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## Regulating “Hate Spin”: The Limits of Law in Managing Religious Incitement and Offense

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As democracies try to manage the risks arising from religious vilification, questions are being raised about free speech and its limits. This article clarifies key issues in that debate. It centers on the phenomenon of “hate spin”—the giving or taking of offense as a political strategy. Any policy response must try to distinguish between incitement to actual harms and expression that becomes the object of manufactured indignation. An analysis of the use of hate spin by right-wing groups in India and the United States demonstrates that laws against incitement, while necessary, are insufficient for dealing with highly organized hate campaigns. As for laws against offense, these are counterproductive, because they tend to empower the most intolerant sections of society.

*Keywords: hate speech, incitement, offense, freedom of expression, censorship, India, United States, First Amendment*

How to regulate religious offense has become one of the most contentious questions concerning freedom of expression. The 2015 murder of *Charlie Hebdo* cartoonists in revenge for their satirical depictions of the Prophet Mohammed was just one of several traumatic incidents that have prompted democracies to ponder once again the tension between free speech and respect for religion. If only to protect people from violent retribution, some commentators wonder whether the time has come to set stricter limits on the right to offend. For example, the European Council on Tolerance and Reconciliation (2015), chaired by former British prime minister Tony Blair, has proposed laws for combating intolerance that would temper liberal democracies’ position on free speech. Its model legislation would give governments the power to suppress “group libel,” including malicious attempts to vilify a group such as calling all Muslims terrorists.

This article contributes to the policy debate by clarifying the roles and limitations of law in dealing with hate propaganda. It does not propose specific laws, since states—even within the liberal democratic family—are unlikely to converge on a single, common regulatory approach to freedom of expression. They

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have different, and deeply entrenched, constitutional priorities (Shapiro, 2003). For example, the United States' premium on free speech and Canada's emphasis on multiculturalism mean the two neighbors will continue to diverge on where exactly to draw the line separating permissible and prohibited expression. Canada has prosecuted types of extreme expression that the United States has protected—burning a cross in front of the home of a non-White family, for example.

Despite these irreconcilable differences at the margins, though, it is possible to identify broad principles that would be relevant for all democracies. I propose to do this not through moral-philosophical deliberation but by examining how hate propaganda actually functions in public discourse. Political actors opportunistically work around the law—and through it—when they exploit religious identity as an instrument of political contention. Understanding the sophistication of their methods is the first step toward an intelligent policy response. This article makes three main points. First, it endorses the sound distinction made in international human rights law between illegal incitement to objective harms on the one hand and unsavory but legal offense on the other. Second, it argues that incitement laws, while necessary, are inherently insufficient for addressing the serious harms that hate speech can cause. Third, insult laws are counterproductive, empowering the forces of intolerance and undermining minority rights.

This study is theoretically grounded in political sociology's ideas about "contentious politics" (McAdam, Tarrow, & Tilly, 2001; Tarrow, 1998). This tradition sees protest movements and other types of unruly politics as innovative forms of collective action. Contentious collective action always involves ideological work. Movement leaders engage in cultural framing and cognitive interventions to build support and solidarity for the cause (Benford & Snow, 2000; Gamson, 1990). Gamson (2013) has argued that this ideological work often employs "injustice frames," which center on symbols that excite a strong sense of indignation within a community. Historical events such as past periods of persecution can serve as injustice symbols. So can perceived offense in the here and now. Movement leaders can declare others' words and actions to be deeply insulting to the community. Outsiders are blamed in order to build solidarities within the group.

I see hate propaganda in this light—as calculated strategy, not as the eruption of visceral emotions that it is sometimes portrayed as. Nor are these conflicts the result of some epic "clash of civilizations" (Huntington, 1996). The contentious politics tradition invites us to focus on the meso level of analysis, attending to how groups act within their historical contexts and why their leaders take the decisions they do. This, in turn, can inform policy responses.

I ground my analysis empirically in the experience of the world's two largest democracies, India and the United States. Although constituted as secular republics dedicated to equal rights for all citizens, both have had to contend with religious nationalisms promoting more exclusive visions of national identity (Hibbard, 2010). In India, this tendency has captured power, through the victory of Narendra Modi and his Bharatiya Janata Party (BJP) in the 2014 general election (Basu, 2015). The BJP's rise was marked by incitement of violence against the Muslim minority and by heightened calls for censorship of books and other expression deemed offensive to Hinduism. These campaigns were often spearheaded by the BJP's associates in the broader Hindu nationalist movement known as the Sangh Parivar.

In the United States, a section of the Religious Right has evolved into what has been called the Islamophobia industry, producing hate propaganda against Muslims (Lean, 2012). Although this is a small group on the fringes of U.S. politics, it has succeeded in organizing angry protests against mosque projects, enacting Islamophobic state legislation, and mainstreaming its rhetoric through sympathizers such as Republican presidential hopefuls Donald Trump and Ted Cruz. India's Hindu nationalists and the U.S. Islamophobia network operate on quite different legal terrains, but each has found openings through which to insert its messages of intolerance and hate. I will draw on these examples as I discuss the related problems of incitement and offense.

### **The Double-Sided Problem of Hate Spin**

It is helpful to think of incitement and offense as two sides of a versatile political strategy that I call "hate spin." Hate spin's more familiar face is incitement, commonly referred to as hate speech. The Council of Europe has defined hate speech as covering forms of expression that "spread, incite, promote, or justify racial hatred, xenophobia, anti-Semitism, or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants, and people of immigrant origins" (cited in Weber, 2009, p. 3). Hate speech has been studied exhaustively, mainly because of its role in fomenting genocide and political violence (Davison, 2006; Hamelink, 2011). A classic case from recent history is the dehumanizing rhetoric that Hutu politicians and media directed at Tutsis in the months leading up to the 1994 Rwandan genocide (Article 19, 1996; Thomson, 2007). Deadly hate speech is part of Indian politics. In 2013, inflammatory messages by Hindu nationalists incited riots in the town of Muzaffarnagar, killing more than 50 villagers and displacing some 50,000 Muslims into relief camps (Rao, Mishra, Singh, & Bajpai, 2013).

The other face of hate spin is politically motivated offense-taking. Archetypal international cases include the violent reactions to the Prophet Mohammed cartoons published by the Danish newspaper *Jyllands Posten* in 2005, and to the release of the *Innocence of Muslims* YouTube video in 2012 (Kampfner, 2012; Olesen, 2014). Domestic cases in the United States include the protests against what opponents dubbed the "Mosque at Ground Zero." The project was deemed an intolerable affront to the memory of victims of the September 11, 2001, attack on New York City (Elliott, 2010). In India, protesters have attempted to censor a string of scholarly historical works on the grounds that they offend Hindus' feelings (Thapar, 2007). Compared with hate speech, the phenomenon of offense-taking is poorly understood. Violent eruptions of righteous indignation tend to be mischaracterized as spontaneous, visceral responses to provocative expression. In small-scale cases of provocation—such as what U.S. jurisprudence terms "fighting words"—the angry reaction may indeed be instinctive. However, large and sustained outpourings of extreme offendedness are more likely than not to be deliberately manufactured. As with incitement, mass indignation is an act of political opportunism involving agents who decide when to activate mob action against opponents.

I define hate spin as a two-pronged political strategy of vilification or manufactured indignation used as a means of mobilizing supporters and coercing opponents. Hate spin can center on race, language, nationality, immigrant status, and other markers of identity. Here, however, I focus on what is probably its most problematic strain: religious hate spin.

Major hate campaigns, such as those of India's Hindu nationalists and the American Islamophobia network, involve both sides of hate spin: They switch fluidly between incitement and offense-taking. The two are closely linked. Both are instruments of identity politics: Leaders persuade an in-group to treat one chosen dimension of identity (religion, say) as supremely important while ignoring others that do not suit their purpose (such as class and, in the Indian case, caste and language). To reinforce the in-group identity, an out-group is constructed as the Other. Both types of hate spin leverage on fears and anxieties of the in-group and scapegoat the out-group as a central cause of its woes. Both types involve provocative speech, and both may culminate in public disorder and bloody violence. It would nevertheless be wrong to conflate the two. Incitement and offense-taking are fundamentally different in that their harms flow in opposite directions. In the case of incitement, vilification of the target group instigates oppression of that same group. With offense-taking, in contrast, the offending words go one way, and the sticks and stones fly in the reverse direction. The group that claims to have been vilified turns the tables and becomes the aggressor. This key distinction between incitement and offense, and the way both are used as techniques of contentious politics, need to be kept in mind in any policy response to hate spin.

### **Legal Frameworks**

Global human rights norms offer a sensible framework for dealing with incitement and offense. These norms emerge from the International Covenant on Civil and Political Rights (ICCPR), the United Nations treaty adopted by the General Assembly in 1966. Article 19 of the ICCPR enshrines freedom of expression as a right that belongs to everyone and that includes "freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers" (UN General Assembly, 1966). States may impose certain restrictions on this right, but only if this done according to clearly written laws. The laws must be proportionate and necessary to achieve purposes that the treaty deems legitimate, such as to protect public order and the rights of others. The permissible grounds on which speech can be restricted does not include protecting people's religious feelings; the prestige of religious leaders, institutions or icons; or the sanctity of any religion, belief system, or ideology. However, Article 20 of the ICCPR identifies hate speech—"advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence"—as a special category of speech that states must prohibit by law (UN General Assembly, 1966). Together, Articles 19 and 20 add up to a prescription that protects the right to offend while requiring the prohibition of incitement. Essentially the same approach is adopted in the regional human rights conventions of the Council of Europe and the Organization of American States (George, 2014).

India and the United States are both vibrant and open democracies with strong traditions of free speech, placing them within the large family of jurisdictions that are broadly consistent with the ICCPR. However, they have adopted approaches to extreme speech that are markedly different from each other, and from the international human rights standard. Ironically, both arrive at their divergent positions in reaction to a common history of religious antagonism and suspicion (Archer, 2001). The founding fathers of the American republic responded to these divisions with a constitution that would prevent state power from ever being used by one's opponents to suppress one's freedom of speech or freedom of religion. Thanks to the First Amendment, and to a series of Supreme Court judgments in the second half of the 20th century, the United States now has the world's most speech-protective constitutional order.

According to prevailing U.S. First Amendment doctrine, debates must be wide open to any viewpoint if collective decisions are to be regarded as democratic (Dworkin, 2009). As a result, most hate speech in public discourse is protected from state restrictions (Post, 2009). Whereas Article 20 of the ICCPR requires states to prohibit incitement to discrimination, the United States applies the higher threshold of incitement to imminent violence.

Pre-Independence India charted a very different path. British colonial policies spawned competition between Hindu and Muslim elites. When this disrupted public order, the authorities introduced laws that lowered the threshold for state intervention in speech (Nair, 2013). The habit of trying to prevent communal conflict by quashing shows of disrespect between communities was entrenched after Independence. The Indian Penal Code has several sections restricting freedom of expression that threatens communal peace. Under Section 153A, for example, individuals can be fined or jailed up to three years for any attempt to promote "enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony." Section 295A prohibits "deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs." These and similar laws have, in effect, created in India a right to be protected from religious offense, over and above the internationally recognized right to be protected from incitement to discrimination and violence.

Aside from criminal law, India also has strict election campaign rules that prohibit hate speech. The Election Commission's Model Code of Conduct states that parties and candidates cannot engage in activities that "aggravate existing differences or create mutual hatred or cause tension between different castes and communities, religious, or linguistic." Nor can they "appeal to caste or communal feelings for securing votes" (Election Commission of India, 2014, Section I). Therefore, while India qualifies for a place near the positive end of the freedom spectrum (Freedom House, 2016), its philosophy toward provocative speech stands in stark contrast to the U.S. formula. The comparison can stimulate our discussion about appropriate legal responses to hate spin.

### **The Inadequacy of Incitement Laws**

Since the legal space available for religious vilification is much wider in the United States than in India, one might expect to find far more hate speech in U.S. politics. Yet—withstanding Donald Trump's statements against Muslims and Mexicans during the Republican primaries in 2015–2016—hate speech is far more prevalent and pronounced in India's national politics. Political rhetoric in the United States has nothing that compares to the incitement of communal riots, the glamorization of past ethnic violence, and calls for citizens belonging to the country's largest minority group to "return" to wherever it came from—all of which have featured regularly in Indian politics (Anand, 2005; Datta, 2015; Dhattiwala & Biggs, 2012).

The contrast seems to vindicate the American faith in nonlegal solutions for hate speech. Civics education, a progressive civil society, and self-regulation by the media, political parties, and other institutions can cultivate strong social norms against bigotry that make legal intervention unnecessary. This is not a settled debate in the United States. A significant counterview, most cogently expressed by

critical race theory, is that historically disadvantaged minorities suffer structural inequalities that leave them unfairly vulnerable to vilification (Schauer, 1995). Equality will remain out of their reach as long as they are forced to function in a marketplace of ideas that is not corrected for racist and other forms of discriminatory speech (Fiss, 1996).

But even if laws against incitement are necessary, they are not sufficient. Legal responses suffer from a number of limitations. The most obvious problem is a chronic failure to enforce laws that are in the books. The Rabat Plan of Action, which spells out international experts' recommended responses to hate speech, says that states must ensure that people have access to fair and public hearings by competent, independent, and impartial tribunals; that courts are regularly updated about evolving international standards; and that police are trained to deal with incitement (Office of the High Commissioner for Human Rights [OHCHR], 2012). These are reasonable prerequisites to expect of established democracies, but many states in the global South are unlikely to achieve them, especially when they face other pressing priorities such as poverty reduction (Posner, 2014).

India's election regulations failed to deter politicians from playing the communal card or indulging in flagrant hate speech in the 2014 election. Although the Election Commission enjoys wide latitude, politicians can exploit its emphasis on due process and its need to be seen by all parties as fair and reasonable (Sharma & Joshi, 2014). By lodging appeals and counter-allegations, they can neutralize rulings or delay enforcement until after polling day. In one case, the Election Commission responded swiftly to the use of hate speech by a senior BJP leader, Amit Shah. It banned him from campaigning in the key state of Uttar Pradesh. But when Shah promised to abide by the Model Code of Conduct Code and not to repeat his offense, the ban was lifted, upon which he promptly reverted to the use of communal rhetoric (Asokan, 2014). After the BJP won Uttar Pradesh decisively, Modi rewarded Shah by appointing him party president. In the wake of many similar cases of impunity, observers have likened the Election Commission to "an old schoolmaster who keeps ranting while kids continue with their pranks" (Dalmia, 2014, para. 3).

India's 2014 experience has prompted a review of hate speech regulation in election campaigns. However, the regulatory gap may be ultimately unbreachable. There is a disconnect between how hate speech can be legally defined in a democracy and how it is actually practiced by its most proficient exponents. Since democracies need to keep discourse open to speech that shocks and offends, hate speech laws have to be narrowly tailored (Mendel, 2012). Hate speech laws should not be so broad as to punish, say, the artistic work of a playwright trying to represent forthrightly a community's deep unhappiness about how it is being treated by the majority group. Applying the human rights standard, offensive expression should be judged impermissible only if it meets certain conditions. First, it must contain a clear and direct call to action that would result in violations of a vulnerable community's rights (Weber, 2009). Second, it tends to be subject to sanction only if expressed in a style that offends social norms of respect (Post, 2009). Third, the speaker must be someone who is influential enough to motivate his audience to act (Weber, 2009).

The problem is that the most dangerous hate speech does not come packaged in a form designed for regulators' convenience. It is a distributed activity, with hateful meanings pieced together in the

audience's mind from bits and pieces derived from multiple sources. The division of labor in hate propaganda means that the most influential leaders—who tend to be the prime beneficiaries of a hate campaign—can keep their hands clean, at least in the eyes of the law. They use moderate language, but containing coded references to narratives of hate that are already circulating. The in-group they address understands what they mean, but their indirect language allows them plausible deniability when they are threatened by legal sanctions. More obviously inflammatory communication is outsourced to lower-level functionaries. Hate spin campaigns also rely on shared memories and symbols that may be extremely emotive but, having been diffused into the surrounding air, are an elusive target for the enforcers of hate speech law.

As practitioners of distributed hate propaganda, the Sangh Parivar is without peer in the democratic world. Its master narrative positions India as a Hindu homeland where the majority community's generosity and forbearance has been exploited by unscrupulous minorities, especially Muslims who arrived as invaders and are still aiming for dominance. According to this worldview, the "sickular" nationalism of the Congress Party has been too accommodating to minorities, making Muslims more and more demanding and unreasonable. Muslims' insatiable appetites and their propensity for terrorism can only be countered with strong leadership that is prepared to put them in their place and revive India's true glory (Anand, 2005; Puniyani, 2012). The notorious 2002 Gujarat pogrom—carried out with the complicity of the state government headed at the time by Modi—is framed within this larger Sangh Parivar narrative. The massacre of some 1,000 Muslims was described as an understandable retaliation for Muslim violence against Hindus and—more chillingly—as a triumphal event that finally taught the minority community a lesson (Dhattiwala & Biggs, 2012; Rajalakshmi, 2002).

These ideas are expressed in openly hateful ways by extreme groups within the Sangh Parivar such as the Vishva Hindu Parishad and the network's ideologically uncompromising lead organization, the Rashtriya Swayamsevak Sangh—the world's largest voluntary association. Cultivated for decades, these narrative themes are now available as a discursive resource for BJP politicians. Modi drew on these shared understandings in a 2014 campaign speech in Uttar Pradesh. Referring to recent episodes of communal conflict, he said, "Terrorists and criminals are rewarded in this state these days." He urged his audience to learn from his own state's history:

Ten years ago, in Gujarat, there used to be many riots. But now the people of Gujarat know they have to live in peace, to live free from the politics of polarisation. They know they have to take the path of development. And all is calm. (cited in Burke, 2014, para. 37)

Having never expressed remorse for the 2002 massacre that took place under his watch, nor disavowed Sangh Parivar statements that it taught Muslims a lesson, Modi's exhortation of a Gujarat solution to bring "calm" to Uttar Pradesh conveyed a chilling innuendo. Such ambiguous statements would not meet the legal definition of incitement. But it is not far-fetched to claim that they helped create an atmosphere that would result in increased discrimination and violence against minorities.

The U.S. Islamophobia network is less coordinated and powerful than the Sangh Parivar. However, it employs the same kind of division of labor. At its core is a small group of ideologues who generate misinformation about Muslims and Islam. Their network also makes use of validators who are perceived as credible, such as former military officers and individuals of Middle Eastern descent. The foot soldiers of the movement comprise single-issue organizations such as Pamela Geller's American Freedom Defense Initiative, which led the opposition to the Mosque at Ground Zero and organized a controversial Prophet Mohammed cartoon contest in Texas in 2015. Islamophobia rhetoric is also amplified by more established Religious Right organizations and influential evangelical leaders such as Franklin Graham and Pat Robertson. Mass media hosts on Fox News and conservative talk radio provide an outlet for these views (Duss, Taeb, Gude, & Sofer, 2015; Wajahit et al., 2011).

At the apex of the pyramid are national politicians. In 2012, the Republican National Convention incorporated opposition to sharia law, a key Islamophobia network position, into the party's platform. Texas senator Ted Cruz also echoed Islamophobic rhetoric (Duss et al., 2015). During the Republican primaries, he called for stepped-up law enforcement "to patrol and secure Muslim neighborhoods before they become radicalized" (Zezima & Goldman, 2016, para. 2). Donald Trump's sensational call for a ban on Muslims entering the United States referred to a survey showing that Muslim Americans were sympathetic to terrorists. The survey came from the Center for Security Policy, a leading organization at the hub of the Islamophobia network (Carroll & Jacobson, 2015). National politicians like Cruz and Trump thus justify and encourage discrimination and hate crimes against Muslims. However, their remarks, which are usually economical with words, would not in themselves meet the legal definition of incitement.

### **The Folly of Insult Laws**

One common response to the perceived ineffectiveness of incitement laws is to widen the regulatory net. Many countries, like India, prohibit the wounding of religious feelings or offense against religious beliefs. Such laws go against the international human rights norm that the right to freedom of religion or belief "does not include the right to have a religion or a belief that is free from criticism or ridicule" (OHCHR, 2012). Nevertheless, many states are convinced that early intervention in potentially inflammatory episodes is necessary to preserve public order. One problem with such an approach is that the insult laws may be applied, or even defined, in a discriminatory manner (OHCHR, 2012; Prud'homme, 2010). Pakistan, for example, has sections in its penal code specifically dedicated to protecting the Quran and the Prophet Mohammed from vilification, with penalties far more severe than for other kinds of offensive expression (Siddique & Zahra, 2008). Indonesia identifies six faiths as religions practiced in the country. It has a blasphemy law protecting the mainstream orthodoxies of these six faiths from whatever their respective religious authorities say is heretical. Radical groups have used this to ramp up discriminatory rhetoric and justify serial human rights violations against minority Muslim sects, especially the Ahmaddiyah community (Bush, 2015; Crouch, 2012).

The law in India—as well as in Singapore, for example—is less discriminatory, in that it extends to all communities the equal right to be offended. Regardless, laws against offense are profoundly counterproductive. They are based on the fallacy that deciding to act against offense is more prudent than waiting for full-blown incitement—like lowering a thermostat setting to be more sensitive to any rise in the

temperature of religious conflict. But this wrongly assumes that any provocative expression would be destructive if left unattended, ignoring the fact that some actually produce positive social outcomes. Attempting to preserve public order by prohibiting offense is like combating arson by putting out any fire—including in kitchens and kilns. A more sensible approach would be to try to balance the potential harms that may be caused by offense with the benefits of free speech. India's higher courts, when cases reach them, have often required that insult laws be interpreted narrowly, thus protecting the space for historical research, artistic expression, and social commentary (McLaughlin, 2010). However, in the long interims before these speech-protective rulings are issued, insult laws can be routinely abused to suppress legitimate criticism and oppress political opponents.

The legal regulation of offense requires subjective assessments of whether a provocative message is really as harmful as the offended parties claim it is. There are at least two reasons why authorities armed with insult laws tend to err on the side of suppressing or punishing offensive expression rather than defending free speech. First, it can be politically difficult for officials to declare publicly that religious hardliners are overreacting to offense. Such statements would open them to allegations that they are insensitive to the feelings of conservative religious communities, who may be politically influential even if they do not make up the majority. Second, states with insult laws are usually those that view controversies around religious offense through the lens of public order rather than human rights. Because public order is more likely to be disrupted by intolerant groups expressing outrage than by liberals fighting for freedom, the state often ends up giving a heckler's veto to the offended parties.

Insult laws might achieve their stated objectives of encouraging mutual respect if these laws were always used in good faith. In an open and diverse society, acting in good faith would entail asking for legal protection from offense only after one has made a sincere attempt to protect oneself from that offense. It would also mean calling for legal intervention only as a last resort, when there are genuine fears that the offense will lead to serious harms that the community cannot defend itself against. Finally, good faith use of insult laws requires a commitment to reciprocity. Groups that demand legal enforcement of respect, presumably in the name of democratic equality, should not deny that respect to others.

A look at how insult laws are actually used in practice shows that such hopes are fanciful and naïve. Hate spin agents go out of their way to locate—and fabricate—causes for righteous indignation. There is an inherent asymmetry in offense-taking. Unlike incitement, which by definition is always intentional, offense can be taken even when no insult is intended. The Mosque at Ground Zero project was in fact a cultural center incorporating a prayer hall. It was conceived as a venue for promoting interreligious understanding. This was why the plan enjoyed broad local support before—and, to the Lower Manhattanites' credit, even after—it was transformed by Islamophobia merchants into a symbol of jihadist terror (Marzouki, 2011; Nussbaum, 2012).

In India, one classic case of manufactured offendedness involved a scholarly essay about the Hindu epic, *Ramayana*. The essay, "Three Hundred Ramayanas," was penned by an eminent literary scholar, A. K. Ramanujan, who had a reputation as a great lover of the epic (Guha, 2013). The essay was added to the reading list of a Delhi University course in 2005. Sangh Parivar activists later decided to find fault with the essay's irrefutable claim that there existed various versions of the *Ramayana*. Their actions

included physical violence against the head of the university's history department and a civil suit. The university's Academic Council eventually decided to drop the essay from the reading list, not because there was anything wrong with it but because some readers might be offended by it (Mahaprashasta, 2011).

Once we understand how offense-taking is used as a tool of contentious politics, we begin to see why laws prohibiting offense generally backfire. Such laws, in effect, place the coercive muscle of the state at the disposal of the most intolerant sections of society. The contrast between India and the United States is instructive. In the United States, the strong constitutional protection of the right to offend within public discourse means that hate spin agents cannot expect their offense-taking campaigns to result in censorship. They are even less likely to succeed if their aim is to provoke discrimination against a religious minority. The First Amendment's establishment clause and free exercise clause prohibit the state from discriminating among religions or unfairly obstructing their practices, regardless of majoritarian pressures and riotous mobs. Therefore, the Islamophobia activists' campaigns to stop mosques from being built or to close down existing ones have reached a constitutional dead end. They are free to use these high-profile opportunities to speak ill of Islam—and this, indeed, is probably the real aim of their offense-taking—but their demonstrations are not rewarded or amplified by sympathetic state action.

In the Indian case, insult laws such as Section 295A oblige the state to investigate complaints about offense. In a full-blown offense-taking campaign, several complaints may be lodged in different locations, requiring the target to appear before multiple officials. Although there have been several cases in which higher courts have ultimately struck down attempts to censor expression deemed offensive, such rulings may take years to arrive. The Indian Supreme Court has a backlog of some 56,000 cases (Freedom House, 2013). Furthermore, free speech cases have not been consolidated into rigorous tests that are clearly understood and applied by lower courts. As a result, hate spin agents can count on the justice system to indulge for prolonged periods their campaigns of righteous indignation. While awaiting a final legal resolution, the very fact that a case is winding its way through the courts can be exploited to energize the hate group's followers and to justify further harassment and intimidation of its targets.

One prominent example is the case of historian of religion Wendy Doniger's scholarly book, *The Hindus: An Alternative History*. In line with mainstream Indian scholarship, Doniger treated the *Ramayana* as a work of fiction. When Penguin India published her book in 2010, Dinanath Batra, the head of the educational arm of the Rashtriya Swayamsevak Sangh, claimed that the book was full of heresies and launched a legal offensive. After four years of legal wrangling, Penguin India reached a settlement with Batra. It agreed to cease publication and to pulp all remaining copies. It said that Section 295A of the Penal Code made it "increasingly difficult for any Indian publisher to uphold international standards of free expression without deliberately placing itself outside the law" (Penguin India, 2014). In fact, there had been no precedent of the courts suppressing a historical work like Doniger's either under Section 295A or through a civil suit. Batra had won "by simply brandishing a toy gun" (Noorani, 2014, para. 6). It is more likely that Penguin capitulated out of fear for the safety of its employees, who were receiving credible threats of mob violence.

Removing insult laws would not put an end to politicized offense-taking, as the U.S. example demonstrates. It would, however, deny hate spin agents the state's coercive support for their claims of indignation. Insult laws incentivize offense-taking as a means of achieving various political objectives, such as mobilizing supporters, marginalizing opponents, and making claims on the state. Diverse, democratic societies need to encourage tolerance and compromise among communities, but a legal regime that rewards offendedness does the opposite. In India, it has produced copycat behavior: Muslim and Christian community leaders led the way in offense-taking, but Hindu nationalists followed suit by demanding an equal right to be offended (Tripathi, 2009). The cumulative result is what Salman Rushdie has called a "culture of offendedness" (cited in Gupta, 2013, para. 2).

### **"Lawfare" and Symbolic Legal Battles**

Thus far, I have examined the law as a framework within which hate spin operates. Laws concerning freedom of expression, hate speech, and religious offense provide the rules of the game, dictating what forms of speech and counterspeech are permissible or prohibited and shaping societal norms. But we should not underestimate the ability of hate spin agents to find opportunities on any legal terrain. What makes hate spin extraordinarily versatile and resilient is that its exponents do not need to win every legal battle. They can achieve their strategic objectives even when they appear to lose.

When hate groups try to get the judges or lawmakers to block the building of a place of worship or the sale of a book, the ostensible purpose is to remove corrupting influences from the community. But the real value of such challenges lies elsewhere. Courts and legislatures provide high-profile venues for the performance of intolerance and bigotry. The symbolic value of righteous indignation was noted in a study of the American temperance movement against alcohol consumption. Joseph Gusfield (1963) observed that the activists were not particularly concerned about enforcement. Their symbolic crusade was at heart an opportunity for traditional, rural communities to affirm their values and lifestyle at a time of great social change. A study of anti-pornography campaigns in the United States arrived at similar conclusions: activists mainly wanted "to demonstrate belief in and support for particular life style or set of 'basic values,' to have a large number of others join in that demonstration, and to have the demonstration recognized by significant others" (Zurcher, Kirkpatrick, Cushing, & Bowman, 1971, p. 236).

The Sangh Parivar's use of the judicial system has already been mentioned. But the most sophisticated exploitation of legal processes for hate spin probably occurs in the United States. This is despite the fact that U.S. law is, as noted earlier, the least indulgent in the world toward groups wanting their feelings protected from offensive expression. The Islamophobia network has mastered the use of legal processes as an ideological weapon. It even has a name for the strategy, "lawfare," coined by one of its chief architects, lawyer David Yerushalmi (Council on American-Islamic Relations, 2013). One of the most outrageous instances of lawfare transpired in the court battles over plans to build a mosque in Murfreesboro, Tennessee—a dispute even more protracted than the Mosque at Ground Zero project. As in Manhattan, Muslims in Murfreesboro had the Constitution on their side, so it was not surprising that the courts ultimately upheld their right to build their mosque. What the Islamophobes got out of the legal challenge, though, was a rash of anti-Muslim propaganda, which captured media attention, energized activists, and put ideological opponents on the defensive.

One such message, printed on signs in a July 2010 protest, was "Islam is not a religion." Zoning rules allowed the plot to be used only for residential purposes or for a house of worship. Therefore, the Muslims' plan would be illegal if indeed Islam were not a religion. Their opponents made this argument in court. Predictably, the judge ruled that Islam is indeed a religion. But in the process, the Islamophobia network succeeded in gaining national airtime for one of its key talking points: that Islam is nothing more than a violent political ideology and that discriminating against Muslims would therefore not violate the principle of religious freedom (Council on American-Islamic Relations, 2013; Duss et al., 2015).

Another ingenious lawfare tactic has been to purchase advertising space for anti-Muslim posters on buses and in subway stations (Duss et al., 2015). Led by the American Freedom Defense Initiative (AFDI), the campaign's superficial goal is to publicize the hate messages contained in the posters. The deeper objective is to spark controversy and trigger court proceedings. When transit authorities reject the ads, AFDI takes them to court for allegedly violating the First Amendment. The ensuing hearings have far greater reach and impact than the ads at the center of the controversy. To avoid a legal challenge, the Washington DC Metro decided to ban all issue-oriented ads so that it would not be found guilty of viewpoint discrimination. But AFDI spun this defeat to its advantage, alleging that the decision demonstrated how cowardly officials were letting radical Muslims set the agenda (Duggan, 2015). Such lawfare tactics illustrate how hate spin agents can work both around and through the law to achieve their goals.

### **Looking Beyond Speech Laws**

As stated at the outset, this article does not aim to offer a definitive answer to the question of where exactly democracies should set the legal limits for free speech. Instead, it has tried to clarify our thinking about religious incitement and offense as a necessary first step toward rational policy responses. Placed within the theoretical frame of contentious politics, case studies from the United States and India reveal hate propaganda to be an instrument used in dynamic and creative ways by political entrepreneurs. Incitement laws are necessary but inadequate against such campaigns, while laws against religious disrespect amount to a cure that is worse than the disease. All in all, it would be a mistake to place too much hope on speech laws as a solution to the hate spin problem. As repeatedly emphasized by human rights defenders, it is equally important to invest in civic and media responses (Article 19, 2009). Progressive civil society organizations and socially responsible media help to shore up the cosmopolitan values and social norms of respect that may ultimately provide the strongest defenses against intolerance.

This is not to say that states do not have a role. Beyond their legal powers, government leadership and other state institutions can exercise great influence on the direction of their societies through their political statements, administrative decisions, and powers of patronage. Such a role for the state carries a risk of compromising citizens' freedom of religion, accommodating some beliefs while disadvantaging others. Brettschneider (2012) offers a useful framework to ensure that the state uses its expressive capacity in fair and noncoercive ways. The state has a legitimate interest in using democratic persuasion to encourage citizens to embrace the ideal of free and equal citizenship, he says. The state is right to criticize discriminatory beliefs and practices as long as it does not attempt to change people's

minds through any means that would violate their fundamental rights, such as their freedom of conscience, expression, and association.

Solutions may also require legal and constitutional reforms—but not necessarily focused on speech. Because so many recent controversies have centered on expression, there is a tendency to define the problem in terms of free speech and its regulation. We may need to reorient the question of religious intolerance around the principle of equality. Antidiscrimination, equality-enhancing laws, as well as protection for the basic human security and other substantive rights of vulnerable groups are probably more important than what a society allows people to say about them. Defending the rights of religious groups against actual discrimination would secure their welfare far more effectively than trying to protect them from insult. Conversely, in a constitutional order that does not vigorously protect equality, laws against incitement or offense are very likely to become tools of repression in the hands of dominant groups. Minorities in such states typically suffer a double injustice. Whatever the laws state in the books, the system in practice gives impunity to those who use hate speech against minorities while at the same time declaring minorities' expression to be intolerably offensive. The regulation of speech, no matter how well designed, cannot compensate for the substantive inequalities that hate spin tries to deepen and exploit.

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