

THE
HARM IN
HATE
SPEECH

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5 Protecting Dignity or Protection from Offense?

Are hate speech laws supposed to protect people from being offended? I think not, and in this chapter I shall set out the basis of a distinction between undermining a person's dignity and causing offense to that same individual. It may seem a fine line to draw, but in this chapter I shall argue that offense, however deeply felt, is not a proper object of legislative concern. Dignity, on the other hand, is precisely what hate speech laws are designed to protect—not dignity in the sense of any particular level of honor or esteem (or self-esteem), but dignity in the sense of a person's basic entitlement to be regarded as a member of society in good standing, as someone whose membership of a minority group does not disqualify him or her from ordinary social interaction. That is what hate speech attacks, and that is what laws suppressing hate speech aim to protect.

The Distinction between Indignity and Offense

I have said several times in this book that laws restricting hate speech should aim to protect people's dignity against assault. I

am referring to their status as anyone's equal in the community they inhabit, to their entitlement to basic justice, and to the fundamentals of their reputation. Dignity in that sense may need protection against attack, particularly against group-directed attacks which proclaim that all or most of the members of a given group are, by virtue of their race or some other ascriptive characteristic, not worthy of being treated as members of society in good standing. That was the burden of my argument in favor of hate speech laws or group-defamation laws in Chapters 3 and 4. It understands dignity as a status sustained by law in society in the form of a public good.

However, I do not believe that it should be the aim of these laws to prevent people from being offended. Protecting people's feelings against offense is not an appropriate objective for the law. In this chapter I shall try to show how a dignitarian rationale for legislation against hate speech or group defamation differs from an approach based on the offense that may be taken by the members of a group against some criticism or attack. And I will defend the claim that the law can hold a line between indignity and offense.

The distinction is in large part between objective or social aspects of a person's standing in society, on the one hand, and subjective aspects of feeling, including hurt, shock, and anger, on the other. A person's dignity or reputation has to do with how things are with respect to them in society, not with how things feel to them. Or at least that is true in the first instance. Of course an assault on one's dignity will be felt as hurtful and debilitating. And no doubt those who assault another's dignity in this way will be hoping for certain psychological effects—hoping to cultivate

among minority members a traumatic sense of not being trusted, not being respected, not being perceived as worthy of ordinary citizenship, a sense of being always vulnerable to discriminatory and humiliating exclusions and insults. Those feelings will naturally accompany an assault on dignity, but they are not the root of the matter.

Offense, on the other hand, is inherently a subjective reaction. The *Oxford English Dictionary* gives this as the main definition of “offend”: “To hurt or wound the feelings or susceptibilities of; to be displeasing or disagreeable to; to vex, annoy, displease, anger; (now esp.) to excite a feeling of personal upset, resentment, annoyance, or disgust in (someone).” The dictionary indicates that this is the main modern use of the word (in its transitive sense),¹ although it acknowledges some other obsolete usages, including “to cause spiritual or moral difficulty,” to assault or assail, to wound or harm, and to attack (as in “go onto the offensive”). And it defines the relevant meaning of “offense” in a similar way: “The action or fact of offending, wounding the feelings of, or displeasing another (usually viewed as it affects the person offended). . . . Offended or wounded feeling; displeasure, annoyance, or resentment caused (voluntarily or involuntarily) to a person.” So, 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.

In insisting on this distinction, I do not mean to convey indifference to the felt aspect of assaults on dignity. Dignity is not just decoration; it is sustained and upheld for a purpose. As I emphasized in Chapter 4, the social support of individual dig-

nity furnishes for people the basis of a general assurance of decent treatment and respect as they live their lives and go about their business. Any assault on this is bound to be experienced as wounding and distressing; and unless we understand that distress, we don't understand what is wrong with group defamation and why it is appropriate to prohibit it by law. Protecting people from assaults on their dignity indirectly protects their feelings, but it does so only because it protects them from a social reality—a radical denigration of status and an undermining of assurance—which, as it happens, naturally impacts upon their feelings. That someone's feelings are hurt is more or less definitive of offense, but it is not definitive of indignity. Shock, distress, or wounded feelings may or may not be symptomatic of indignity, depending on the kind of social phenomenon that causes these feelings or that is associated with their causation.

We can see this in the way that dignity used to work, when it was associated with hierarchical office or differential status. Something was an assault on the dignity of a judge, for example, not simply because the judge's feelings were hurt, but because the action complained of tended to lower the esteem in which the judge was held and diminish the respect accorded to him, so that it fell below the threshold that would sustain his authority and enable him to do his job. Even if a judge was distressed at some expression of contempt, it was not the distress we sought to protect him from; it was the diminution of his (socially necessary) dignity. And so, too, for the dignity of basic citizenship (in the sense that being a "citizen" means being a member of society in good standing), which is something we accord as high status now to everyone.² A democratic society cannot work, socially or po-

litically, unless its members are respected in their character as equals, and accorded the authority associated with their vote and their basic rights. An assault on a person's status undermines his or her dignity, whether or not it is also associated (as it ordinarily would be) with hurt and distress.

Something similar happens with the concept of degrading treatment, which derives from the idea of dignity. The prohibition on degrading treatment in the International Covenant on Civil and Political Rights, Article 7, and in Article 3 of the European Convention on Human Rights (ECHR), is designed to protect people against being treated in ways that diminish their elementary status as persons. In almost every case, degrading treatment will be experienced as humiliation and will be felt as deeply distressing. This is because human dignity almost always has a conscious component, if only because it is linked to aspects of our being such as reason, understanding, autonomy, free will, and normative self-regard. So, in most cases, degradation may not be possible without some conscious impact. But not as a matter of definition. In unusual cases—the treatment of the very old, for example—where a person's awareness of how he or she is being treated is necessarily limited, degradation may be possible without the typical mental impact.³ As the English High Court put it in a recent discussion of treatment of the aged,

Treatment is capable of being “degrading” within the meaning of article 3 [of the ECHR], whether or not there is awareness on the part of the victim. However unconscious or unaware of ill-treatment a particular patient may be, treatment which has the effect on those who witness it of

degrading the individual may come within article 3. It is enough if judged by the standard of right-thinking bystanders it would be viewed as humiliating or debasing the victim, showing a lack of respect for, or diminishing, his or her human dignity.⁴

In any case, the distress is not the essence of degradation even when we would expect it to be present. Unlike offense, insults to dignity are not about wounded feelings, at least not in the first instance.

We see this, too, in the way the law of defamation works. Whether something is defamatory depends on the effect that it tends to have on a person's reputation—that is, on the view that others have of him or her. Of course a libel is wounding, and people are greatly distressed when they are defamed. But that is a consequence of what the law of defamation is supposed to protect people against; it is not itself what the law of defamation is supposed to protect people against.

There are areas of law where people *can* be held liable for something like hurting others' feelings. I have in mind the tort of intentional infliction of emotional distress. In the nineteenth century, the legal position was that "mental pain or anxiety" was not something the law could value for the purpose of awarding damages, at least not when it stood alone apart from other grounds of liability: this was one of the holdings in *Lynch v. Knight* (1861), in which a woman was distressed by a slander on her moral character communicated to her husband.⁵ But since the beginning of the twentieth century, the common law in England and in many American states has permitted plaintiffs to re-

cover for emotional distress suffered as a result of a defendant's negligent action, and, in certain cases, for conduct intended to cause mental shock (such as falsely telling someone that his loved ones have been injured or killed in an accident).⁶ The idea, then, that it might be unlawful to wound people's feelings is not an incoherent one, and we know how to recognize legal principles whose aim it is to protect people from this sort of harm. But such principles are a distraction in the present context—a distraction, I might add, which is introduced gratuitously into the discussion of hate speech laws by those intent on discrediting them.⁷ It is not the function of racial or religious hatred laws to protect against hurt feelings, and the rationale for doing so would have to be quite different from the dignitary rationale elaborated in Chapters 3 and 4 of this book.

Complexities

The basic distinction, I think, is reasonably well understood. But its application may be more difficult, for several reasons. One we have already mentioned. Assaults on people's dignity, on their status as members of society in good standing, are normally experienced as distressing. And the distress associated with these assaults is not unimportant. We protect people's basic dignity because it matters: it matters to society in general, inasmuch as society wants to secure its own democratic order and its character as a society of equals; and dignity matters of course to those whose dignity is assaulted. That it matters to them will certainly be indicated by their very considerable distress and grave fear and apprehensions about what may be done to them, what is to be-

come of them, and how they and their family members are to navigate life in society under the conditions that the hate-speakers are striving to bring about. The importance of this subjective aspect of indignity should not be suppressed, even though the price of emphasizing it is to open the way for critics of hate speech laws to say—I think, with studied obtuseness—that the only purpose of such laws is solicitude for people’s hurt feelings.

Second, the ordinary meanings of terms like “dignity,” “hurt,” “distress,” and “offense” may be looser than the analytic distinctions outlined in the previous section. “Hurt” can comprise a variety of phenomena ranging from physical injury to emotional suffering, from the violation of rights to the undermining of a person’s social standing. In many contexts, it is not important to make these distinctions. But in the justification of hate speech laws, it is. When we describe hate speech as hurtful, we may—depending on the context—be registering the damage it does to people’s social status or using the term “hurtful” to refer to that damage, by metonymy, via the subjective consequences that are normally associated with it. And “offense,” too, can be ambiguous. In the section above, I emphasized its primary meaning in terms of hurt feelings, but there is a deeper, more abstract sense that may also be in play: the sense in which something may be an offense against a person’s standing, quite apart from the distress that that offense occasions. In this sense—but in this sense only—hate speech laws do protect people against offense; but if we say that they do so, we have to take special care to emphasize that it is not offense in the sense of hurt feelings that is the primary concern.

Third, we have to deal with the complexity of psychological

phenomena, which are not always as tidy as our verbal taxonomy promises. The phenomenology of the reaction by a minority member to any particular incident of hate speech is likely to be complex and tangled. As a man walking with his family turns a corner and sees a swastika or a burning cross or posters depicting people of his kind as apes, he will experience a plethora of thoughts and emotions. It will not be easy to differentiate terror from outrage, from offense, from insult, from incredulity, from acutely uncomfortable self-consciousness, from the perception of a threat, from humiliation, from rage, from a sense that one's world has been up-ended, from sickening familiarity ("Here we go again"), from the apprehension of further assaults or worse, and all these from the shame of having to explain to one's children what is going on.⁸ In the gestalt that these roiling emotions compose, it will be difficult, and sometimes may seem futile and insensitive, to start picking and choosing to see whether we can separate out those feelings that are not appropriate for legislative concern from those which are or from those that accompany other phenomena that are. And critics of hate speech laws will say, "How are we supposed to make this distinction in real-life cases?"

The answer is actually easier than the psychological complexity indicates. For, first, we do not make decisions about the lawfulness and unlawfulness of certain speech acts on the basis of a case-by-case analysis of the emotions of particular victims. Instead, we identify categories and modes of expression that experience indicates are likely to have an impact on the dignity of members of vulnerable minorities. If we pay attention to the hurtfulness of this kind of speech—in order to convey how much

it matters to those on the sharp end of it—we can indicate certain kinds of suffering and apprehension that are likely to be involved, whatever other emotions are also occasioned. We don't have to dissect any of this and present it in a pure form in order to understand the wrongness of hate speech and the wisdom of legislating against it.

Let me add one last thing. On my account, legislators do have to be vigilant that those who demand solicitude for their dignity and for their group reputation do not also succeed in securing protection against offense. A situation in which someone is gravely offended by what another says may involve an emotional reaction which, as a conglomerate, might look quite similar to the complex emotional reaction that we just considered. A religious person confronting an offensive image of Jesus, for example, like Andres Serrano's *Piss Christ* or the poem by James Kirkup that was the subject of prosecution in the U.K. in *Whitehouse v. Lemon* (1976),⁹ may experience the same thoughts and feelings we listed a few paragraphs ago: outrage, offense, insult, incredulity, uncomfortable self-consciousness, the perception of a threat, humiliation, rage, a sense that his or her world has been up-ended, and so on, all the way through to the shame of having to explain what is going on to one's children. And someone may ask or complain: If legislative action is appropriate in response to a minority member's welter of emotions in the case of cross-burning or the daubing of swastikas, why isn't it also appropriate in response to a similar welter of emotions generated by *Piss Christ* or by some other blasphemous publication? We should not try to answer this question by pointing to some key item whose presence distinguishes the one emotional gestalt from the other.

We should answer it by saying that the primary concern in the hate speech case is with the assault on dignity and the public good of assurance, which we spoke about in Chapter 4. With this object in mind, we are in a position to parse the emotional complex differently in one case from the way we parse it in the other, even though the psychological aspect of the two cases may seem quite similar to an impatient observer.

These are not simple matters, and in my experience opponents of hate speech laws will pretend to be exasperated by their subtlety. But I am not proposing a complicated legal test for distinguishing hate speech from speech that merely offends. I am only suggesting that in defending (or arguing about) such a distinction, we should be willing to come to terms with psychological complexity.

Some will say that the lines I am defending in this chapter are difficult lines to draw. And so they are. But I do not infer from this that we should give up the position. Legislative policy is often complicated and requires nuanced drafting and careful administration; outside the United States, the world has accumulated some experience of how to draft these regulations and how to administer these distinctions. Some people believe that no position can be valid in these matters unless it is presented with rule-like clarity, uncontroversially administrable, requiring nothing in the way of further moral judgment or careful thought and discretion. I do not belong to that school. I belong to a school of thought that accepts that the tasks assigned to courts and administrators in matters of fundamental rights (rights to free expression, rights to dignity) will often be delicate and challenging, often involve balancing different goods and essaying difficult value

judgments.¹⁰ I do not think people should defect from this school of jurisprudence just because they perceive some advantage in doing so for their position in the hate speech debate.

Racial Epithets

Some of the complexity here can be illustrated by reference to issues about racist or homophobic abuse. In American discussions of hate speech, it is often assumed that restrictions on hate speech will attempt not only to protect people's dignity and the social assurance on which their dignity depends, but also to protect people from having vicious epithets concerning their race or sexuality directed at them. There can be no doubt about the wounding effect of racial and sexual epithets. Charles Lawrence has done a tremendous amount to convey the trauma that such wounding words might cause, and I can imagine an honorable legislative attempt to protect people from this and to prohibit the infliction of this harm.¹¹ But that project is different from mine, different from the dignity-and-reputation rationale that I am considering here.

My argument depends partly on points I made in Chapter 3 concerning the legal distinction between slander and libel. I mean the distinction between the spoken word—words that are blurted out “when the spirits are high and the flagons are low”¹²—and the visible presence of that which is written or scrawled on a wall or otherwise published, and which becomes part of the environment in which all the members of society have to live their lives. My main interest in this book is the enduring impact of hate speech over and above the dynamics of any particular encounter.

Still, things may be complicated. In suggesting that a shouted

epithet is relatively ephemeral, I don't mean that it doesn't linger in people's experience, nor do I mean that the bruise of its impact magically gets better as soon as the person who shouted it goes away. Under certain conditions, the echo of an epithet can linger and become a disfiguring part of the social environment. This is particularly true when there is reason to suppose that the license that permitted racist anger or contempt to express itself this way on one occasion is likely to be equally hospitable to its repetition, whenever the members of minorities came within range of the hatemongers.

So I don't want to draw the line too sharply. I can certainly understand the importance of restricting the use of racial and other abusive epithets on campuses and in the workplace, in an effort to maintain the atmosphere required for the particular enterprises pursued in these settings.¹³ From one point of view, a prohibition on racial epithets in the workplace can be justified by reference to the exigencies of the business: most employers do not want their employees to be bullied, traumatized, distressed, and demoralized in this way. But also the language of "hostile environment" used when anti-discrimination law is applied to workplaces takes up, in microcosm, themes which we have been pursuing at the level of society in general. In the United States the logic of hostile environment seems to make great sense to people at this level, and they can easily see that concerns of this kind must be able to prevail over First Amendment considerations in the workplace.¹⁴ For some reason, however, it is more difficult for them to recognize the compelling nature of the same or similar considerations when they are extrapolated out of the workplace to the level of society as a whole.

The other point to remember is that the shouted epithet sel-

dom occurs in isolation. Often it is used in the context of the communication of a more extensive message which is more evidently an assault on dignity, as in “Niggers, go back to Africa!” Indeed, even without such explicit context, the epithet itself is capable of spitting out in its venomous way a message of radical denigration. Like a burning cross or a noose placed on someone’s door, it intimates (even if it does not explicitly convey) the desirability of returning to a time when members of a racial minority were kept in their place by terrorizing threats, and it expresses and, more importantly, seeks to evoke the contempt on which such subordination was predicated. The conveying of that sort of message, even if it is done in a two-syllable word, is part of the target of my argument, provided it is capable of becoming a permanent—and thus a permanently damaging and permanently disfiguring—feature of the environment in which people have to live their lives.

Religious Hatred and Religious Offense

It is sometimes said that the distinction between offending people and assaulting their dignity is more difficult to sustain in the case of religious hate speech than it is in the case of racial hate speech. For example, a very distinguished former English Court of Appeal judge, Sir Stephen Sedley, says that he supports racial hatred laws but that the enactment of laws prohibiting incitement to religious hatred is “a much more contentious shift.” The tendency of the latter prohibition, he suggests, is to try to insulate individuals or groups against religious insult and offense.¹⁵

Part of the problem that Sedley alludes to has to do with the

particular circumstances in which the British Parliament enacted the Racial and Religious Hatred Act of 2006. I mentioned in Chapter 3 that the United States abandoned the category of blasphemous libel in the nineteenth century. Blasphemous libel was not understood as an attack on the believers or on their reputation or social standing; it was understood as an attack on Christian belief itself, following Blackstone's definition of it as an offense "against the Almighty, . . . denying his being or providence, or uttering contumelious reproaches on our Saviour Christ."¹⁶ Britain maintained laws against blasphemy until very recently. In the last successful prosecution, blasphemy was defined as "any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible, or the formularies of the Church of England as by law established."¹⁷ As these definitions indicate, the only body of religious belief protected by the blasphemy laws was Christian belief. The Islamic and Jewish faiths were not protected in this way, and occasional attempts to invoke the blasphemy laws to punish alleged attacks on Islam or on the character of its founder always failed.¹⁸ Many thought this was unfair. After the passage of the Religious and Racial Hatred Act, which defined certain "offences involving stirring up hatred against persons on religious grounds,"¹⁹ Parliament legislated to abolish the common-law offenses of blasphemy and blasphemous libel altogether.²⁰ This could be seen as a move to promote fairness—a leveling down, so that Christian faith enjoyed no more protection than the others (i.e., none). But inevitably some people saw the definition of new offenses in the 2006 statute as a way of leveling up, a way of giving all faiths protection against the sort of attacks that only Christianity had been protected against until

that point. Or at least it was hoped that the act might be interpreted in that way: maybe the statutory definition of “religious hatred”—“hatred against a group of persons defined by reference to religious belief”²¹—might be extended to comprehend hatred of the beliefs themselves, as well as hatred of the persons holding them. Never mind that Parliament felt constrained to insert into the statute a sharp distinction between words attacking believers and words attacking religious beliefs: “Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents.”²² The hope was that this distinction might be finessed via an understanding of “religious hatred” that would be capacious enough to include the idea of giving offense. I think that, with this background, it is possible to sympathize with Sedley’s doubts about whether a line could be held between attacks on dignity and giving offense in the context of Britain’s laws about the fomenting of religious hatred.

What I do not accept, however, is that the blurring of this line is inevitable, given the sort of approach to dignity that I am taking in this book. Later in this chapter, I will consider whether dignity is too vague or mushy a concept to be relied on in this context. But the basic distinction between an attack on a body of beliefs and an attack on the basic social standing and reputation of a group of people is clear. In every aspect of democratic society, we distinguish between the respect accorded to a citizen and the disagreement we might have concerning his or her social and political convictions. Political life always involves a combination of the sharpest attacks on the latter and the most solicitous respect

for the former. I think the views held by many members of the Republican “Tea Party” right are preposterous and (if they were ever put into effect) socially dangerous; but Tea Party members are entitled to stand for office, to vote, and to have their votes counted. Denying any of these rights would be an attack on them; but attacking or ridiculing their beliefs is business-as-usual in a polity in which they, like me, are members in good standing. Moreover, it would be inconsistent with the respect demanded by their status as citizens to publish a claim, for example, that Tea Party politicians cannot be trusted with public funds or that they are dishonest. I don’t know whether the Tea Party people could navigate the byzantine complexities of American free-speech and defamation laws so as to hold someone liable for such an imputation; but in my view they ought to be able to do so, because that would be a scurrilous attack on what I have called their elementary dignity in society. It would be group defamation of exactly the kind we have been considering. But at the same time, there is no affront to their dignity in “expressions of antipathy, dislike, ridicule, insult or abuse” directed at their economic views. We draw this distinction all the time in democratic politics, and there seems no reason why it should not be drawn also in the context of religious life. True, in the religious life of a society there is nothing resembling voting or candidature which could give vivid content to the socially protected dignity of every individual. But there are free-exercise guarantees, which are quite compatible with the most scurrilous criticism of the doctrines and ceremonies that free exercise involves. And there are laws entitling believers of all faiths to go about their business as ordinary respected members of society in good standing, no matter

how absurd their beliefs seem to others. Again, the ordinary understanding of religious freedom depends on our grasp of this distinction.

So why does the distinction seem so difficult to sustain in the case of laws against religious hate speech? There is the psychological similarity discussed earlier in this chapter, and it may seem that by ignoring a complex of anger, distress, and so forth when it can be categorized as mere “offense,” we are failing in our concern and empathy for the feelings that believers actually have when their faith is put under attack. But my argument at this stage is simply that this distress is not, in and of itself, the evil that hate speech legislation seeks to address. This leaves open the possibility that the law may respond differently to it in other contexts—for example, in legislation prohibiting the disruption of religious services and in legislation prohibiting attacks on particular cherished religious symbols.²³

Apart from the psychological similarities, there is also verbal confusion, particularly about the application of words like “defamation.” I have assimilated hate speech laws in general to laws against group defamation. But when people speak of “religious defamation,” they often mean defaming the religion or its founder, and not just defaming its adherents. When I wrote about “group defamation” in Chapter 3, I tried to make clear that the issue concerned defamation of individual members *via* group characteristics, not defamation of the group as such. If we talk about a religious group as such, considered apart from the individuality of its members, it may seem that there is nothing to defame—and nothing to be protected from defamation—except the beliefs which make the group what it is, and the reputation of the group’s founder and its most venerated holy figures. Defam-

ing the group that comprises all Christians, as opposed to defaming Christians as members of that group, means defaming the creeds, Christ, and the saints. Defaming the group that comprises all Muslims may mean defaming the Koran and the prophet Muhammad. I actually don't think this is an inappropriate use of the term "defamation," just as I do not think it is inappropriate to talk of the dignity of groups.²⁴ The only reason it is inapplicable in the present context is that the whole tendency of the hate speech laws that exist in the world is—and ought to be—to protect individuals, not groups as such. That is what I have been urging. It may be difficult to keep sight of this when what we are protecting individuals against is an attack centered around a group characteristic. But ultimately the concern of this book is for individual dignity—particularly for vulnerable individual members of minority groups that have attracted the rage and contempt of their fellow citizens in the past.

To sum up, then. Individual Christians, millions of them, are entitled to protection against defamation, including defamation as Christians. But this does not mean that any pope, saint or doctrine is to be protected, nor does it mean that the reputation of Jesus is to be protected (as Mary Whitehouse tried to protect it in the *Gay News* case).²⁵ By the same token, individual Muslims, millions of them, are entitled to protection against defamation, including defamation as Muslims. But that doesn't mean that the prophet Muhammad is to be protected against defamation or the creedal beliefs of the group. The civic dignity of the members of a group stands separately from the status of their beliefs, however offensive an attack upon the prophet or even upon the Koran may seem.

So we have to be careful with a term like "defamation of

religion”—careful with its use by those who want to extend the ambit of hate speech legislation (and careful also with its use by opponents of such laws). A recent incident will illustrate. The United Nations General Assembly and its Human Rights Commission (UNHRC) have from time to time voted on resolutions condemning religious defamation. For example, on March 26, 2009, a UNHRC resolution was passed condemning the “defamation of religion” as a human-rights violation. It is pretty clear that these resolutions have been motivated more by a desire to protect Islam from criticism (in the way that blasphemy laws used to protect Christianity) than by a desire to prevent the denigration of Muslims and their exclusion from social life.²⁶ But many commentators treat these resolutions as being on a par with laws that ban the fomenting of racial hatred. The words of Jonathan Turley, a commentator in the *Washington Post*, are typical:

Emblematic of the assault is the effort to pass an international ban on religious defamation supported by United Nations General Assembly President Miguel d’Escoto Brockmann. . . . The U.N. resolution, which has been introduced for the past couple of years, is backed by countries such as Saudi Arabia, one of the most repressive nations when it comes to the free exercise of religion. Blasphemers there are frequently executed. . . . While it hasn’t gone so far as to support the U.N. resolution, the West is prosecuting “religious hatred” cases under anti-discrimination and hate-crime laws. British citizens can be arrested and prosecuted under the 2006 Racial and Religious Hatred Act, which makes it a crime to “abuse” religion.²⁷

The deliberate misrepresentation of religious hate speech laws is epitomized in the last sentence of this extract, particularly in the use of quotation marks around “abuse.” The quotation marks make it seem as though Professor Turley is quoting from the penal provisions of the statute. But the word “abuse” is used only once in the Racial and Religious Hatred Act, and that is in the passage already cited which specifically *privileges* and *protects* “expressions of antipathy, dislike, ridicule, insult or abuse of particular religions.”²⁸

The U.N.’s moves against religious defamation were in large part a reaction to the “Danish cartoons” affair.²⁹ I mean the cartoons portraying the prophet Muhammad as a bomb-throwing terrorist that were published in a Danish newspaper in 2005.³⁰ The images led to a storm of protest around the world and many calls for legal (and, indeed, for extralegal) action against those who would defame the founder of a great religion in this way. In and of themselves, the cartoons can be regarded as a critique of Islam rather than a libel on Muslims; they contribute, in their twisted way, to a debate about the connection between the prophet’s teaching and the more violent aspects of modern jihadism. They would come close to a libel on Muslims if they were calculated to suggest that most followers of Islam support political and religious violence. As one scholar notes, “[c]artoons that associate the prophet Muhammad with terror . . . tend to reduce the social status of Muslim identity as they enforce a negative stigma, according to which terror is part and parcel of Islam.”³¹ I have heard some Danish colleagues say that the language that surrounded the cartoon panel in the original publication sought to impute to Danish Muslims hostility to the liberal institutions

under which they lived; in other words, it juxtaposed the bomb cartoon with text stating, in effect, “Some Muslims reject modern secular society.”³² So it might be a question of judgment whether this was an attack on Danish Muslims as well as an attack on Muhammad. But it was probably appropriate for Denmark’s Director of Public Prosecutions not to initiate legal action against the newspaper. As I have argued throughout this book, where there are fine lines to be drawn the law should generally stay on the liberal side of them.

I do not mean that the newspaper’s actions—or the actions of the publications in the West that also reproduced the cartoons—were admirable. In my view, there was something foul in the self-righteousness with which Western liberals clamored for the publication and republication of the Danish cartoons in country after country and forum after forum.³³ Often, the best they could say for this was that they were upholding their right to publish them. But a right does not give the right-bearer a reason to exercise the right one way or another, nor should it insulate him against moral criticism.³⁴ My view is that the exercise of this right was unnecessary and offensive; but as I have now said several times, offensiveness by itself is not a good reason for legal regulation.

Thick Skins

The position I am defending combines sensitivity to assaults on people’s dignity with an insistence that people should not seek social protection against what I am describing as offense. I commend this sensitivity on the matter of dignity to the attention of our legislators, even as I try to steer them away from undertaking

any legal prohibition on the giving of offense. It is a fine line—we have seen that—though I contend that it's a viable one. But what motivates it? One can see that it makes sense tactically: I am drawing this line between protecting dignity and protecting against offense because laws protecting against offense are easy to discredit. But does the combination of these attitudes make sense intellectually? I believe it does.

Especially in a multifaith society, religion is an area where offense is always in the air. Each group's creed seems like an outrage to every other group: Christian trinitarianism seems like an affront to Jewish or Islamic monotheism, while Islam's relegation of Jesus to the status of a mere prophet, and Judaism's characterization of him as a deceiver, seem like affronts in the other direction. Even within faith communities, each person's attempt to grapple with diverse beliefs in the circumstances of modernity is likely to involve their saying things that seem blasphemous, heretical, irreverent, and offensive. I see no way around this. Persons and peoples have to be free to address the deep questions raised by religion the best way they can. For either these questions are important or they are not. If they are, we know that they strain our resources of psyche and intellect. They drive us to the limits of linear disputation and beyond, for they address the ineffable, the speculative, the disturbing, the frightening, the unknowable, and the unthinkable. The religions of the world make their claims, tell their stories, and consecrate their symbols, and all that goes out into the world, as public property, part of the props and furniture of culture. It is not always requisite, nor is it psychologically possible, to just tiptoe respectfully around this furniture in our endeavor to make sense of our being and upbringing. We

have to do what we can with the hard questions, and make what we can of the answers that have been drummed into us since childhood.

I wrote about these issues many years ago in connection with the Salman Rushdie affair, and I gave the example of the relation between religion and sex.³⁵ I didn't just mean the various ecclesiastical prohibitions on fornication, adultery, homosexuality, and so on. I meant our deeper understanding of the issue. We all cast about for an understanding of ourselves, our bodies, and the intense experience of sexuality. We find in our culture tales of pure and holy men, like Muhammad, and even the claim that God has taken human form, flesh and blood, in the person of Jesus Christ. Incarnation itself is not a straightforward idea, and it beggars belief to say we are required to think about it without dealing with the fraught question of Christ's sexuality. In general, our view of the body—*the flesh*, as it is so often described—is so bound up with what we are taught about holiness that we cannot prohibit all associations of the sacred and the sexual in our attempt to come to terms with ourselves. Some may be able to hold the two apart, but their piety cannot clinch the issue of how others are to deal with this experience.

By the same token, we all cast about for an understanding of evil in the world. There is disease, there are great crimes, children are killed, the heavens are silent, and there seems no sense in it. We know the great religions address the issue shyly and indirectly, with a cornucopia of images and stories. Satan lays a wager with God that Job, a good and holy man, can be brought by misfortune to curse God to His face³⁶—a story which, if it were not already in the Bible, might have earned its publisher a firebomb

or two. The point is not a cute *Tu quoque*: it is that no one even within the religious traditions thinks this issue can be addressed without a full range of fantastic and poetical techniques. Once again, respect for the sensitivities of some cannot, in conscience, be used to limit the means available to others for coming to terms with the problem of evil. It is already too important for that.

The upshot of all this is, as I have said, that offense is likely to be endemic. Things that seem sacred to some will in the hands of others be played with, joked about, taken seriously by being taken lightly, fantasized upon, juggled, dreamed about backwards, sung about, and mixed up with all sorts of stuff. Storytelling will take on the hush of reverence or the hue of blasphemy. Sacraments and traditions will be clouded in incense and satirized in smoke-filled comedy clubs. History will contaminate theology as each faith nurtures its favorite grievances against the others. Inquiry will alloy with indignation. And those who have settled on a given set of answers, for the time being, to the deepest questions that humankind has ever posed will pretend to believe that alternatives are unthinkable and further questioning is an outrage.

There is nothing to be done about this. Neither in its public expression nor in an individual's grappling aloud with these matters can religion be defanged of this potential for offense. The deepest, most troubling feelings are involved, and mutual affront is pretty much the name of the game. Offense in these matters can spring up like wildfire. Some groups go out of their way to offend others, and then make the response of those others the ground of their own offense. But there is plenty of offense to go around, without its deliberately being cultivated. The key to the matter is not to try to extirpate offense, but to drive a wedge be-

tween 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.

But precisely because religious differences can be offensive, there is a standing danger that people will be attacked—harmed or denigrated—for their modes of worship or for the things they believe. Protection against this harm is first and foremost a matter of mutual toleration. We forbid religiously motivated violence or attacks on people's freedom or property, and we stand together to protect people when their lives are threatened by people inside or outside their religious communities. But it would be a mistake to pretend that violence is the only threat. Those who are precluded from beating up the individuals whose faith they find offensive will try, if they can, to make the offenders into social pariahs, to disparage and disenfranchise them, and to get others to do the same. They will see this as an attractive alternative to the violence that is forbidden them, and they will think they can get away with it as "the exercise of their rights." The gist of my argument is that this danger must be recognized, too—the harm of denigration, defamation, and exclusion—along with the more familiar evils of terror, arson, and violence. I believe we can recognize it and legislate against it without taking on the impossible burden of protecting everyone from offense.

Religious freedom means nothing if it is not freedom to offend: that is clear. But, equally, religious freedom means nothing if it does not mean that those who offend others are to be recognized nevertheless as fellow citizens and secured in that status, if need be, by laws that prohibit the mobilization of social forces to exclude them.

The Perils of Identity Politics

People sometimes say they *identify* with their religious beliefs. When they say this, they make it difficult to distinguish between an attack on a belief and an attack on a person. When a belief reels under the impact of the “criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions”³⁷—expressions that hate speech laws permit—those who adhere to the faith in question may feel that their very identity is at stake. They may be tempted to make a big deal of this in the context of “identity politics.”

I think that what we call identity politics is largely an irresponsible attempt on the part of individuals, groups, and communities to claim more by way of influence and protection for their interests and opinions than they are entitled to. I have written about this elsewhere in relation to cultural identity.³⁸ Let me repeat the gist of that critique here.

In politics, everyone has to be willing from time to time to accept defeat. There is a plethora of opinion in society, and opinions other than my own may prevail now and then, in deliberation and in voting. People’s interests often point in different directions, and public policy may favor your interests rather than mine or neglect my interests or set them back. We hope this doesn’t happen too often or too consistently to any particular person or group, but we have to accept that it happens, and it is part of the discipline of ordinary democratic politics to accept these defeats and setbacks gracefully. However, it is also part of democratic politics to insist that, although sometimes my interests have to be sacrificed for what is perceived in collective

decision-making as the greater good, *I myself* am not to be sacrificed. Although people inevitably have to bear some costs, risks, and disappointments for the sake of peace, justice, democracy, and the common good, still we should not enact laws or implement policies that require individuals to give up their very being to secure some social good. Each person has fundamental interests—we call these “rights”—and they impose constraints on the political decisions that are taken in the community and set limits on the defeats and setbacks that any person can expect to suffer. These interests mark the inviolability of the individual.

Now, if a conception of this kind is accepted, then of course there will be disputes about which individual interests fall into this category; that is, there will be disputes about what rights we have. Contributing to and resolving these disputes will be part of what civic participation involves. This, too, is a part that must be played responsibly: one of the things each of us should bear in mind as we advance our list of rights is the impact of that list on the overall civic enterprise of decision-making. Each individual must ask himself whether a given demand that he makes as a matter of *rights* will promote or preclude the decision-making and settlement that politics requires. In liberal thought, the assumption has been that only a very small number of such claims need to be put forward—that the inviolability of persons is not infinitely demanding, and that most individual preferences and interests can be dealt with on a fair basis that allows voting, negotiation, and trade-offs. There is a modest list of rights, but the idea of rights is not all there is to political morality, so far as the interests of individuals are concerned. True, we have to acknowledge that if the list is too modest, individuals may be required to

give up too much, in derogation of their fundamental personhood. (This has been my worry about the neglect of dignity, as though it didn't really matter that some persons' basic social standing was undermined.) But if the list of non-negotiable interests is too demanding, then politics will face an impasse as each alternative decision seems to violate the rights of somebody.

It is in this context that we should understand the irresponsibility of modern identity politics. When I say that I *identify* with some opinion I hold, when I say it is part of my identity, then I purport to elevate that opinion above the scrum of ordinary politics, into the realm in which protection is accorded to fundamental interests. I say: "I can give up many things for the social good, but I will not give up my identity. I should not be required to sacrifice *who I am* for the sake of majority rule or benefit to others." Identity links the opinion in question with the idea of certain reservations which one is entitled to insist on for oneself and which others have to recognize as constraints. By saying that some issue is crucial to my identity, I present my view of that issue as politically non-negotiable: I imply that accommodating my interests, needs, and preferences in this matter is crucial to respecting me.

In earlier writing on this topic, I suggested that claims of cultural identity are particularly pernicious because "culture" has the ability to expand and include many issues on which, as a matter of fact, collective decisions have to be made.³⁹ For example: we have to make decisions about environmental values, but if everyone "identifies" with one or other option regarding a given mountain or wetland, then collective decision will face an impasse; it will no longer be possible to settle on any policy without assault-

ing someone's identity. I think it is incumbent on people in this situation to think very carefully about the identity claims that they make, and to reconsider whether identifying *themselves* with some option that has to be examined and debated in society is actually necessary from the point of view of what the protection of personhood really requires.

I have no doubt that some needs and preferences relative to religion are among the individual interests that must receive non-negotiable protection in a modern liberal state. Free exercise of religion—freedom of worship—is one of those interests. No one should be required to compromise the demands of worship, as he or she understands it, for the sake of the greater good. To adapt a phrase of Ed Baker's: forcing people to give this up, to accept defeat on this front, is like requiring them to "take off their skin."⁴⁰ Even here, we debate the outer limits of this requirement, as we consider in U.S. constitutional law whether generally applicable laws which have no religious motivation should nevertheless be subject to strict scrutiny in the light of First Amendment values.⁴¹ However, that problem pales into insignificance compared to the debate that would be required if each person, in a religiously plural society, identified so strongly with every element of his creed that he demanded protection from offense at the hands (or mouth) of any other believer. I believe that Jesus Christ is the Son of God and redeemer of mankind, and of course my right to believe that is one of the core interests that must be protected in society come what may. But can I plausibly demand—in the same non-negotiable spirit—a social environment in which this view is never contradicted or made fun of? Of

course not. Many other creedal claims, held as fervently as mine, deny this belief about Jesus, and many religions (and certainly the views of many secularists) bolster this denial by making fun of what any objective observer has to recognize as an intrinsically absurd and implausible proposition. I may be distressed by these denials and this derision, and I may hope that when they are expressed they are expressed softly and tactfully (and preferably out of my hearing). But I have no right to demand the suppression of these views on the ground that they offend me. The administration of such a right would be impossible in a religiously plural society, for reasons I explained in the previous section. The rights that are recognized in society must be compossible; they must be able to be respected together. But the only way in which we could secure compossibility of individual rights and not be offended would be by suppressing any religious speaking, thinking, or consideration in public.

This argument cannot be evaded by associating religious beliefs with identity. On the contrary, it is identity politics that poses the difficulty here: recklessly presenting claims about offense as though they were non-negotiable, without regard to this important issue of their compossible administration. If I identify my *self* with my beliefs, then criticisms of them will seem like an assault on me. And that, I might say, is something I am entitled to protection against by the law. In my view, this implication or tendency of identity politics makes it much harder for a society to be administered in the midst of difference and disagreement. Better to reserve the idea of “an assault on me” for attacks on my person or attempts to denigrate or eliminate my social standing. Once

we apply that phrase to any criticism of a belief that I hold, then we place the elementary duty of respect for persons in the way of any sort of public expression or meaningful debate.

Critics of what I wrote about cultural identity say that I exaggerate the claims that are made in the course of identity politics: they say that “recognizing the importance of identity to the intelligibility of reasons offered in the context of civic deliberation is the first step towards the kind of dialogue that democratic participation requires.”⁴² I hope that is right in the present context. I fear that identity politics contributes a lot to a muddying of the waters in the hate speech debate; but I hope I am wrong. Maybe it is more innocuous than I am saying. No doubt people will want to convey to one another how deeply they are hurt by various religious presentations, and, hopefully, respectful dialogue can soften some of the sharp edges that are involved in the coexistence of different faiths. I have no problem with the idea of “identity” as it might be used in such a dialogue. I developed a broader critique in this section because I was anxious to show (in the spirit of what I said at the beginning of the previous section) that limiting the legislative impact of identity claims in this context is not just an ad hoc strategy adopted to make the overall position here more defensible. It is part of an independently motivated position in political philosophy which requires caution and responsibility in the individual claims that we make.

Is the Concept of Dignity Too Vague?

Much of my discussion has been organized around the concept of dignity, and in this chapter I have tried to distinguish an attack

by X on Y's dignity from Y's being merely offended at something that X says or does. That puts a lot of weight on the concept of dignity. Some have questioned whether the concept is capable of bearing that weight.⁴³ There are a number of concerns.

One concern is that dignity is a soft and mushy idea, and that invocations of it are often just "happy talk." "Dignity" is a feel-good word—who could be against it?—designed to elicit warm approval without analytic scrutiny for whatever normative proposals happen to be associated with it at a given time.⁴⁴ Schopenhauer referred to it scathingly as "the shibboleth of all perplexed and empty-headed moralists."⁴⁵ In a recent survey of the uses of dignity in human-rights law, Christopher McCrudden ventured the suggestion that the concept is often used in grand international conventions at places where everyone wants to sound deep and philosophical but is not quite sure what to say or what they can agree on: "Dignity was included in that part of any discussion or text where the absence of a theory of human rights would have been embarrassing. Its utility was to enable those participating in the debate to insert their own theory. Everyone could agree that human dignity was central, but not why or how."⁴⁶ The point is not that we lack a theory of dignity. We have many such theories—too many, perhaps, to allow the term to do any determinate work. There is Kant's theory that identifies dignity with moral capacity; there is Roman Catholic theology that associates it with men and women being created in the image of God; there is Ronald Dworkin's theory that associates it with the responsibility each person must take for his or her own life; there are theories that use dignity to capture something about the high status we accord every person in social and legal interactions.⁴⁷ My usage is

like the last of these, but there is no denying that the other uses are also very prominent.

The proper response, however, is to point out that “dignity” is not being used legislatively in my account.⁴⁸ Nor am I proposing that we recognize a free-standing legal “right” to dignity, which might allow hate speech laws built on that foundation to compete with First Amendment considerations in a fair fight.⁴⁹ The proposal set out in Chapters 3 and 4 is not that we should interfere whenever speech compromises or affects something one could plausibly describe as dignity, or that a statute should be enacted to that effect. In those chapters, I developed an argument about the interest that people have in their elementary social reputation and their status as ordinary members of society in good standing. I proposed employing the term “dignity” to capture the importance of this interest, but I certainly did not use the term (in the way McCrudden thinks the framers of human-rights conventions used the term) to excuse myself from the obligation of explaining what was at stake. I used it in the course of making an argument about the desirability of certain legislation. It was not proposed as a legal principle, but as a value or principle embedded in political argument.⁵⁰

Personally, I believe McCrudden’s critique of the multiple uses of dignity and of its placeholder status in major human rights conventions is overblown.⁵¹ But I am willing to concede the following. If some philosopher can identify a different kind of interest, which might also plausibly be characterized as “dignity,” then, as things stand in the usage of “dignity,” the case that I have made in favor of hate speech laws adds nothing to any case that that philosopher might be making. “Dignity” does have multiple uses,

and dignity discourse is cursed by equivocation. So we do have to be careful to ensure that a case made for the importance of one set of considerations under the heading of “dignity” should not be conflated with the case made for the importance of another set of considerations under that heading. It may be that there are conceptions of the human-dignity principle which hold that dignity requires that people be protected from offense. I am not actually aware of any such conceptions, but the critics to whom I imagine myself responding in this section may try to convey the impression that “dignity” can be conceived in this way. After all, it’s a mushy word; it might mean anything. Very well: if that is a serious problem, then I base nothing on the word. I rest my case on a particular argument developed over many pages and on the distinction between the values pursued here (whatever you call them) and the issue of offense, a distinction for which I have argued since the beginning of this chapter. If the association of all this with “dignity” is confusing, then I urge my readers to concentrate on the argument itself: an argument about reputation, status, standing in a society, and the damage that hate speech may do to it.

What should we say, secondly, about the fact that dignity might be cited on both sides of this argument? I have spoken about the damage done by hate speech and group libel to the dignity of members of vulnerable minorities. But the right of free speech is an aspect of dignity.⁵² And hate-speakers might also complain about the indignity of having their speech censored and being told, like children, what they are and are not to say in public. Doesn’t that in itself attest to the indeterminacy of the concept?⁵³ I think not. We are familiar in ordinary moral and po-

litical life not only with clashes and trade-offs between different values such as liberty and equality, but also with clashes and trade-offs between one and the same value represented perhaps in different ways in the same confrontation: my liberty may obstruct your liberty, for example, or my interest may clash with your interest. Such clashes do not by any means indicate that there is anything confused in the way each party's side of the story is represented; on the contrary, it may be impossible to accurately describe what is going on, except to say that it is X's liberty against Y's liberty and so on. Why should it not be the same with dignity?⁵⁴ Dignity is a complicated enough concept to have multiple applications in one and the same setting—and even without any conceptual confusion, there might be legitimate contestation about the extent or strength of its application on one side or the other. In Chapter 6, I will consider an argument by Ed Baker that hate speech legislation undermines the basic autonomy of self-disclosure, which he thinks is one of the most important functions of speech. I have no doubt that that could also be expressed in the language of dignity. What I argue in Chapter 6 is not that we should dismiss this interest, but that it must be balanced against other interests at stake in the situation—interests which, as it happens, can also be represented in dignitarian language. We should keep our heads. There is no paradox or contradiction in any of this.

Is there any other ground for concern about the introduction of the concept of dignity into this debate? It is true that using a term like “dignity” to sum up the force of an argument does indicate an openness to nuance and new insight in moral and politi-

cal philosophy. Maybe this is a third concern: people may worry that once “dignity” is admitted to our discourse, we will no longer have on the blinkers that are constituted by narrower and sharper-edged concepts. We all know what it is for someone to be hit, and we are against violence. We know what it is for someone to be hurt, and, like good utilitarians, we are against pain. We know what it is for someone’s movements to be blocked or threatened, and we are in favor of negative liberty. We know what it is for someone to be excluded from facilities otherwise open to the public, and we are against discrimination—at least if it is direct intentional discrimination. This is all straightforward. But if we introduce dignity into the picture, as something to be protected, something to be solicitous of, then things may get out of hand and there may be much more to be concerned about—concerns that are much more difficult to parse—than were dreamt of in our analytical philosophy.

There is nothing much to be said in response to this concern except “Get used to it!” The use of the notion of dignity in contemporary moral and political philosophy does indicate a willingness to notice new conceptions of value and principle, and new sources of concern. Like American government lawyers facing the supplementation of their familiar rule against cruel and unusual punishment with a prohibition on “inhuman and degrading treatment” of detainees, we now have to be alert—and we have to be aware that the world is alert—to the dehumanizing implications of some practices that we may not have thought much about. I believe “dignity” is a status term, and my use of it indicates the importance of paying attention to the way in which

a person's status as a member of society in good standing is affirmed and sustained. This concern is more diffuse than concerns about their safety or negative liberty in several ways.

First of all, it looks at how things are for the person in question in all the myriad interactions of social life—not that we want to micromanage any of this, but that we understand the connection between social status and living a life with others in a society. Status is not just like citizenship, something that may be relevant only at the passport counter or in the voting booth. It has to do with the way one is received in society generally.

Second, the concern for the ordinary dignity of an individual focuses on the ways his or her status is affirmed and upheld—and the ways in which it might be endangered—as one person among thousands or millions of others. We are interested in the affirming and upholding of people's status as a public good, accruing to individuals, to be sure—but provided uniformly and non-crowdably to millions of people at a time. And we are concerned, too, with ways in which this status might be endangered on the basis of what hatemongers make of ascriptive group characteristics like race or religion. There is an interplay here between individuals, groups, mass characteristics, and mass provision which may make traditional liberals a little nervous, conditioned as they are to recoil from any form of collectivism. But like many social goods, basic dignity and social standing are provided and affirmed en masse as public goods. And if we are concerned about what it is like for people when they are led to feel that their very status in a society is imperiled, we have no choice but to add an understanding of these mass characteristics to our repertoire. In these and other ways, the use of the concept of dignity does rep-

resent a perhaps disconcerting opening-up of our moral and political interests. But the disconcerting can sometimes be salutary, and I think that is the case here. It gives the hate speech issue, as I understand it, some interest not just for itself but for broader consideration about how we should approach things in political philosophy.