

The Hateful and the Obscene: Studies in the Limits of Free Expression

By L. W. Sumner

Reviewed by Arnie Herschorn*

In *The Hateful and The Obscene*, L. W. Sumner formulates and defends a philosophical framework for evaluating the Canadian law on obscenity and hate speech.¹ Although obscenity and hate speech are generally regarded as being on the perimeter of freedom of expression, their restriction is invariably considered problematic.² A central element of Sumner's solution to the controversy is to reduce obscenity to a type of hate speech. The appropriate vehicle for regulating obscenity is criminal legislation targeting the hateful rather than the obscene.³

Sumner's argument for the application of his philosophical framework may be summarized in several propositions. (1) A restriction on expression is justifiable only when the expression can be shown by convincing evidence to cause harm to others. (2) The source of justification for a proposed restriction on expression is the "harm principle," enunciated by John Stuart Mill in his classic defence of freedom of expression in *On Liberty*: "The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."⁴ (3) Consensual harm is harm that arises or is alleged to arise from an activity in which a participant engages voluntarily. For example, if a willing consumer of pornography were to suffer moral harm from indulging in that activity, the resulting harm would be a type of consensual harm. (4) On the proper interpretation of the harm principle, consensual harm does not count as harm to others. Willing consumers of pornography do not generally regard themselves as being made worse off by indulging their taste and do not wish to be rid of it. (5) Thus, properly understood,

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¹ University of Toronto Press, 2004.

² Sumner draws a distinction between pornography, material with erotic content whose primary function is to arouse its audience sexually, and obscenity. Ordinarily, the obscene is whatever we find disgusting or repugnant or shocking. For the purposes of this review, it will not be necessary to distinguish the use of the two terms or to explore the adequacy of Sumner's distinction. The terms will be used interchangeably.

³ *Supra* note 1 at 193.

⁴ J. Mill, "On Liberty," c. 1 in S. Collini, ed., *On Liberty; with The Subjection of Women and Chapters on Socialism* (Cambridge: Cambridge University Press, 1989).

the harm principle does not apply to the supposed harms of moral corruption and moral degradation of willing consumers of pornography and the moral distress of others who may become aware that willing consumers of pornography are being corrupted or degraded. (6) Although moral distress may be understood as a kind of harm, it cannot be acknowledged as harm within the philosophical framework without undermining the personal sphere of liberty. Too many of our fundamental freedoms would be subject to undue restriction if restriction could be justified solely on the basis of the moral disapproval of others. (7) When the large moral component underlying the traditional aversion to obscenity is factored out, the result of applying the principles of Sumner's philosophical framework is to require that the harms that might justify a restriction on obscenity be of the same kind as the harms that might justify a restriction on hate speech. (8) Obscenity may then be regarded as a sub-category of hate speech, more exactly, hate speech against women, while the problem of justifying a restriction on obscenity is then reduced to the problem of justifying a restriction on hate speech. (9) Any restriction on expression must meet two conditions. First, the expression in question must cause harm to others, apart from excluded harms. Second, restricting the expression must yield a better balance of benefits over costs. (10) There is also a strong presumption against restricting expression because of its content. A proponent of restriction, usually the state, must provide convincing evidence of the link between the expression in question and the harm it causes. Inconclusive evidence is insufficient.

According to Sumner, the existing Canadian legislation against hateful expression is not justifiable when measured against the necessary conditions for restriction. Sumner argues that the state has not met the heavy burden of proving that hate speech actually causes harm. Hate messages are rightly regarded as offensive. But that is a reaction of moral distress and so does not qualify as harm.⁵ The problem with the hate speech law lies in the very idea of criminalizing speech on the ground that it might contribute to an atmosphere of hostility toward a particular social group. The government has not met the heavy burden of demonstrating the correctness of that assumption. There is little or no social-scientific evidence to confirm it.⁶ Given the conditions a restriction on expression must meet, the hate speech law can not be justified, even though common sense would suggest that hate speech may cause serious harm.

Sumner also argues that the benefits of restriction do not clearly outweigh the costs. Doubts can be raised about the effectiveness of restriction, especially in the age of the internet.⁷ The list of protected

⁵ *Supra* at 158.

⁶ *Ibid.* at 164.

⁷ *Ibid.* at 197.

groups in the hate speech section of the *Criminal Code*, conspicuously shorter than the list of actual target groups, seems arbitrary.⁸ If the statute is defensible at all, simple consistency requires that the scope of its protection be extended. Further, many people would dismiss any attempt to bring criminal sanctions to bear on hateful opinions when they are expressed by respectable figures in a mainstream newspaper or an academic journal. How then, Sumner asks, can we justify applying the law to the expression of equally intense negative opinions by less respectable sources such as hate groups?

For Sumner, counterspeech is less intrusive than criminalizing hate speech, and has the potential to be more effective. It might well be that the principal consequence of allowing hate groups to voice their views openly and frankly would be to discredit and marginalize them. The anti-racism cause arguably is better served by allowing racists to speak their mind than by intimidating them into formal silence by the fear of prosecution.

Sumner advocates revising the law so that it criminalizes conduct only when hate speech gives rise to some other offence. Hate speech is a call to action to members of hate groups, frequently involving acts of violence against members of target groups or their property. There is good evidence that many hate groups have a history of involvement in violence.⁹ Sumner argues that hate groups may serve as the concrete connection between hate messages and hate crimes, if their dissemination of “hate messages has the effect of recruiting members who are then motivated to practice their acquired ideology by means of acts of violence against the groups they have been induced to hate.”¹⁰ Hate groups may play a role in the causal nexus of hate violence analogous to the role of the pedophile in the sexual abuse of children.¹¹ If the motivation for the crime can be traced to the hate message of the group, “there seems no reason not to regard the latter as having incited the violence and as being liable to prosecution on that basis.”¹² Sumner recommends that hate speech be criminalized when it amounts to incitement. The function of hate speech, to recruit new members and motivate adherents to commit hate crimes, opens up the possibility of treating the communication of hate messages, under certain circumstances, as incitement to violence. Where hate crimes “can be traced back to the influence of particular hate messages...the incitement can itself be classified as a hate crime.”¹³

Section 319(2) of the *Criminal Code* makes it an offence for anyone

⁸ R.S.C. 1985, c. C-46, s.319.

⁹ *Ibid.* at 162.

¹⁰ *Ibid.* at 182.

¹¹ *Ibid.* at 164, 199.

¹² *Ibid.* at 199.

¹³ *Ibid.*

to promote hatred wilfully against any identifiable group by communicating statements other than in private conversation. Section 319(1) makes it an offence for anyone to incite hatred against any identifiable group by communicating statements in any public place, where such incitement is likely to lead to a breach of the peace. According to Sumner, section 319(2) should be repealed because it is unnecessarily intrusive of expressive interests. It does not pass the justificatory threshold because it criminalizes hate speech for its content. Section 319(1) should be reworked “so as to apply to cases in which the causation of hate crimes can be traced back to the influence of particular hate messages.”¹⁴ In such cases, the incitement itself can be classified as a hate crime, with the list of protected groups expanded to include women, as well as gays and lesbians.

Sumner’s revised hate speech law still criminalizes expression because of its content – the message must still be hateful – but only when the expression actually succeeds in influencing attitudes that in turn cause harmful actions. Sumner’s approach, however, is flawed. It gives rise to a number of anomalies that would make the revised law unworkable. One anomaly is that two persons could disseminate the same hateful message, while only one would be liable to conviction because the message actually succeeded in influencing attitudes, while the other did not. Another anomaly is that someone could disseminate a hateful message that succeeds in influencing attitudes and causing harmful actions only decades later. The disseminator of the hate message would remain potentially liable to prosecution indefinitely. The anomalies arise because Sumner’s revised law is actually a hybrid between a hate speech law and a law of seditious libel. The intention to promote feelings of ill will and hostility between different classes of Her Majesty’s subjects is seditious.¹⁵

Like a hate speech law, Sumner’s revised law retains the requirement that the proscribed expression be hateful and that it be directed toward enumerated target groups. It differs from a law against seditious libel in not being topic neutral. Like the law of seditious libel, it requires that the hateful expression be effective to incite someone to commit an act of mischief. In this it differs from a hate speech law in requiring more than just the dissemination of the hateful message. While incitement, traditionally conceived, must be relatively proximate in time and place to the mischief instigated, the expression proscribed by Sumner’s revised hate speech law need not be.

A law against seditious libel does not criminalize any particular expression because of its content but criminalizes any expression that amounts to incitement. Because incitement requires a reasonably close

¹⁴ *Ibid.*

¹⁵ *R. v. Burns* (1886), 16 Cox. C.C. 355 at 361.

proximity both in time and space between the expression and its success in influencing attitudes, a law against incitement could well give rise to a situation where two persons disseminated the same hateful message with only one being liable for prosecution, if the one incited while the other did not. That would not be anomalous because the speaker urged action on the message and had reason to believe it would be acted on. That is the hallmark of incitement. A speaker whose message succeeded in influencing attitudes only decades later would not be liable for incitement because of the absence of proximity in time and space.

Sumner's revised law is not a law against incitement because it does not require that there be proximity between speaker and audience. However, if the revised law were to require proximity, it would be redundant, because the existing law of seditious libel would be adequate to deal with the problem of hateful speech. The law of seditious libel does not require broadening to include, for example, women, gays and lesbians.

A law against incitement or seditious libel is topic neutral as to the target group. A law against hate speech is not, and whether someone has committed an offence does not depend on the circumstances in the way it does in the case of seditious libel. In *R. v. Aldred*, Justice Coleridge emphasized how the law of seditious libel is circumstance dependent:

[Y]ou are entitled to look at the audience addressed, because language which would be innocuous, practically speaking, if used to an assembly of professors or divines, might produce a different result if used before an excited audience of young and uneducated men. You are entitled, also, to take into account the state of public feeling....You are entitled also to take into account the place and mode of publication. All these matters are surrounding circumstances which a jury may take into account in solving the test which is for them, whether the language used is calculated to produce the disorders or crimes or violence imputed.¹⁶

If Sumner were really prepared to recommend that expression not be criminalized because of its content, he could then rely on a topic neutral law of seditious libel and achieve a double reduction. The problem of obscenity could be reduced to the problem of hate speech, which in turn could be reduced to the problem of seditious libel. But because Sumner appears unwilling to embrace the requirement of proximity, a feature of the law of seditious libel, his revised hate speech law still proscribes expression because of its content, to make possible prosecution for "action at a distance." Incitement, by contrast, is advocacy "directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action."¹⁷

¹⁶ (1909), 74 J.P. 55 at 56.

¹⁷ *Brandenburg v. Ohio*, 395 U.S. 444 at 447 (1969) [emphasis added].

Sumner rejects a law that proscribes expression for its content alone. Sumner grants that common sense would indicate that hate speech makes some contribution toward the unequal social status of various target groups. He states, however, that “no serious scientific attempt has been made in either case to factor out and measure the extent of this contribution, nor is it easy to see how this could be done.”¹⁸ Regulation of expression must rest on “reliable evidence” of harm.¹⁹ Hateful opinions ought to be criminalized only when they have a “discernible effect” on the level of hostility toward their target groups.²⁰

Consistent with his philosophical framework, Sumner argues that the offence caused to target minorities is not a sufficient reason to restrict hate speech. Although Sumner’s framework does not countenance appeals to abstract right, it appears nevertheless that the premise underlying the hate speech law is that the members of the target minorities have an equal right to feel at home in the wider society. Not everything that threatens the right can or ought to be criminalized. There appears to be a consensus that some things, like hate speech, ought to be criminalized.

The question whether someone who disseminates hate messages should be liable for prosecution only when the messages succeed in influencing attitudes is inseparable from the question whether there ought to be a hate speech law at all, understood as a law that proscribes expression because of its content alone. Sumner accepts as the factual background to his revised law that hate-mongers themselves have little power to impose discriminatory practices beyond the confines of their own narrow circles. He also notes that groups responsible for hate messages operate clandestinely on the margins of Canadian society, and likely have little influence on mainstream public opinion.²¹ However, in a seemingly innocuous passage, Sumner writes: “My conclusion is based on the best evidence I have been able to locate; should new evidence come to light, or should the level of racism, sexism, and homophobia in Canada undergo a significant increase then it may need to be rethought.”²² But what would need to be rethought? A law against hate speech would be ineffective by the time hateful attitudes had significantly permeated the community consciousness. The prosecutors and the judiciary who would enforce the law and the juries who would decide its application could not reasonably be expected to be immune from the attitudes that, by assumption, had achieved some level of social credibility. In a democratic society, the point of such a law is to signal

¹⁸ *Supra* note 1 at 161-62.

¹⁹ *Ibid.* at 185.

²⁰ *Ibid.* at 193.

²¹ *Ibid.* at 194.

²² *Ibid.* at 200.

society's disapproval of such attitudes before they become widespread.

Sumner's overall discussion is characterized by exceptional balance, in an area where balance is often difficult to maintain. However, in one conspicuously unbalanced passage, Sumner writes "[l]aws that are futile are worse than pointless; because of the serious damage they can do, they are evil."²³ There is a rhetorical progression here from the unstated starting point of a law that is unsuccessful in securing its objective, to one that is futile and finally to one that is evil. The rhetoric is unwarranted. Who is evil, the person who is disseminating hate or the person who is trying to prevent dissemination?

Sumner argues that the methodology actually adopted by the Supreme Court of Canada for conducting the balancing exercise mandated by section 1 of the *Charter* is congruent with the philosophical method of deciding questions of right and wrong recommended by utilitarians such as Mill. Sumner refers to the utilitarian method as "consequentialism." A consequentialist believes that an action is right if performing it will tend to promote the greatest good, where the good is taken to be human welfare. Consequentialism is a controversial philosophical thesis. In recent times it has been powerfully opposed by a revived doctrine of contractualism. A contractualist regards an action as right if it is warranted by principles that would be chosen by persons under certain ideal conditions of choice, whether or not the action tended to promote the greatest amount of human welfare. Sumner argues that the Supreme Court is ultimately engaged in a balancing of interests, rather than rights, and that interests constitute the human welfare that consequentialists submit are the proper focus of inquiry. Even if Sumner were to demonstrate that the balancing exercise is concerned with interests rather than rights, would that be sufficient to establish that the exercise is ultimately consequentialist? If not, then the perceived congruence between the balancing exercise and the consequentialist method would be only superficial.

In the development of Sumner's argument, the balancing mandated by the *Charter* is the connecting link between the jurisprudence and his philosophical framework: "We have located the optimal balance between conflicting interests when the costs of a departure in either direction exceed its benefits....Consequentialism is the name for the kind of moral/political theory which tells us always to prefer the outcome which maximizes this balance."²⁴ The outcome of the balancing exercise determines whether a proposed restriction on hate speech is justifiable:

When two important social values (such as liberty and equality) conflict, the optimal tradeoff or balance between them is that point at which further gains in one of the values

²³ *Ibid.* at 184.

²⁴ *Ibid.* at 63.

would be outweighed by greater losses in the other. Freedom of expression would be better protected were there no legal constraints whatever on hate propaganda, while the equal status of minority groups would (arguably) be better safeguarded by legislation more restrictive than the hate propaganda law, hedged round as it is by its various safeguards. Somewhere between these extremes lies a balance point at which the greater protection for these groups afforded by more restrictive legislation would be outweighed by the greater impairment of expression, while the greater protection for expression afforded by more permissive legislation would be outweighed by the greater risk of discrimination.²⁵

Sumner finds that the balancing exercise called for by section 1 of the *Charter*, as formulated by the Supreme Court of Canada in *R. v. Oakes*, fits neatly with the philosophical framework he advocates.²⁶ The *Oakes* tests require a contextual, case by case, balancing of the costs and benefits of any legislative measure found to infringe section 2(b) of the *Charter*.²⁷ Sumner sees a striking similarity between that balancing procedure and a consequentialist justification of rights and their limitation, and an equally striking resemblance between a court's balancing of costs and benefits and the factors noted in Mill's harm-based approach to justifying restrictions on liberty. Consistent with Mills' harm principle, any legislative measure imposing a content restriction on expression must pass a harm test. The government must be able to show that the expression in question poses a significant risk of harm to third parties. Following the first *Oakes* test, the harm must be significant. Following the second *Oakes* test, the restriction on expression must yield an acceptable balance of benefits over costs. For Sumner, the *Oakes* tests are a good approximation to the justificatory analysis suggested by Mill's philosophical framework.

The first step in Sumner's application of the philosophical framework is to argue that the balancing called for by section 1 of the *Charter* is a balancing of interests, not rights:

Presumably, the metaphor of balancing rights presupposes that we can compare their relative weights on some scale. But how is that to be done? The court suggests an answer to this question by speaking of balancing (not rights but) *values* or *interests*. It seems therefore to take the view that we can balance rights only by looking behind them to the interests they are meant to enhance or protect. Rights 'in the abstract' have no weight; they are weightless. But competing (individual and collective) interests can have weights, and it is only by weighing those interests that an appropriate balance can be struck between the rights which protect them.²⁸

²⁵ *Ibid.* at 62-63.

²⁶ [1986] 1 S.C.R. 103.

²⁷ The tests are described by Sumner, *supra* note 1 at 56.

²⁸ *Ibid.* at 60.

Let the premise be accepted that the balancing exercise can not be conducted exclusively in terms of a balancing of rights, because rights are not foundational and only serve the values or interests that ultimately weigh in the balance.²⁹ Even with that emendation, it remains the case, as Sumner notes, that the consequentialist principle “does not provide a simple algorithm for deciding whether, and when, the state is entitled to enforce restrictions” on expression.³⁰ It is also clear, as Sumner recognizes, that one of the problems in the balancing exercise is that conflicting values need to be commensurated.³¹ The problem of a conflict in values will remain even when the court does not discount the value of a form of expression in advance of conducting the section 1 analysis, but rather at the end, as part of the proportional effects test.³²

Sumner’s argument that the balancing exercise is ultimately consequentialist does not appear to proceed all the way to its intended conclusion. Interests may have weights, but not in the sense that we can weigh them literally in a balance. The relative weights of interests are controversial. Those who would restrict the right to express hate would maintain either that very little of value is thereby sacrificed or that, if something of value is lost, it does not come close to balancing the gain from restriction. At that point, there does not appear to be much for a defender of freedom of expression to say to someone who is aware is of the costs and benefits of restricting expression but who opts to strike the balance at a different point. It would appear rather that the value judgments that inform the conflicting positions are prior to the consequentialist balancing discerned by Sumner in the application of section 1 of the *Charter*, and therefore consequentialist balancing cannot be its foundation.

Is the balancing exercise ultimately consequentialist? It is at this critical point that the basic premises of consequentialism ought to apply to the conflict of values. There are four relevant basic premises. (1) The justification of rights must be instrumental. Rights are devices for the protection of important values, such as freedom or equality. (2) The justification of rights must be consequentialist, requiring an exercise of cost-benefit balancing. (3) The justification of rights must be welfarist. The

²⁹ The claim is controversial. See T. Scanlon, *The Difficulty of Tolerance* (Cambridge: Cambridge University Press, 2003) at 4 (“In order to decide what rights people have, we need to consider both the costs of being constrained in certain ways and what things would be like in the absence of such constraints, and we need to ask what objections people could reasonably raise on either of these grounds. But the fact that claims about rights, like other moral claims, need to be justified in this way, does not make rights morally derivative, or mere instruments for the production of morally valuable states of affairs.”).

³⁰ *Supra* note 1 at 33.

³¹ *Ibid.* at 70.

³² *Ibid.* at 81-82.

values involved are all interests. (4) The justification of rights must be aggregative. A right is justified when its recognition will maximize welfare.

Sumner does not attempt to apply his philosophical framework, particularly the premise that the justification of rights must be aggregative, at the most difficult point of the balancing exercise. Consequentialists generally understand aggregation to mean that the rightness of actions will depend on their tendency to increase the quantity of a value that is the same for all agents.³³ It seems singularly implausible, however, that conflicts of values at the end of the balancing exercise, between such values as freedom of expression and security, can be resolved in such fashion. How does one aggregate incommensurable interests? Any argument that the balancing exercise is more than superficially consequentialist would have to follow the welfarist and aggregative premises to their conclusion. Sumner does not indicate how that is to be done.

There is much to praise about *The Hateful and The Obscene*. Sumner gives an accurate presentation of the relevant legislation and the *Charter* jurisprudence on obscenity and hate speech, organized effectively by assessing the law from the viewpoint of an interesting philosophical framework. Lawyers and others without an extensive philosophical background will likely find Sumner's exposition of Mill's consequentialism and defence of freedom of expression lucid and easy to integrate into the jurisprudence with which they will already be familiar.

Sumner strikes just the right note when he advises that he advances his conclusion with as much confidence as the nature of consequentialist argumentation will permit. Consequentialist argument relies heavily on assessment of facts that, because they deal with human affairs and are not generally subject to scientific proof, are often difficult to ascertain. Sumner writes that different communities will strike the optimal balance between competing values according to their different circumstances. Sumner's views are appropriately tentative. In a discussion of a topic that tends to arouse emotions, Sumner's tone remains commendably dispassionate. It is fair to say that, because of Sumner's meticulous presentation, even those who disagree with his position will have no difficulty understanding what that position is and how he arrived at it.

³³ T. Nagel, "The Foundations of Impartiality," c. 8 in D. Seanor & N. Fotion, eds., *Hare and Critics: Essays on Moral Thinking* (Oxford: Clarendon Press, 1988) at 104.