictions of Muhammed (PBUH), and he insists that the "distinction between an attack on a body of beliefs and an attack on the basic social standing

15. Leroy v. France, Application no. 36109/03 (ECtHR 2008); Dogru v. France, Application no. 27058/05 (ECtHR 2008); Kervanci v. France, Application no. 31645/04 (ECtHR 2008); S.A.S. v. France, Application no. 43835/11 (ECtHR 2014). But see Gündüz v. Turkey, Application no. 35071/97 (ECtHR 2003), in which the ECtHR found a violation of Article 10 in a case involving criminal prosecution of Islamist speech.

and reputation of a group of people is clear" (2012, 114–126). The distinction may be clear to Waldron, but many European Muslims seem unpersuaded by it. Its unpersuasive character is exacerbated by European laws prohibiting Holocaust denial, which are widespread and vigorously enforced, and which seem closer to hypothetical laws banning depictions of the Prophet (PBUH) than to actual laws banning racist hate speech (Bleich 2011, 44–61). As Bleich notes, this juxtaposition was particularly stark in February 2006 when, at the height of the Danish cartoon controversy, an Austrian court convicted David Irving of Holocaust denial and sentenced him to three years in prison (2011, 56–57). Banning Holocaust denial might make sense because such speech acts are deeply hurtful to many Jews and indeed are a leading mode for contemporary expressions of anti-Semitism (Kahn 2004; Suk 2012). But then why would we not also ban caricatures of the Prophet (PBUH), which are deeply hurtful to many Muslims and indeed are a leading mode for contemporary expressions of Islamophobia?

In sum, Waldron's distinction between written epithets directed against racial and religious minorities (which should be banned) and written mockery of minority religious doctrines (which should be allowed) is reasonable in the abstract, but its social meaning when enacted into law by contemporary European states is to signal to vulnerable Muslim minorities that they are not equal citizens of those societies. One widespread Muslim response to these signals is to demand legal regulation of written mockery of their faith. European governments have generally been unwilling to accede to such demands, for the good reason that free and democratic societies require space to criticize religious doctrine. But this decision has resulted in a legal playing field that does not appear to be level, and European judges to date have proven unwilling or unable to level it. In addition to rejecting freedom-of-expression and freedom-of-religion challenges to French bans on Muslim clothing and other forms of Islamist expression (such as the Leroy cartoon), the ECtHR also rejected a Moroccan complaint about the Danish non-prosecution of *Jyllands-Posten*, though we do not know what it would have done if Danish Muslims had brought such a complaint.[16] But this same court has repeatedly upheld legislative bans on racist hate speech, legislative bans on Holocaust denial, and in one substantive ruling to date, a legislative ban on anti-gay speech.[17]

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16. The ECtHR held that the Moroccans' application was inadmissible because "there is no jurisdictional link between any of the applicants and the relevant member State, namely Denmark." Ben el Mahi v. Denmark, Application no. 5853/06 (ECtHR 2006).

17. In addition to the cases cited in note 9, see Balsytė-Lideikienė v. Lithuania, Application no. 72596/01 (ECtHR 2008); Pavel Ivanov v. Russia, Application no. 35222/04 (ECtHR 2007); Hizb

HOMOPHOBIC SPEECH

Like European Muslims, European LGBT communities have argued that the state's failure to protect them against hateful and abusive speech signals that their rights and security are less valuable than those of other minority communities. As a result, some LGBT rights advocates have called for legislative bans on such speech acts, some European states have heeded these calls, and some courts have allowed such bans to be enforced; these efforts almost inevitably trench on well-established spheres of protected religious and political speech.

For example, the Swedish parliament amended its hate speech law in 2003 to include sexual orientation. As amended, the Act prohibited any statement or communication that "threatens or expresses contempt for an ethnic group or any other group of people with reference to their race, skin colour, nationality or ethnic origin, religious belief or sexual orientation."[18] It authorized prison sentences of two years for violations, or longer if the speech act was especially threatening, extremely disrespectful, or widely disseminated. Despite requests from the Swedish Council of Free Churches, the statute did not exempt sermons, and the Swedish Minister of Justice indicated that some anti-gay sermons might well be prohibited (Bob 2014, 216). At the time of enactment, the Government issued a statement indicating that "the purpose of this legislative solution is [to] underscore that the same principles are to be used in considering whether an act against homosexuals, for example, is within the purview of the provisions regarding incitement against a group, as when considering an act against any of the other groups that are protected by these provisions."[19]

This legislative change was supported by (some) LGBT rights advocates, both in Sweden and internationally. Key actors included the Stockholm-based Swedish Federation for Gay, Lesbian, Bisexual, and Transgender Rights and the International Lesbian and Gay Association (Bob 2014). As Ian Leigh has noted, LGBT organizations had "lobbied for an offence of this kind as an equalizing measure that would bring the treatment of sexual-orientation equality into line with race and religious equality" (2009, 384). Heeding such concerns, the European Parliament has passed repeated resolutions demanding an end to homophobic speech, and a number of national legislatures have followed suit (Bob 2014, 224). In 2008,

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utTahrir and Others v. Germany, Application no. 31098/08 (ECtHR 2012); Kasymakhunov and Saybatalov v. Russia, Application nos. 26261/05 and 26377/06 (ECtHR 2013); and Vejdeland and Others v. Sweden, Application no. 1813/07 (ECtHR 2012).

18. Swedish Penal Code, Ch. 16, sec. 8, quoted in Prosecutor General v. Green, Case No. B 105005 (Supreme Court of Sweden 2005).

19. Quoted in Prosecutor General v. Green, Case No. B 105005 (Supreme Court of Sweden 2005).

England amended its law of incitement to provide that it would be illegal to use threatening words, behavior, or written material with intent to stir up hatred on the grounds of sexual orientation. In response to religious critics, the new provision was altered prior to enactment to provide that "the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred."[20] Statutory bans on anti-gay speech have been enacted in Croatia, Denmark, Finland, France, Greece, Iceland, Ireland, Italy, Lithuania, the Netherlands, and Norway as well.[21]

Even before these legislative changes, anti-gay speakers were sometimes prosecuted under existing laws that did not reference sexual orientation directly. In 2001, for example, Harry Hammond was convicted under England's Public Order Act for holding a sign in a town square with the message "Stop Immorality. Stop Homosexuality. Stop Lesbianism. Jesus is Lord." In the U.S., such messages are a routine feature of sidewalk preaching in many college towns (and elsewhere), but in England, Hammond ran afoul of the Act's ban on the display of "any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby."[22] The English High Court held that Hammond's freedom of expression was outweighed by the need to defend public order and protect the rights of gays and lesbians. Hammond died while his appeal was pending, and though his heirs sought to continue the case, the ECtHR ultimately declared it inadmissible on the grounds of his death.[23]

Following the legislative change in Sweden, Pentecostal pastor Åke Green intentionally provoked a legal test of the new law by delivering a sermon entitled "Is homosexuality congenital or the powers of evil meddling with people?" During the course of the sermon, Green drew on scriptural readings of Leviticus

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20. Criminal Justice and Immigration Act 2008, ch. 4, schedule 16; see Leigh (2009).

21. Croatian Penal Code, S174; Danish Penal Code, §266b; Finnish Criminal Code, ch. 11, sec. 10; French Penal Code, Article R.624 and 625; French Press Law of 1881, Article 24 (as amended 1972); Greek Law 4285/2014, Article 1; Icelandic General Penal Code No. 19, Article 233a; Irish Prohibition of Incitement to Hatred Act 1989; Lithuanian Criminal Code, Article 170, No. VIII-1968; Dutch Penal Code, sec. 137c and d; Norwegian General Civil Penal Code, §135a. See Bangstad (2014); Bleich (2011: 40–41); Langer (2014); Leigh (2007, 2009); Loof (2007); Saletan (2012); Mattijssen and Smith (1996).

22. Public Order Act 1986, 1986 Chapter 64, sec. 5(1)(b), http://www.legislation.gov.uk/ukpga/1986/64. See Weinstein (2009: 30–35).

23. Fairfield and Others v. UK, Application no. 24790/04 (ECtHR 2005).

and Paul's First Epistle to the Corinthians in preaching that legal recognition of same-sex relationships would "create unparalleled catastrophes," that "sexual abnormalities are a serious cancerous growth on the body of a society," and that "sexually perverse people will even force themselves upon animals."[24] As with the legislative change that enabled it, Green's prosecution was supported by (some) LGBT rights advocates, both in Sweden and internationally (Bob 2014). Green was convicted and sentenced to one month in prison. On appeal, the Swedish Supreme Court rejected his domestic constitutional speech and religious freedom arguments, but reversed the conviction on the grounds that it was inconsistent with ECHR Article 10.[25] This latter holding was a victory for free expression, but it left the statute in place for future prosecutions, with the Swedish Court appearing to indicate that some potential applications of the law remained legitimate.[26] In other words, in the absence of continental free speech norms, the Court would have upheld Green's conviction under Swedish law, despite its clear and sweeping infringement on religious speech; even with those norms in place, the Court signaled that it might uphold future such convictions where the infringement on speech was less severe.

The ECtHR itself did not weigh in on the merits of a homophobic speech case until 2012. In *Vejdeland and Others v. Sweden* (2012), the European Court rejected an Article 10 claim filed by a group of Swedes who had distributed anti-gay leaflets to students in an upper secondary school. The leaflets, produced by an organization called National Youth, characterized homosexuality as "deviant" and "morally destructive," urged students to tell their teachers that the AIDS epidemic was rooted in homosexuals' "promiscuous lifestyle," and suggested that homosexual lobby organizations were seeking to legalize pedophilia.[27] The avowed purpose of the leafletting was to initiate a debate regarding what the speech claimants saw as biased curricular content in the Swedish schools. The leaftletters were convicted in Swedish courts of violating the national hate speech law, as amended in 2003, and two of them were initially sentenced to two months in jail. In July 2006, a divided Supreme Court upheld the convictions, but suspended the prison sentences. Four of those convicted then petitioned to the European Court on Article 10 grounds.

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24. Prosecutor General v. Green, Case No. B 105005 (Supreme Court of Sweden 2005).

25. Prosecutor General v. Green, Case No. B 105005 (Supreme Court of Sweden 2005).

26. Prosecutor General v. Green, Case No. B 105005 (Supreme Court of Sweden 2005). See Bob (2014).

27. Vejdeland and Others v. Sweden, Application no. 1813/07 (ECtHR 2012), para. 8.

At the ECtHR, the International Centre for the Legal Protection of Human Rights and the International Commission of Jurists argued (as third-party intervenors) that

> Sexual orientation should be treated in the same way as categories such as race, ethnicity and religion which are commonly covered by hate-speech and hate-crime laws, because sexual orientation is a characteristic that is fundamental to a person's sense of self. . . . When a particular group is singled out for victimisation and discrimination, hate-speech laws should protect those characteristics that are essential to a person's identity and that are used as evidence of belonging to a particular group. Restrictions on freedom of expression must therefore be permissible in instances where the aim of the speech is to degrade, insult or incite hatred against persons or a class of person on account of their sexual orientation, so long as such restrictions are in accordance with the Court's well-established principles.[28]

Noting that "discrimination based on sexual orientation is as serious as discrimination based on 'race, origin or colour'," the Court agreed.[29]

These arguments are understandable from the perspective of LGBT rights advocates seeking the same sort of legal protections that other vulnerable minority groups have won, but the ECtHR's holding opens the door to potentially significant infringements on Article 10 free speech rights. Given the limited doctrine to date, we do not yet know how far the ECtHR will allow such infringements to go. If the European judges had heard the *Green* case, for example, would they have reached the same judgment as the Swedish Supreme Court? In other words, are the different results in *Green* and *Vejdeland* the result of a national court adopting a broader reading of Article 10 than the European Court requires? Or a result of the cases' different fact patterns? In short, when the ECtHR faces a case like Green's—involving criminal prosecution for anti-gay readings of the Bible, delivered from the pulpit—will it find an Article 10 violation?

CONCLUSION

The European legal treatment of Islamophobic and homophobic speech illustrates the two horns of the dilemma faced by democratic states seeking to outlaw hateful

28. Vejdeland and Others v. Sweden, Application no. 1813/07 (ECtHR 2012), para. 45–46.

29. Vejdeland and Others v. Sweden, Application no. 1813/07 (ECtHR 2012), para. 55.

speech. With regard to satirical and offensive caricatures of the Prophet Mohammed (PBUH), Western European states have by and large erred on the side of defending free expression, at the cost of signaling to a vulnerable minority that they must tolerate what they see as hateful, discriminatory, and harmful speech acts. With regard to religiously motivated denunciations of homosexuality, European states have increasingly erred on the side of protecting vulnerable minorities from harmful speech, at the cost of signaling to religious conservatives that their deeply held views are not welcome in public debate.

From a U.S. First Amendment perspective, the European approach to speech involving Islam in particular seems to represent a worst-of-both-worlds stance. On the one hand, in an extension of their approach to racist hate speech, European legislators and judges have gone so far in banning both anti-Muslim and pro-terrorism speech that they have trenched on what seem like clear and fundamental democratic norms of free expression: note, for example, the convictions of Mark Norwood and Denis Leroy. On the other hand, the pervasive speech acts about which actual European Muslims express the greatest concern—mocking images of the Prophet (PBUH)—are tolerated as legitimate commentary on religious doctrine, with European lawmakers lecturing Muslims on the sorts of tolerance that are required in a diverse democratic society.

This dilemma has no easy solution. As Bleich has noted with regard to the Danish cartoons, "[t]he failed lawsuits in Denmark and France indicate to [Muslim] plaintiffs that their feelings are not given sufficient weight by the state. Yet if Muslim groups had won these cases, the ability to express controversial ideas in the public sphere would have been severely compromised" (2011, 40). If European legislatures and courts are unwilling—for good reason—to start banning published caricatures of Mohammed (PBUH), then their best bet may be to stop banning Islamist calls for violent resistance to the West—i.e., to stop banning such calls unless and until they rise to the level of true threats to individuals or otherwise incite one or more persons to engage in imminent violent action. (On speech acts that virtually everyone, including civil libertarians, believes can legitimately be regulated, see Heinze (2013, 590–95).) Particularly if combined with a relaxation of existing bans on racist, anti-Semitic, and homophobic speech, such deregulation of Islamist speech would moderate the signals of unequal status that are currently sent by the widespread failure to regulate caricatures of the Prophet (PBUH). If these deregulatory changes were accompanied by the rich array of non-coercive governmental efforts to promote egalitarianism that Brettschneider calls for, then the cost to those relatively powerless groups who are protected by existing hate speech laws could be moderated as well (Brettschneider 2012; see also Gelber 2012).

The ECtHR could use its Article 10 jurisprudence to force some steps in this direction. To the extent that it imposes some consistency on legal regulation of hateful speech directed at racial minorities, Jews, Muslims, and LGBT persons, it would dampen any signals of unequal citizenship that are sent by national laws of selective scope. To date, the ECtHR has largely failed to do so, and in so failing, it has echoed and amplified the signal sent by European states that their Muslim minorities are due less than fully equal protection of the laws.

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The prosecution of right-wing extremists for saying or writing hateful things that fall short of direct incitements to violence has a number of potential downsides that have been rehearsed by other scholars. Such prosecutions may have a tendency to turn the haters into victims and martyrs, and they may sometimes drive hate organizations underground in ways that make them more difficult to monitor. These downsides are counterbalanced by the important symbolic message that the targets of the outlawed speech are full and equal members of the polity, whose safety and status will be protected by the state. But even this upside has a downside, in that it signals to other vulnerable groups—those targeted by hateful speech that has not been banned—that they are not yet full and equal members. The U.S. First Amendment approach, in which hateful speech acts are generally not prosecuted, has downsides too, such as forcing all of us to tolerate pickets at military funerals bearing messages like "God Hates Fags" and "Thank God for Dead Soldiers."[30] But U.S. lawmakers are not faced with the European dilemma of whether to selectively protect some vulnerable groups from hateful speech or to accede to ever-proliferating reasonable demands to extend such protection to new and additional such groups, with an ever-constricting effect on the scope of free expression.

The most-cited passage in Waldron's Holmes Lectures is his objection to white liberals' too easy tolerance of racist speech, when they are not the ones who have to live with its consequences (2012, 33). But one could just as easily invoke civil libertarians of color to draw attention to white liberals' too easy embrace of speech restrictions, when they are not the ones who have to live with the consequences of anti-racism campaigns that emphasize words over substance (Gates 1993; M. Malik 2009; Shaw 2012; see also Greene 2012; Kalven 1965; Walker 1994). The same could be said of LGBT civil libertarians (Eskridge 1999, 318–19; Rubenstein 1992; Tatchell 2007). Civil libertarians come in all shapes and sizes, as do advocates of

30. Snyder v. Phelps, 131 S. Ct. 1207 (2011).

further government restrictions on speech. The question for all of us is how best to protect the targets of hatred from violence and discrimination, to integrate them into democratic societies, and to signal that all members of such societies are entitled to equal concern and respect. Democratic states should certainly denounce hatred of vulnerable groups wherever and whenever it arises, but it is not clear that they can coercively suppress such hatred without sending inegalitarian signals of their own.

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