Cumulative Jurisprudence and Hate Speech: Sexual Orientation and Analogies to Disability, Age and Obesity

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The Example of Sexual Minorities and Hate Speech

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Abstract. Non-discrimination norms in human rights instruments generally enumerate specified categories for protection, such as race, ethnicity, sex or religion, etc. They often omit express reference to sexual minorities. Through open-ended interpretation, however, sexual minorities subsequently become incorporated. That ‘cumulative jurisprudence’ yields protections for sexual minorities through norms governing privacy, employment, age of consent, or freedoms of speech and association. Hate speech bans, too, are often formulated with reference to traditionally recognised categories, particularly race and religion. It might be expected that the same cumulative jurisprudence should therefore be applied to include sexual minorities. In this chapter, that approach is challenged. Hate speech bans suffer from inherent flaws. They either promote discrimination by limiting the number of protected categories, or, by including all meritorious categories, would dramatically limit free speech. Sexual minorities within longstanding, stable and prosperous democracies should generally enjoy all human rights, but should not necessarily seek the protections of hate speech bans.

Keywords: discrimination, free speech, gay rights, hate speech, human rights jurisprudence, minorities, sexual minorities

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Introduction

On the evening of 13 September 2002, three boys, aged 16 – 20 entered a city park in Reims, France. Their plan was to ‘smash an Arab’ (‘casser de l’Arabe’). Instead they found François Chenu. Chenu was 29 years old, an openly gay man. So they decided to ‘smash a faggot’ (‘cassé du pédé’). They taunted him, beat him, then threw him in a pond, where he was later discovered drowned.2

Queer bashing is never just about physical assaults. A society casual about words like ‘queer’ or ‘poof’ is one in which sexual minorities3 are maimed and murdered. Queer bashing without words is like a dirge without music. Queer bashing is that torrent of blows and words, every kick and punch chanted with ‘queer’, ‘poof’, ‘faggot’, ‘cocksucker’ or ‘lesbo’; like a racist, anti-Semitic or Islamaphobic attack, the same kinds of words spewed with the same kinds of blows.

In recent years, that violence of words has provided powerful justifications for hate speech bans.4 It is understandable that sexual minorities would seek protection under them as part of a broader effort to combat prejudice. In so doing, they would be pursuing an otherwise legitimate and often successful strategy, which I shall call ‘cumulative

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1 The ideas presented in this piece benefited from a staff seminar held at Durham University in April 2007, chaired by Erika Rackley and facilitated by Helen Fenwick and Gavin Phillipson, and from a subsequent one-day conference at Durham entitled ‘Sexuality, Hatred and Law,’ 6 May 2008, organised by Neil Cobb and Gavin Phillipson. Thanks are due also to James Weinstein and two anonymous reviewers for their detailed comments, and to Phil Chan for his kind assistance.


3 Like concepts of ‘race’, ‘ethnicity’, or ‘religion’, concepts of ‘sexual orientation’ and ‘sexual minorities’ may be fluid and are not amenable to conclusive definitions. For the limited purposes of human rights law, the term ‘sexual minorities’ may be used generally ‘to denote people whose preferences, intimate associations, lifestyles, or other forms of personal identity or expression actually or imputedly derogate from a dominant normative-heterosexual paradigm.’ See Eric Heinze, Sexual Orientation: A Human Right 61 (Dordrecht, NL: Martinus Nijhoff, 1995).

jurisprudence’. Gains for sexual minorities have frequently resulted from activists, lawyers and scholars citing protections, such as privacy, free expression, free association, or non-discrimination, which may not originally have been adopted with sexual minorities in mind, but then showing how those protections can and should be interpreted to include sexual minorities. In the following discussion, I shall argue that cumulative jurisprudence is appropriate for sexual minorities as a general matter, but should not be assumed to apply mechanically to all norms that may emerge within the human rights corpus, without any deeper enquiry into the legitimacy of the underlying norms themselves. Norms against hate speech provide an example.

I shall begin by examining the concept of cumulative jurisprudence as a systematic application of general human rights norms to categories of persons not expressly named or intended in leading human rights instruments. A cumulative jurisprudence has allowed sexual minorities to gain increasing recognition within human rights systems, and might seem prima facie to justify the extension of hate speech bans to include sexual minorities. I shall then argue, however, that hate speech bans pose a dilemma intolerable for human rights law: either they promote discrimination by unfairly limiting the protected categories and individuals; or, if they were to include all similarly-situated categories and individuals, they would represent more than just minimal limits on free speech. I conclude that sexual minorities should generally enjoy all guarantees available within human rights law, but should not seek refuge in bans that may serve more to betray fundamental principles of human rights law than to promote them.

Sexual Minorities and Cumulative Jurisprudence

Michel Foucault’s publication of *Histoire de la sexualité* in 1976 sparked a revolution in our understandings of dominant and subordinated social groups. Foucault described the post-Enlightenment appropriation of sexuality within the sphere of scientific enquiry. Purportedly neutral, objectivist—professionalised and therefore exclusive—scientific discourses of sexuality, presupposing unacknowledged standards of normativity and deviance, came to pervade language and consciousness to the extent that what we now know as ‘heterosexuality’, ‘homosexuality’, ‘transsexualism’, and a long train of similar terms came to construct, and thereby to control, our everyday sense of sexual experience and sexual identity. The objectivist, scientific discourses have persisted, of course, providing ample fodder for debates between ‘essentialist’ and ‘social constructionist’ approaches. Foucault nevertheless shed real light on how dominant social discourses regiment everyday experiences and attitudes.

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Social constructionism reminds us that when gay bashers cry ‘queer’, ‘poof’, ‘faggot’ and ‘cocksucker’, they are not merely describing some ‘outside world’ which ‘contains’ such individuals. Rather, they are ‘constructing’ that world, to control those individuals. Compare a story told by Randall Kennedy:

Although they typically travelled on public buses, my mother had failed to notice that her mother, Big Mama, always took her to the back of the bus where Negroes were segregated. One day, Big Mama asked my mother to run an errand that required her to catch a bus on which they had often ridden together. This errand marked the first time that my mother rode the bus on her own. She stood at the correct stop, got on the right bus, and deposited the appropriate fare. Being a bit scared, however, she sat down immediately behind the bus driver. After about a block, the driver pulled the bus over to the curb, cut the engine, and suddenly wheeled around and began to scream at my mother who was all of about eight or nine years old—‘Nigger, you know better than to sit there! Get to the back where you belong’.

Randall Kennedy’s mother was not born a ‘nigger’. She was made one, as Chenu was made a pédé, within a world whose fundamental relationship to such individuals was one of social dominance and subordination.

The phrase ‘hate speech’ is recent, having arisen in the 1980s in the United States. More recently, the phrase has been adopted in Europe and elsewhere. But the problem itself is ancient. Blasphemy laws, for example, may not in every sense be identical to current hate speech laws, as they have often protected beliefs themselves, regardless of whether any groups or individuals might be personally offended by speech against those beliefs, which, moreover, have generally been the ideas of the dominant group, and not of a minority.

Functionally, however, they have served to protect sensibilities and to avoid offence. In recent jurisprudence, blasphemy laws have often been maintained precisely insofar as they serve the same aims as hate speech laws—prohibiting speech likely to be found offensive or unduly disruptive.

Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR), currently binding on 160 states, provides that ‘any advocacy of national, racial or religious
hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.’ Drafted in the 1960s, the ICCPR does not use the phrase ‘hate speech’. However, it captures the overall aims that have emerged in post-WWII regulations of speech deemed to be highly offensive.13

From the perspective of sexual minorities, it might well be argued that the enumeration of three specific kinds of target groups in article 20(2)—national, racial or religious—should be deemed only ‘illustrative’, and not final or exhaustive.14 On that approach, it could be argued that article 20(2) represents only an early attempt to deal with intolerance through human rights instruments, which can grow to encompass additional target groups as each groups’ history and circumstances comes to light. In support of that approach, it could be noted that, like similar provisions in other international, regional or national instruments, article 19(3), which limits freedom of expression on grounds of ‘public order’, ‘morals’ or even ‘rights or reputation of others’, remains amenable to hate speech bans protective of sexual minorities.15 Some national legal systems have already extended hate speech bans to protect gays, either by specific legislative amendment or through subsequent judicial interpretation.16

The International Convention on the Elimination of All Forms of Racial Discrimination17 (CERD), also drafted in the 1960s, includes a detailed prohibition of hate speech, which, albeit expressly limited to race, exemplifies the broad reach of hate speech bans that have been promoted within international law and institutions.18 Article 4 requires that States Parties,

‘(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour of ethnic origin . . . .

‘(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall

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15 See Heinze, supra note 10, at 556 – 59.
18 Cf. UNHCR, supra note 12.
recognize participation in such organizations or activities as an offence punishable by law.’

CERD is of particular interest, insofar as post-WWII movements for the rights of sexual minorities have often followed in the footsteps of anti-racism movements, as illustrated, for example, in the United States, where the African-American civil rights movements of the 1950s and 1960s, joined by the feminist movements of the 1960s and 1970s, became decisive in inspiring America’s gay rights movements. In the post-WWII period, gay rights movements have frequently pursued a strategy of cumulative (or ‘analogical’) jurisprudence, whereby rights first recognised for racial, ethnic, religious or national minorities, or women, would be seen to set the stage for rights of sexual minorities.

The question I am asking is whether the considerable success of a cumulative jurisprudence in achieving rights for sexual minorities should be applied so as to extend hate speech bans to embrace sexual minorities. In the mid-1990s, when sexual minorities were first beginning to gain attention within the United Nations, I had argued that their rights must not primarily be seen as ‘innovations’. They must be seen as necessary applications of existing international norms, without which the interpretation of those norms would be inherently contradictory. I recommended some jurisprudential principles for the recognition of rights of sexual minorities within existing international human rights law. One of them, which I called the ‘Principle of Extant Rights’, was formulated as follows: ‘Rights of sexual orientation are required by extant human rights law to the degree, and only to the degree, that they derive from extant rights.’

By including the restriction ‘only to the degree’, I conceded the minor, arguably tautological, point that fundamental rights for sexual minorities could not be said to exist already within the existing international human rights corpus except insofar as those rights existed within the corpus for human beings generally. That slight limitation having been acknowledged, the more important point was that protections already existing for human beings generally had to be extended ipso facto to sexual minorities. Cumulative jurisprudence has provided an important vehicle for realising the Principle of Extant Rights.

The aim of the Principle of Extant Rights was to play both descriptive and prescriptive roles. As a prescriptive matter, it suggests that fundamental international human rights must

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20 Cf. text accompanying notes 34 - 46 infra.
21 Cf., e.g., Heinze, supra n. 3, at 12 n. 55 (noting limited attention to sexual orientation within the UN through the 1980s).
22 Id. at ch. 8.
23 Id. at 136.
be construed to apply to sexual minorities if they are to avoid falling into internal contradiction. As a descriptive matter, it provides a sense of how, in general, advocacy for rights of sexual minorities has in fact tended to proceed: once the post-World War II frameworks for human rights were already firmly in place—originally drafted with little regard to rights for sexual minorities—sexual orientation and identity have subsequently been incorporated at international, regional and national levels, be it through national legislation and adjudication, or through the judgments or opinions of international or regional human rights bodies.\(^{24}\)

In its prescriptive role, the Principle of Extant Rights takes as axiomatic—that is, it merely assumes, insofar as international human rights count as norms within positive international, regional or national law—that existing rights within the international corpus are normatively legitimate, in particular such fundamental norms as privacy, expression, association or non-discrimination. In proposing it, I conceded from the outset that human rights may not be historically or cross-culturally universal. They may be artefacts of specific historical, political and economic circumstances. Or, even if we take as given a general corpus of human rights, certain rights within that corpus might be challenged in their formulation or interpretation.\(^{25}\) Many a human rights norm—such as privacy, expression, association, non-discrimination—could be independently contested on its own terms, before any more specific inquiry into its applicability to sexual minorities would even arise. Is the norm genuinely universal? Does it, in all cases, stand as a legitimate “trump” over worthy, competing interests?

The prescriptive approach, then, simply assumes the validity of the general corpus of fundamental human rights, without undertaking any inquiry into the overall validity either of any specific right, or of the human rights corpus, as such. Its role is merely to state that, insofar as the existing corpus is accepted and applied, it must be applied equally to sexual minorities. For nuts-and-bolts human rights practice, that assumption poses few problems. Everyday advocacy can assume, as a general matter, that sexual minorities as such merit, say, privacy\(^{26}\), freedoms of expression or association\(^{27}\), or non-discrimination\(^{28}\) insofar as all human beings merit it.

The cumulative jurisprudence of non-discrimination for sexual minorities has not been mechanical or straightforward. Consider the US example. Having adopted the most demanding standard of judicial review, ‘strict scrutiny’, for racial classifications\(^{29}\), the road to

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\(^{24}\) Cf. text accompanying notes 34 - 46 infra.

\(^{25}\) Heinze, supra n. 3, at ch. 3.

\(^{26}\) Id. at ch. 10.

\(^{27}\) Id. at sections 14.3 – 14.5.

\(^{28}\) Id. at chs. 12, 13.

gender equality was rockier, starting from a highly deferential ‘rational basis’ standard, then swinging towards a strict scrutiny standard, until finally settling upon a standard of intermediary review (‘heightened’, but not always ‘strict’), which—often in the interest of respecting gender differences that would accrue to women’s advantage—had to take into account complexities of difference that tend to be specific to gender.

The road for sexual minorities was at least as rocky. After a major defeat in the 1986 case of Bowers v. Hardwick, the US Supreme Court began to recognise rights for gays only in the 1996 case of Romer v. Evans, then the 2003 case of Lawrence v. Texas. Even in those cases, the Court has created the oddity of applying a remarkably rigorous standard of review in practice, while remaining ambivalent about declaring the adoption of a stricter level of scrutiny as a formal or final matter. Despite that erratic approach, it seems that, overall, a jurisprudence originating in anti-racist movements has expanded to encompass other targets of discrimination, with sexual minorities gradually included through a cumulative jurisprudence.

In Europe, the evolution of article 14 of the European Convention on Human Rights also provides an example of cumulative jurisprudence. Article 14 sets forth a standard non-discrimination provision,

The 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. (emphasis added)

Whilst specifically referring to sex (originally construed as applying to men and women), race, colour, and other categories, the ‘such as’ and ‘other status’ clauses have long been interpreted to mean that the expressly enumerated categories are not exhaustive. In Marckx v.

30 See Reed v. Reed, 404 U.S. 71 (1971). Since the Supreme Court in Reed did strike down the gender discrepancy in dispute, however, it could be argued that the Court was already anticipating a more stringent approach.
31 See Frontiero v. Richardson, 411 U.S. 677 (1973). The application of strict scrutiny by a plurality of only four Justices, however, suggested a continuing unease about the appropriate judicial standard.
37 Although Lawrence was not decided primarily on grounds of equal protection (non-discrimination), the Court noted the consistency of its holding with equal protection principles. Lawrence, 539 U.S. at 574 – 75 (describing as ‘tenable’ a disposition of the case on equal protection grounds). See also id. at 579 (O’Connor, J., concurring) (arguing that the sodomy statute should be struc k down on equal protection grounds).
Belgium, the European Court of Human Rights held discriminatory treatment of unwed mothers to be in violation of article 14.\(^{40}\) In Inze v. Austria, the Court interpreted ‘other status’ to encompass children born out of wedlock.\(^{41}\) In Darby v. Sweden, the Court extended the clause further to include persons not registered as resident\(^{42}\). Recognition of homosexuality came as early as 1981, with Dudgeon v. United Kingdom\(^{43}\) (although subsequent developments, notably for transsexuals, have not been uniformly positive\(^{44}\)). The UN Human Rights Committee, too, has increasingly recognised sexual orientation\(^{45}\) along with other classifications under the ‘other status’ clauses of ICCPR.\(^{46}\)

**Cumulative or Contradictory?**

Is there a limit to the Principle of Extant Rights, in particular, to the axiomatic assumption of the overall validity either of the corpus in general or of any given background norm? How shall we proceed when it is by no means obvious that a particular norm should carry the kind of authority that can be accorded to norms such as privacy, expression, association, or professional or educational non-discrimination? Should sexual minorities accept the overall, background norm of prohibitions on hate speech wholesale, insisting on equal protection under them, without any independent analysis into the merit of those norms themselves?

CERD art. 4 may refer only to race, and ICCPR art. 20(2) may include only the two other categories of nationality and religion. Sexual minorities might nevertheless reason as follows: once we have shown that homophobic speech is similarly harmful, easily associated with precisely the kinds of danger or violence that those provisions sought to avert, extending hate speech bans to encompass sexuality should proceed as a matter of course. Some states have already begun to protect sexual minorities under hate speech bans.\(^{47}\) In 1997, a resolution of the Committee of Ministers of the Council of Europe (COM-COE) urged a more extensive regime of hate speech bans. Unlike CERD art. 4 or ICCPR art. 20(2), it is worded more like a standard non-discrimination norm, employing an open-ended ‘other forms’ clause, suggesting a potentially unlimited range of individuals or groups for protection under hate speech bans.

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\(^{47}\) See text accompanying note 16 supra.
Sexual minorities would count as obvious candidates. The resolution calls upon member states to combat,

. . . statements . . . which may reasonably be understood as hate speech, or as speech likely to produce the effect of legitimising, spreading or promoting racial hatred, xenophobia, anti-Semitism or other forms of discrimination or hatred based on intolerance.48

Although that resolution is non-binding, such a statement represents an authoritative synthesis of views, either on the current status, or on a plausible further evolution of their respective states’ approaches. To date, the European Court of Human Rights has accepted a principle of wide latitude towards states’ decisions to censor speech found to be offensive49, and UN Human Rights bodies have advised European states to strengthen further their censorship activity.50 The more specialized European Commission against Racism and Intolerance (ECRI) has also continued to push for stronger censorship.51

Standard non-discrimination norms aim to secure benefits and burdens spread throughout society, without any individuals or groups unfairly treated52 on grounds of irrelevant characteristics. The modern non-discrimination norm is amenable to a cumulative jurisprudence because it is cumulative in its conception.53 To exclude one group holding a claim that is equal in merit to that of an included group, is, itself, to discriminate. Any such disparity impeaches the non-discrimination norm altogether. To expand the norm’s scope—as long as that expansion retains the aim of eliminating such recourse to irrelevant characteristics in the distribution of burdens and benefits—is to perfect it, and thus to perfect the whole of the human rights corpus. The same is true of any legitimate extensions of norms of privacy, expression, association and the like.

49 See, e.g., Otto-Preminger-Institut v. Austria, Eur. Ct. H. R., Ser. A, No. 295-A [1994]; Wingrove v. United Kingdom, [1996] Eur. Ct. H. R. 1937. In Jersild v. Denmark, ECtHR, Ser. A, No. 298 [1995], the Court struck down a penalty imposed for the broadcast of racist views solely because they were broadcast within the context of expository journalism, not presented as the views of the journalist or broadcaster. There was no suggestion that the original speakers merited any freedom of speech.
53 Cf. generally Bossuyt, supra note 14.
That observation cannot be made about hate speech bans. Consider an analogy to persons who are mentally or physically disabled.\(^{54}\) That analogy reveals flaws in hate speech bans, and distinguishes such bans from rights of privacy, employment, speech, association, and other human rights. Bringing the disabled within the scope of a standard non-discrimination norm may occasionally pose practical problems (e.g., questions about expenditure for ‘reasonable accommodation’\(^{55}\)); however, under today’s non-discrimination norms, it can no longer be denied that a given handicapped individual who, for all relevant purposes, is equally situated to others in terms of qualifications for such matters as housing, education, or employment, must be accorded equal access.

Similarly, unless their specific health or welfare dictate otherwise, arguments can scarcely be made against their equal rights of expression, association, belief, right to life and other fundamental rights. Nor can it be claimed that their enjoyment of such rights in any serious way diminishes the rights of others. In a word, taking into account any such pragmatic considerations, the application of ‘other status’ clauses to encompass the physically or mentally disabled within non-discrimination norms would widely be seen today not merely as feasible, but as a moral imperative.

What would it mean, however, to include the disabled within hate speech bans? Consonant with concepts of social constructionism, advocates of hate speech bans argue that, insofar as derogatory terms remain standard within ordinary speech, their underlying prejudices—Blacks are inferior, Jews are greedy, sexual minorities are dangerous deviants or predatory perverts—are expressively or tacitly disseminated and reinforced as social norms.\(^{56}\) Similarly, words like ‘idiot’, ‘moron’, ‘spas’, ‘spack’, ‘lame’, ‘psycho’, ‘loony’ or ‘schizo’ construct physical, mental or psychological disability as inferior, inept, bumbling, misbegotten or ridiculous.\(^{57}\) They are so engrained within our language and usage as to seem innocuous, not unlike the casual racism or homophobia of earlier times, when words like ‘nigger’ or ‘queer’ passed easily in polite society. According to guidelines adopted by the American Psychological Association, ‘The use of certain words or phrases can express gender, ethnic, or racial bias, either intentionally or unintentionally. The same is true of language referring to persons with disabilities, which in many instances can express negative and disparaging attitudes.’\(^{58}\)

\(^{54}\) Cf. generally, e.g., ‘What is Disability’, at Disability Knowledge and Research, http://www.disabilitykar.net/learningpublication/whatisdisability.html (visited 04/10/2009) (noting controversy about the concept of ‘disability’).

\(^{55}\) Cf., e.g., Heinze, \textit{supra} note 52, at ch. 16.

\(^{56}\) See, e.g., Matsuda \textit{et al.}, \textit{supra} n. 4.


Nor has disability been the only category generally excluded from protection under hate speech bans. Age is another. Epithets like ‘old bag’ or ‘senile’ stigmatise both real and mythical infirmities of age.59 Consider also physical fitness or appearance: ‘fatsos’ or ‘fat slob’ degrade those who are overweight (leaving aside questions of when overweight would count as a disability), even through medical conditions beyond their control, such as congenital diabetes.60 Eddie Murphy’s 2006 film *Norbit* was rebuked for courting laughter at the expense of obesity.61 Had his portrayals featured similarly conceived caricatures of groups, such as racial, ethnic or religious groups, protected under hate speech bans in European states, serious questions of censorship could have been raised about the film’s European distribution.62 In the words of the COM-COE resolution, such a film can ‘reasonably be understood’ to be ‘spreading or promoting’ discriminatory attitudes.

In 1999, the England Football Association manager Glenn Hoddle publicly stated that individual disabilities were justly deserved, through ‘bad karma’ accumulated in former lives. Hoddle lost his job thereafter,63 but only as a matter of public relations, due to his high profile, and not through the application of any hate speech ban. Even in the rare cases where physical, mental or psychological disability has been contemplated for inclusion under hate speech bans64, no serious attempt has been made to explain how that inclusion could occur without either massive, or wholly random, censorship of speech. Either whole categories such as physical, mental or psychological disability, age, or overweight, must be excluded; or, if they are included, essentially random, and therefore individually discriminatory, choices must be made about which members of those groups will and will not be protected from terms so ubiquitously used.

A cardinal aim of hate speech bans is to protect groups or individuals with scant political influence. While ethnic or religious minorities in several Western countries have organised visible political movements, the disabled are often isolated; limited in their ability even to associate effectively, let alone to mobilize strategic lobbying efforts. They are often restricted in their ability to earn, let alone to pool resources, and can generally direct few of their resources towards activities like anti-hate speech campaigns, given the ongoing and more pressing expenses of primary care.65 It would come as no surprise nowadays for leading

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62 See text accompanying notes 48 - 49 supra.
65 At a global level, most people with disabilities lack the basic services they require. See, e.g., Committee on Economic, Social and Cultural Rights, ‘General Comment No. 5: Persons with disabilities’ (Eleventh session,
celebrities or commentators to shun terms like ‘nigger’, ‘dirty Jew’ or ‘queer’, while directing terms like ‘idiot’ or ‘moron’ at leading political figures, indeed in the belief that they are speaking in the same socially critical vein. Obvious examples have included US President George W. Bush or Vice President Dan Quayle, not to mention countless uses of such terms, sometimes passionately, sometimes nonchalantly, in everyday speech.\textsuperscript{66} The problem arises not from the prospect of offence caused to a Bush or a Quayle. Rather, the problem is that such terms offend all persons whose psychological conditions are thereby degraded.\textsuperscript{67}

That shift in focus—from the disparagement of a classification targeted against someone belonging to that classification, to its use against someone not belonging to it—requires some explanation, as it may appear to change considerably the nature of the hate speech concerned. As James Weinstein, for example, has commented on a previous statement of my views,

> It is very rare nowadays that anyone, at least in the US or UK, would use a term to knowingly disparage the mentally retarded or physically handicapped. Nor is there a massive amount of hate speech readily available on the internet against the mentally retarded or the physically disabled, as there is with respect to blacks, Jews and gays. There is not nearly the same reason to try to use the force of law to eradicate “hate speech” against these groups. People nowadays simply do not hate the mentally retarded or physically disabled in the way that too many people hate blacks, Jews, or gays. I think the same is true of the elderly. There may be more hostility towards this group, but nothing like that directed towards people on the basis of race, ethnicity or religion.

Moreover and more significantly, though there may be cases of people using “fighting words” against the elderly, the disabled, or the obese in the street when the get annoyed, there is to my knowledge no hate literature against these groups at all, and even if there is some, it is nothing like the virulent tracts directed against Jews, blacks and sexual minorities.\textsuperscript{68}

Weinstein’s objection is empirical. There is no evidence of widespread hostility towards the mentally or physically disabled, elderly, or obese, comparable to that against certain racial, ethnic, religious, or sexual categories. Therefore, by definition, there can be no substantial causal link between derogatory language against those groups and any such hostility.

If that objection were correct, however, governments, courts and human rights bodies would endorse hate speech bans only if some threshold level of hostility against protected


\textsuperscript{67} To draw an analogy, it is not merely Falstaff, but Jews who are smeared when Mistress Page disparages Falstaff’s deceit by calling him ‘A Herod of Jewry’. William Shakespeare, \textit{The Merry Wives of Windsor} II.i.20.

\textsuperscript{68} Private communication of 24 Dec. 2007, on file with author.
group could be demonstrated. In *Otto-Preminger-Institut v. Austria*\(^{69}\), however, the European Court of Human Rights rejected any such condition placed on a state’s prerogative to combat intolerance through censorship. The Court did not require any showing of systemic hostility or discrimination towards Roman Catholics in Austria, who have long constituted the overwhelming numerical and socio-cultural majority of the country’s population.\(^{70}\) The prosecution was originally brought under traditional blasphemy principles, and not a hate speech ban in the modern sense; however, the European Court upheld the conviction on general grounds of overall tolerance\(^{71}\), and not on grounds of any *sui generis* exceptions to free speech principles carved out for blasphemy laws.

In essence, the Court treated anti-Catholic expression as an evil in itself, evil simply on grounds of its expression of intolerance, and not merely as evil on the condition that some independent history, or future possibility, of material detriment be adduced. Nor, despite some criticism of *Otto-Preminger-Institut*, is that decision an aberration. The Court reiterated its view in *Wingrove v. United Kingdom*, in which it, once again, upheld censorship on grounds that the material in question was offended Christians or Christian beliefs. No international human rights body has recommended any principles that would contradict or limit such an approach. (The censorship in *Otto-Preminger-Institut* and *Wingrove* were not ‘hate’ materials in any straightforward sense. They were merely art-house films, which, respectively, lampooned and sexualised Christian symbols.)

Nor could these human rights bodies easily do otherwise, once they had started down the road of endorsing hate speech bans. To require threshold showings of some sufficient number of acts of hostility would entail a ‘more-victim-than-thou’ jurisprudence, which, far from combating discrimination, would only entrench it. Intolerant attitudes may disadvantage the designated groups or individuals in ways subtler than concerted campaigns of hate. For example, if someone who is mentally or physically disabled is denied housing or employment despite possessing the competence to fulfil all requirements—precisely as if a person belonging to a racial, ethnic, religious or sexual minority is denied—it may be impossible in any given case to determine whether or to what degree overall social attitudes were a contributing factor.

Unsurprisingly, advocates of hate speech bans have not insisted upon rigorously empirical evidence to demonstrate links between broader attitudes and discrete detriments suffered in particular instances. The crucial premise of hate speech bans has never been that


\(^{70}\) According to the *Encyclopaedia Britannica*, ‘In the early 1990s the [Austrian] population was 84 percent Roman Catholic and 6 percent Protestant (mainly of the Augsburg Confession). Some 4 percent followed other religions—including the Old Catholic and Orthodox churches, Judaism, and Islam—while some 6 percent had no religious affiliation. *Britannica Online*, http://www.britannica.com/eb/article-33395 (visited 04/10/2009).

\(^{71}\) See ECHR, Ser. A, No. 295-A, para. 47 (interpreting ECHR article 9 as protecting ‘the religious feelings of believers’ from ‘provocative portrayals of objects of religious veneration’).
hate speech *demonstrably* causes detriment to the disparaged groups, as no such evidence has been adduced for longstanding, stable and prosperous democracies\(^\text{72}\), no more than it has been shown that violent films promote social violence, or that pornography augments incidents of rape. Rather, advocates of hate speech bans proceed on the broader assumption that hate speech *might plausibly* cause such detriment, indeed in ways which are often subtle and pernicious, and therefore not amenable to precise empirical observation.

Nor can it be argued that Blacks, Jews or sexual minorities have more burdened histories. Nazism showed how the physically or mentally disabled, along with all the propaganda—hate speech—concerning their threats to Aryan purity and perfectability, led them to extermination on grounds of their putative sub-humanity.\(^\text{73}\) Might Chenu’s attackers not just as eagerly have assaulted someone mentally or physically disabled, or someone elderly or obese? Can anyone argue that such an attack would not have been motivated by a cultural arsenal stockpiled with age-old barbs of ‘idiot’, ‘spas’, ‘old bag’ and ‘fat slob’? It would require a leap of sociological imagination to argue that such an assault would be ignited by a consciousness promoted by hate speech when racially motivated, but not when motivated by stereotypes of mental or physical condition.

At first blush, one might wonder whether such disparities between classifications included within, and excluded from, hate speech bans are insurmountable. One might argue, in the spirit of the COM-COE resolution, that *any* actual or potential victims of discrimination should be protected by hate speech bans. But what would it mean to extend the bans so widely? We can safely assume that the films, newspaper or magazine articles, radio and television shows or websites in which terms like ‘idiot’ and ‘moron’ appear—the same media that would no longer use ‘nigger’ or ‘queer’ in non-ironic or non-critical contexts—are innumerable. Remarkably broad censorship of both the media and everyday speech, backed up by legal penalties, would be required. Hate speech bans can only succeed either through enormous measures of censorship or through discriminatory selection of target categories or individuals.

To date, of course, the latter course has been chosen. Few have seriously proposed massive censorship. Rather, leading proponents of hate speech bans, often justifying bans as necessary means of listening to society’s unheard, excluded voices, have generally excluded physical, mental or psychological disability, age or overweight from the categories for which

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they seek protection. Indeed, so common is the use of terms degrading to members of these groups that proponents of bans on racial and ethnic hate speech unwittingly use these terms. For instance, Richard Delgado, a leading Critical Race Theorist and passionate advocate of penalties for racist speech, has used the word ‘schizophrenic’ derisively to mean ‘inept’. As Delgado states elsewhere, ‘we are our current stock of narratives, and they us.’

It might be argued that, in view of increasing numbers of vocal elderly and overweight, they are now able to defend themselves in the public arena. However, the relative political stature of an otherwise numerical minority has not generally been deemed by advocates of hate speech bans to constitute grounds for excluding the affected members from protection. Again, in Otto-Preminger-Institut, the fact that Roman Catholicism has long been Austria’s overwhelmingly dominant faith, far from preventing censorship, was cited by Austrian authorities, unchallenged by the European Court, to suggest that there was *ipso facto* ‘a pressing need for the preservation of religious peace’.

Hate speech bans collide, then, with either of the following two principles of human rights law. (1) If they are narrowly drawn so as to limit their application, they violate the principle of non-discrimination by censoring or punishing some offences, while permitting similar offences against equally vulnerable persons. (2) If they are broadly drawn to include all target groups or individuals, they potentially capture large quantities of expression. In applying the Principle of Extant Rights, then, my concerns about the inclusion of sexual minorities within hate speech bans stems not from any specific characteristics of sexual minorities, but from the inadequacies of hate speech bans themselves. The fact that some or all sexual minorities *might* be amenable to inclusion under hate speech bans provides no moral compensation for the exclusion of other equally vulnerable groups or individuals. Sexual minorities, or any groups—racial, ethnic, religious—cannot legitimately accept the protections of such norms within a framework of *fundamental, universal rights*, when equally vulnerable groups or individuals are excluded.

**Some Objections and Replies**

Hate speech bans may be required as temporary measures within weak or newly emerging democracies, or under legitimately declared states of emergency. Such circumstances cannot, however, overcome either the bans’ discriminatory character. Within longstanding, stable and prosperous democracies, it becomes questionable whether sexual minorities, or any other

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75 Delgado, *supra* note 4, at 15.
groups, should be seeking protection from norms that are fundamentally exclusive of some of society’s most vulnerable.

I cannot examine all possible objections to my criticism of hate speech bans, as any such discussion would require a full-blown analysis of the overall problem of hate speech bans, which has been the subject of countless scholarly studies. It is worthwhile, however, to note some concerns arising specifically from an understanding of cumulative jurisprudence as a central instrument of rights for sexual minorities.

An anonymous reviewer of this piece objected that I have noted ‘no ground peculiar to sexual minorities’ use of hate speech which . . . makes them particularly vulnerable to its misapplication.’78 That objection effectively makes the following assumption: if some groups or individuals, such as sexual minorities, are satisfied with the protections they can receive from hate speech bans, the bans are therefore legitimate for those groups. Yet that is precisely the assumption I am rejecting. The view of human rights I am assuming is the opposite: even if a hate speech ban could be both drafted and applied so as to protect some groups, or some individuals, in ways generally seen as beneficial, we would still be contradicting the founding assumptions of the leading human rights norms—certainly, of all those that have been central to rights of sexual minorities—if we were to maintain that a norm is legitimate even if it cannot be enjoyed equally by all similarly situated persons.79

The premise of international human rights since the Universal Declaration of Human Rights (UDHR)80 has been that norms of the human rights corpus can claim universal legitimacy only insofar as they can, in principle, be framed and applied so as to encompass all human beings.81 For sexual minorities, or any other actual or potential beneficiary group, to claim protection of norms that cannot be extended to other equally vulnerable groups should prompt the gravest ethical concerns about whether such norms properly belong within the international human rights corpus (except, again, as temporary measures in unstable states), despite the fact that hate speech bans have been endorsed within international human rights law.82

The same reviewer objected that ‘[n]one of the international laws . . . or indeed national hate speech laws that exist internationally, defines every insult or offence as hate speech. To do so would be ridiculous. Yet [Heinze] argues . . . that every insult against an overweight or disabled or elderly should be considered hate speech as the only alternative is to discriminate

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81 UDHR arts. 1, 2, 7, 28.
82 See notes 48 - 51 supra.
selectively, which is anathema to human rights principles.\textsuperscript{83} I have not had to argue, however, that every such insult would have to count as hate speech. No such broad claim is required to demonstrate the discriminatory nature of hate speech bans. It suffices to ask whether there is any body of insults that can be covered under leading international and regional norms without either discriminatory application, whereby equally dangerous or hurtful terms go unregulated, or highly rigorous censorship.

Even avid proponents of, for example, race-based hate speech bans, do not generally insist that ‘every’ racist insult be banned, for the simple reason that insults are context-bound, and not amenable to exhaustive enumeration. ‘Queer bastard’ might be benign if used, for example, in an ironic, comical or in-group situation. Meanwhile, ‘funny gay man’ might be offensive in an overtly anti-gay context. In view of the grey areas that render many contexts ambiguous, neither I nor anyone else could provide any conceptually exhaustive account of what counts as ‘every’ insult against any given category of persons. The view that ‘[t]o do so would be ridiculous’ is, then, precisely the problem. Any serious step towards non-discriminatory application of hate speech bans, even in cases of overall parity in the level of offence to the targeted group or individual (‘easy cases’), would indeed be a step towards a ‘ridiculously’ censorious regime, whereby much freedom of speech would be exercised not as a right, but as a contingent government concession. Yet any step away from that order of censorship becomes a step towards discriminating between protected and unprotected victims of speech acts that are otherwise equally offensive.

One might also raise a more pragmatic objection. Consider the following argument: ‘Perhaps terms like “idiot” or “old bag” are indeed difficult to eradicate. However, the fact that we cannot protect all individuals does not mean we should protect none. We don’t live in an ideal world. We must achieve what we can, even if we can’t achieve everything.’ That objection might carry some weight in many other areas of law (it may be legitimate to renovate Hyde Park even if there is not enough money to clean up St James Park, or to catch more speeding motorists on the M1 than on the M4), but raises grave concerns for human rights. By analogy, there is no doctrine of human rights law which states that torture of some is justified as long as torture of most can be prevented; or that privacy, or freedom of conscience, are justified for some, even if they cannot be extended to all (such results may often occur in practice, for reasons of material constraint or political will, but are never justified by any principle of human rights law). Everyday legislation on ordinary issues must certainly deal in horse-trading and compromises, which presumably underlies much routine legislative activity: ‘We’ll agree to reduce taxes on the wealthy if you agree to reduce them on the poor’; ‘We’ll agree to raise the speed limit if you agree to build safety ramps’. That

\textsuperscript{83} Report of anonymous reviewer, note 78 supra.
reasoning cannot transpose simpliciter to human rights law.84 Even under a validly declared state of emergency, we could hardly adopt approaches such as, ‘We don’t have enough money to protect the Catholics, so we’ll just protect the Protestants’ or ‘If you agree not to torture the children, we’ll allow you to torture the adults’. One reason for the credibility of such fundamental rights to life, privacy, expression, and non-discrimination is that, despite breaches in practice, there is absolutely no conceptual difficulty in postulating their universal application in principle. Insofar as hate speech bans are not, and cannot be, extended to protect all vulnerable individuals or groups, they violate that principle of universality.

Where does this all leave François Chenu? In calling for coherence in human rights, does one risk overlooking some of the concrete problems that hate speech bans might help to solve? Not at all. Another error among advocates of hate speech bans is their frequent failure to distinguish between, on the one hand, a broader arena of public discourse—the arena of radio, television, film, the press, or the speaker in the public common—and, on the other hand, invective specifically and immediately directed by certain individuals against other, more-or-less specifically targeted individuals in face-to-face situations.85 Opponents of hate speech bans rarely deny that offensive speech of the second type may legitimately be proscribed. In the United States, the doctrine of ‘fighting words’ allows the punishment of personally targeted insults in live, hostile encounters.86 In principle, the protections afforded by that traditional doctrine are far broader than those afforded by modern hate speech ban; they allow punishment of any kind of strongly offensive remark, which may include, yet need not be limited to, insults on grounds of race, ethnicity, religion or other such identity. Certainly, traditional bans on ‘fighting words’ require periodic review as to their content or application, in view of changing social conditions. However, in itself, an approach like the US Supreme Court’s upholding of bans on fighting words contains all that is required to protect all individuals from direct and unduly hostile verbal assaults. Moreover, as to actual crimes, involving non-speech acts such as killing, battery, theft, rape or vandalism, the US Supreme Court has found that no violation of free speech arises when hate speech is used as evidence of a hate-based criminal motive, or that crimes motivated by racial or other group-based animus may be punished more harshly than others.87

Again, my focus in this article has been on stable, longstanding and prosperous democracies. What makes a democracy sufficiently stable, longstanding and prosperous to be able to abolish hate speech bans? There will always be room for debate in borderline cases. But, as a general matter, Western European states certainly fill the bill. At the very least,

84 Cf. generally, e.g., Ronald Dworkin, Taking Rights Seriously (Cambridge, MA: Harvard University Press, 1977) (distinguishing between concepts of ‘policy’ and ‘principle’).
85 See, e.g., Matsuda et al., supra n. 4.
some sufficiently stable, longstanding and prosperous democracy is presupposed by any binding civil rights instrument, as suggested (1) by the inclusion, in modern instruments, of derogations clauses, authorizing suspension of certain rights during legitimately declared states of emergency\textsuperscript{88}, as well as (2) the judicial application of derogation principles to older instruments\textsuperscript{89}. Derogation principles effectively require that a state guarantee rights unless it is rendered materially unable to do so.\textsuperscript{90} Certainly, many states, in Europe and internationally, albeit not fully stable, longstanding and prosperous democracies, are parties to the ICCPR or the European Convention on Human Rights (ECHR), without regularly invoking the derogations clauses. However, as to weaker or emerging democracies, the totality of their political, social and economic standards would warrant them to invoke those clauses against political or social unrest with far greater latitude (both under the ICCPR ‘proportionality’ principle and under the ECHR ‘margin of appreciation’ doctrine) than would be expected for the wealthier and more stable Western European members.\textsuperscript{91}

It is stable, longstanding and prosperous democracies that I have had in mind in noting that no correlation has been shown between levels of hate speech and incidence of hate crime. However, it is by no means certain that such correlation is absent today in weaker or newly emerging democracies. In some emerging democracies, for example, is has been suggested that a newly liberalised press can harshly impact vulnerable groups without the democratic institutions or traditions, or the sheer resources, required to redress the effects.\textsuperscript{92} Meanwhile, in such societies, attitudes towards sexual minorities have often remained harsh and have even worsened.\textsuperscript{93} Accordingly, I have refrained from taking a position on hate speech in such societies. Bans may indeed be required where some likely causation from hate speech to hate crime can be shown. Overall, however, the growing strength of democratic institutions and practices, along with the resources to protect vulnerable groups, should be displayed in a society’s gradual ability to reduce its reliance on hate speech bans.

Today, as opposed to just a few decades ago, the increasing disdain for persons who casually drop epithets like ‘nigger’, ‘dirty Jew’ or ‘queer’ gives testimony not so much to the

\textsuperscript{88} European Convention on Human Rights (ECHR) art. 15; International Covenant on Civil and Political Rights (ICCPR) art. 4.
\textsuperscript{89} See, e.g., Korematsu v. United States, 323 U.S. 214 (1944) (finding that national security may constitute a compelling government interest in abridging a constitutionally protected right).
\textsuperscript{90} Cf. ECHR art. 1; ICCPR art. 2(2).
\textsuperscript{91} Thus, for example, the UN Human Rights Committee’s reference to ‘exigency’ inevitably presupposes levels of available resources to prevent violence or harm. Human Rights Committee, ‘General Comment 29: States of Emergency (article 4),’ U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 186 (2003).
efficacy of prosecutions, which have scarcely had any systematic character in Europe, but to the fact that, in essentially open, liberal democracies, maintaining faith in the free and robust exchange of ideas\textsuperscript{94}, informal, social pressures have always had the potential to effectuate needed change without the need for coercive laws which, at best, accomplish nothing, and, at worst operate in unjustifiably discriminatory ways. In general, sexual minorities have been right to follow a cumulative jurisprudence—to insist that norms of even-handedness intrinsic to the very idea of human rights be rigorously implemented and respected in practice. However, cumulative jurisprudence is only as worthy as the norms to which it is applied. Hate speech bans, despite their wide acceptance within international law and in most national jurisdictions, raise grave concerns about both their conceptual and practical compatibility with the norms and principles of human rights law.

Conclusion

A cumulative jurisprudence of human rights has been and remains an important means of advancing the interests of sexual minorities within the dominant contemporary framework of international, regional and national human rights regimes. Even non-discrimination norms not originally conceived to apply to sexual minorities have been interpreted to extend to them with little conceptual or practical difficulty. That does not mean, however, that it should be applied willy-nilly to any norm that may emerge within human rights regimes. Hate speech bans are by definition conceived as limitations on fundamental rights of speech and expression. They cannot be applied in a non-discriminatory way without raising serious questions about the fundamental status of free speech. Again, any step away from discriminatory application becomes a step towards massive censorship; and any step away from massive censorship becomes a step towards discriminatory application. Either hate speech bans must arbitrarily exclude persons who are just as vulnerable as those who enjoy protection, or the bans must extend so far as to undermine the right of free speech and expression. Hate speech bans have no place within longstanding, stable and prosperous democracies, which have ample means at their disposal to protect sexual minorities and other vulnerable groups from hate crime and discrimination, without having to impose inevitably arbitrary limits on speech.

\textsuperscript{94} For a classic judicial statement, see, e.g., Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J. concurring).