



A STAND FOR FREE SPEECH

Modern hate speech laws have their roots in a strange form of modern Puritanism and must be opposed, argues political science professor **David Martin Jones**.

Speakers Corner, The Domain, Sydney.

... hate is the verb that to me
is superb,
And love just a drug on the mart.
Any kiddie in school can love
like a fool,
But hating, my boy, is an art.

– Ogden Nash,
'Plea for Less Malice Toward None'
(*The New Yorker*, April 15, 1933)

A new class of speech and thought managers are hell-bent on eradicating Ogden Nash's art of hating. The view that certain speech acts require a program of government or institutionally licensed sanitisation first arose among critical theorists and human rights lawyers. An inexorable consequence of sanitising speech required a proliferation of bureaucratic devices—Equality Diversity and Inclusivity (EDI) statements, and unconscious or implicit bias training programs—designed to compel subscription to a set of progressively approved beliefs concerning history, race, gender, identity, and social justice. Why has this preoccupation with how we do things with words led to laws, institutional codes, and practices that not only control what we say, think, and do, but also how we should feel?

Sanctioning speech and legally enforcing approved norms represents an extension of bureaucratic management into the sphere of public and private morality. Democracies such as Australia, the US, Canada, and New Zealand that share a common law heritage with the UK occupy the vanguard in promulgating practices of atonement for past wrongs and current grievances felt by self-identified minorities.

They have all, at different times, legislated to prosecute speech acts as well as microaggressions deemed to cause minority offence. For Australians, section 18C of the *Racial Discrimination Act* is only the most well known of such laws. In Victoria, *The Racial and Religious Tolerance Act* (2001) prosecutes racial and religious vilification,

while the NSW Parliament in 2018 introduced a single new indictable offence for public “threat or inducement to violence made on the basis of race, religion or sexuality”.

Today, the UK crown prosecution service considers a hate crime committed when an offender demonstrates “hostility based on race, religion, disability, sexual orientation or transgender identity”. In 2020, the UK College of Policing published new national hate crime guidelines. They require police forces to “prioritise incidents and ensure steps are taken”, particularly when responding “to non-crime hate incidents”. The devolved Scottish Assembly went further, devising a new omnibus crime of “stirring up hatred” against “a protected (minority) group” called ‘The Hate Crime and Public Order Act (Scotland)’.

Hatred served as a resource for critically productive animosity.

In January, the Edinburgh constabulary interviewed the female head of a woman's refuge charity for a “harmful” tweet threatening to cut ties with a “trans inclusive rape crisis centre”. A few days later, in South Wales, Gwent police arrested Jennifer Swayne for distributing “offensive posters”. Deemed particularly hurtful were slogans such as “cervix—it's a woman thing”. Police searched the disabled woman's home and confiscated a collection of essays on *Transgender Children and Young People*. Elsewhere in Northern Ireland, after seven years of legal appeals, a devoutly protestant Christian baker was eventually exonerated in January 2022 for refusing to inscribe a cake with the legend “support gay marriage”.

Prosecuting what we do with words requires police to interpret performative or indeed *illocutionary* speech acts. (Illocutionary is a term coined by linguistic philosopher J.L. Austin to capture the effect of words, such as to warn or to promise: “Do you have any salt?” may be framed as a question, but its *effect* is “Pass the salt”.) Such acts, Austin wrote, could not only misfire but might also produce unintended consequences. Developing speech act theory in a way Austin would have considered unsound, the UK College of Policing considers hate “not caused by the speech, but *the speech itself* constitutes the harm”. The novelty of prosecuting speech that “implies a high degree of animosity” represents a remarkable extension of the common law to adjudicate upon what might be a harmless statement or ironic allusion, criminalising in the process an all-too-human emotion.

The English-speaking world has been here before. During the 18th century the British Enlightenment view of tolerance, individual liberty, and freedom evolved against a backdrop of political persecution and religious tests. The neglected origins of our modern secular consciousness shed a disturbing light upon contemporary practices that seek to police speech and reinstate a stifling politically religious conformity.

HATE AND THE NONCONFORMIST MIND

In his 1850 bestseller *The Scarlet Letter*, Nathaniel Hawthorne analysed the puritan characters that settled the New England colony in the 17th century and forged the moral disposition of the United States in the 19th. Hawthorne wrote of his moral protagonists:

It is a curious subject of observation and inquiry whether hatred and love be not the same thing at bottom ... each leaves the passionate lover and the no less passionate hater forlorn and desolate by the withdrawal

of his object. Philosophically considered, therefore, the two passions seem essentially the same, except the one happens to be seen in a celestial radiance and the other in a dusky and lurid glow.

This “dusky and lurid glow” is what legislators and HR departments are now eager to extinguish. In doing so they are drawing upon an ambiguous puritan legacy of collective guilt, penitence, and atonement. This woke update of puritanism requires the recognition of the modern sins of racism, sexism, and transphobia. How did this transvaluation of values come about?

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In the beginning was the word and the word ‘hate’ was ambivalent. Christ, if Luke reported him correctly, was guilty of ‘a precrime hate incident’ when he said that “if any man come to me and hate not his father and his mother, and his wife and his children, and his brethren and his sisters, yea and his own life also, he cannot be my disciple”. Thomas Aquinas, who codified the Catholic perspective on sin and virtue in the 12th century, considered hatred a vice, but not a capital one. It arises, as Saint Augustine had earlier disclosed, from the passions, most notably anger. Even a Christian, Augustine wrote, might find anger solidifying into hatred when confronted by a hostile enemy. At the Reformation, protestant fundamentalists solidified their anger against



Newport Police Station protest in support of Jennifer Swayne.

Photo: South Wales Argus

the corruption of the Catholic church. Calvin wrote that “God distinguishes between the righteous and the unrighteous, and in such a way as shows that he is not an idle spectator; for he is said to approve the righteous, and to hate the wicked”. In the 16th century, European Christendom was devastated by religious hatred and the confessional warfare that Calvin and his followers provoked. The resolution of the crisis resulted in the emergence of the modern state. Hatred, in this conflict, served as a resource for critically productive animosity. The long history of Calvinism in Europe and Puritan nonconformity in England evinced a jealousy of the Establishment and a fondness for sectarian controversy.

Puritan controversialists, like John Milton and John Lilburne, mounted polemical defences of freedom of speech and publication, including what would now be considered hate speech, directed at more conservative and Catholic opponents.

In order to counter the increasingly fanatical puritan temper within and obviate the ever-present external threat posed by European counter reformation Catholic states without, the reformed Anglican state that emerged at the end of the 17th century made a wide use of state oaths to test allegiance and ensure political and religious conformity. By the 18th century, the infant United Kingdom of Great Britain required an oath of allegiance from all graduates of the universities and as an entrance test to all positions of status in church and state. The *Schism Act* (1714), that uncannily resembles contemporary practices of hate speech policing and unconscious bias training, tried to banish dissent completely. Via these practices, an English confessional state maintained its political hegemony until the second decade of the 19th century.

Not surprisingly, alienated conservatives such as Alexander Pope and Jonathan Swift, and cynical nonconformists like Daniel Defoe (famed for *The Dunciad*, *Gulliver’s Travels*,

and *Robinson Crusoe*, respectively), objected to this political settlement and the Whig oligarchy that enforced it. They satirised its pretensions and equivocated or refused its questionable tests of conscience. The critic and philosopher William Hazlitt captured the character of this anti-establishment style and the creative dynamism it unleashed in his seminal essay *On the Pleasure of Hating* (1826). Hate, Hazlitt wrote, is like “a quantity of superfluous bile upon the stomach” that wants “an object to let it out upon”.

The pleasure of hating hate speech is often confused with moral virtue.

Hazlitt, like Hawthorne, considered hatred a passion intrinsic to human nature. The more we examine human psychology the more we realise “we are made up of antipathies”. Without something to hate, Hazlitt averred, “we should lose the very spring of thought and action. Life would turn into a stagnant pool were it not ruffled by the jarring interests, the unruly passions, of men”. In 1871, one of George Eliot’s characters in *Middlemarch* (1871) claimed Goethe as authority for advising “the poet must know how to hate”.

Without something contemptible to react against, there could be neither progress nor productivity. Hate, in fact, captures what moral philosophers by the 20th century, such as Alasdair MacIntyre and J.L. Mackie, came to see as an irresolvable conflict between moral perspectives: admirable from one point of view; deplorable from another. Consequently, a secular, pluralistic democracy, that necessarily abandoned the use of oaths and tests in the 19th century, in order to tolerate moral difference, has to

invent standards of right and wrong. “There are,” Mackie wrote in *Ethics: Inventing Right and Wrong* (London 1977), “no objective values.” Interestingly, both anti-racist fanatics and our contemporary speech managers find this unacceptable. As a result they often confuse the pleasure of hating hate speech with a form of moral virtue.

Yet, requiring the legislator to sanction certain speech acts because their audience might find them ‘hurtful’ draws the courts into an area that the common law, after the modern secular state abolished religious tests, sought to avoid. John Wolfenden, in his landmark report on *Homosexual Offences and Prostitution* (1957), considered that “a lot of behaviour many people find morally reprehensible are not crimes”. There must, Wolfenden maintained, “remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business”. Our lawmakers evidently need reminding that the rule of law, over time, distinguished between crime and sin and the imposition of oaths and tests to enforce moral orthodoxy. It is this distinction that hate speech legislation, and the cancel culture it enables, wants to erase. How did this happen?

SIN AND THE MODERN STATE

In a theocracy the law is religious law, every crime is recognised as a sin, and every sin proscribed as a crime. This is the case in contemporary Afghanistan and Iran, but in the West the divergence between sin and crime since the Enlightenment has been a notable political achievement. In the English-speaking world, the modern state came to be understood as an association whose members subscribe to a variety of beliefs, and yet live under one, common, law. Establishing this distinction between crime and sin was one of the outstanding achievements of secular Western democracies.

However, it is not, as we witness daily, an absolutely secure distinction. In the UK, Australia, and the United States, the separation was only slowly achieved and

required two factors. First, the variety of moral and religious opinion which appeared in these societies would have destroyed any possibility of social cohesion if the government had imposed a single moral or speech code. Second, Christian principles permeated the moral understanding of European societies and Christianity accepted a distinction between sin and crime, between what must be avoided if salvation is to be achieved and what might be legitimately demanded by Caesar and civil law.

At the same time, modern European and early American societies were not immune from overriding this distinction. In Calvin's Geneva, and among the millenarian sectaries who dominated Barebones' parliament in England in 1653, and their brethren in New England a few decades later, a sanctified elect imposed a form of rule where crime and sin coincided. But neither here nor anywhere else in the increasingly secular West did these endeavours enjoy durable success.

Yet, the absence of detailed coincidence between particular beliefs about right and wrong and what civil laws in Western societies enjoin and forbid did not mean there was no connection between morality and politics. There never was a time when political argument did not outline appropriate moral and political conduct, and therefore whether government should or should not be active in certain manners and matters. This was so even where a liberal democracy did not require the direct enforcement of what was believed appropriate for civilised human conduct. In other words, political judgement, even in secular states, which recognises the distinction between sin and crime, invariably evinces some moral viewpoint.

MODERNITY AND PUBLIC MORALITY

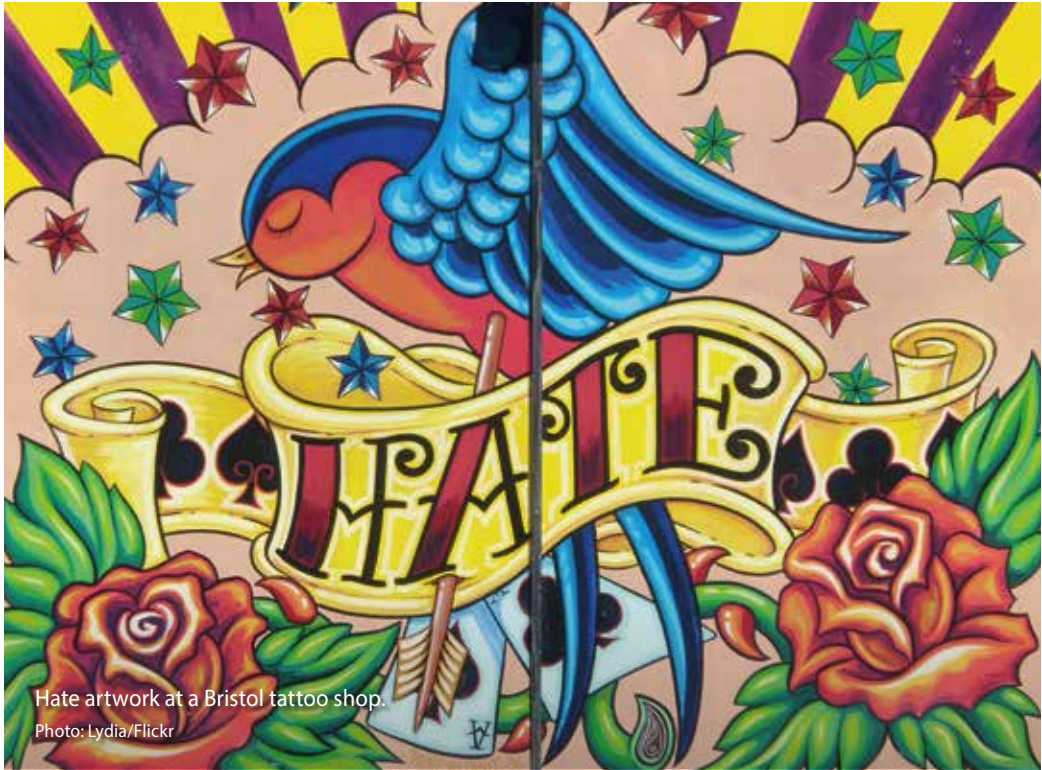
To understand our current perplexity, we need to recall how our public morality evolved. The conservative political philosopher Michael Oakeshott identified three distinct dispositions that shaped Western self-understanding:

- › the morality of communal ties
- › the morality of individuality
- › the morality of collectivism.

They arose chronologically and contingently. The oldest, the morality of communal ties, reflected a pre-modern community where custom and hereditary status prevailed. This feudal relic enjoys only a fragmentary existence in the present.

To achieve speech compliance, correct utterance assumes an increasingly acronymic character.

By contrast, the morality of individuality, or the ability to make choices for oneself, as conduct proper to a self-determining agent, emerged during the Renaissance. It gave rise to a new mode of conduct where the individual claimed moral sovereignty over himself and lived a life governed by choice. Human societies were perceived as associations of individuals. Philosophers from Hobbes and Locke to Montesquieu, Hume, and Smith clarified its preconditions and principles. Such a form of civil association revealed an intimate connection between the institution of private property, freedom of speech, and the desire to enjoy the potential of individuality. Such individualism has little interest in curtailing speech acts unless they are illocutions inciting a crowd to criminality or physical violence. Prior to recent legislation on hate speech, this was the conventional view of speech acts held by common lawyers, liberal thinkers, and the



Hate artwork at a Bristol tattoo shop.

Photo: Lydia/Flickr

general public. In Wolfenden's day, it was still an "essential element in the common law understanding of the public good that there should be private personal responsibility".

Unfortunately, the history of modern morality did not end with the displacement of feudal loyalty by the morality of individualism. Modern industrial society bred not a single moral character, but two opposed ones: that of the individual; and that of the man who, for various reasons, could not be an individual. The anti-individual was not the relic of a communal past, but a distinctly modern character produced by the same dissolution of feudal ties that generated the individual.

From the 19th century, the anti-individual masses of the industrial age not only looked to the state for support, they, or their advocates, also generated a morality appropriate to their character and condition. As the modern state grew, some of its most salient political inventions were designed to make choices

for those considered victims and therefore incapable of making them. It is morality in this collectivist idiom that feels the need to curtail harmful speech and harmful thought. It treats human beings as abstract resources of a moral enterprise. It manages, disallows, and polices speech it considers harmful to a population composed of oppressed minorities. At the same time, it condones tests and diversity programs that undermine the morality of individuality, liberty, and private responsibility. How so?

SANITISING SPEECH

The collectivist mind allocates rewards and benefits according to an abstract formula that establishes the conditions for perfect equality and perfect solidarity. In its economic version it seeks the management of the means of production and the equal distribution of resources. In its recent social justice formulation, it revives an earlier millenarian

vision of a society divided between the just and the reprobate. The righteous today, unlike their sectarian precursors, are the victims of historic injustice, whether through colonialism, biology, or capitalist democracy's inegalitarian structures.

The guilty, in this moral melodrama, are the reprobate majority, who have unjustly or unconsciously victimised minority groups. It requires rewriting the recent past, renaming streets and demolishing statues. It generates a lurid vision of modern Britain, the US, or Australia as a tangle of inherited injustices that demand self-vilification, penitence, and atonement. Such an anachronistic interpretation of history has generated a rhetoric of collective moral guilt that now dominates public life and the terms in which public morality is discussed. As the American economist and philosopher Thomas Sowell, an astute judge of the style explains, "political decisions about the future are made as if they were moral decisions about the past".

This latest version of a collectivist utopia requires groups be retribalised, as suffering minorities must be cherished and compensated. This not only requires meeting bureaucratically determined targets for inclusivity, consciousness raising, and bias correction but also limiting the language through which dissent might articulate itself. In curtailing harmful speech, it turns the common law into a rationalist instrument for detecting and criminalising sinful utterance and behaviour. In the 1950s, Lord Chief Justice Goddard worried that "If you legislate quantitatively a man's private personal responsibility which you bring within the realm of the criminal law, to that precise extent, quantitatively, you decrease the area of his personal responsibility".

However, this is precisely what hate speech legislation intends. It is not, then, the illocution or speech act itself, but the perlocution or response of an audience of *so-called* victims that determines an offence. In this manner a world view can be imposed upon a population as it is schooled in suitably sanitised locutions.

To achieve speech compliance, correct utterance assumes an increasingly acronymic character. It evacuates meaning by imposing a neutral, bureaucratic vocabulary. In the UK ethnic categories—Afro-Caribbean, Black, Asian—are in the process of being acronymically transformed into the neutral and bureaucratic verbal shorthand BAME (Black, Asian, Minority Ethnic) or POC (People Of Colour). Words that allude to a specific minority characteristic or disposition will soon become *prima facie* evidence of pre-crime hate.

Abbreviation, euphony, and euphemism over time alter and narrow meaning. Cancelling words ultimately cancels thoughts that the Human Resource industry finds uncomfortable. Minimising speech not only provides a medium of communication for the mental habits proper to the devotees of a collectivist morality, it eventually makes other modes of thought impossible and, in so far as thought depends on words, unthinkable. Such criminalisation of language and the compulsion to think as the moral code requires reduces its speakers to a condition of mute compliance, inviting yet further rectification by the new oligarchy of speech and thought managers.

This article is drawn from a talk given to the Victorian branch of the English Speaking Union in March 2022. The author's footnotes will be included in the online version.

David Martin Jones is a Professor in the War Studies Department, King's College, London, and Honorary Reader at the School of Political Science and International Studies, University of Queensland. He holds a PhD from the London School of Economics.

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