

Book Notes: The Hateful and the Obscene, by L. W. Sumner

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THE HATEFUL AND THE OBSCENE, BY L.W. SUMNER. TORONTO: UNIVERSITY OF TORONTO PRESS, 2004. Pp. xi + 275. \$29.95 paper.

BY ADRIEL WEAVER

In *The Hateful and the Obscene*, Wayne Sumner first constructs a theoretical framework for understanding free expression and its limits, and then applies it to two of the most troublesome forms of speech: hate propaganda and pornography. In so doing, Sumner challenges both his own pretheoretical convictions and the state of Canadian law and policy.

Sumner begins by reviewing J.S. Mill's utilitarian approach to expression, from which he draws two conditions necessary for any coercive limitation: first, that the expression must cause harm to others (Harm Principle) and, second, that the limitation must result in a better balance of benefits over costs (Consequentialist Principle). Sumner argues that, unlike the U.S. Supreme Court, which distinguishes categories of speech that merit different degrees of protection, the Canadian Supreme Court has adopted an approach that is more in keeping with Mill's approach. This is evident in the landmark cases of *Keegstra*, in which the Court used the *Oakes* proportionality test to engage in an explicitly consequentialist balancing of competing rights and *Butler*, where it affirmed that restrictions on pornography must be harm-based rather than morality-based.

Sumner is critical of the latter decision, however, insofar as it defines harm by reference to community standards of tolerance. Taking the Harm Principle seriously requires abandoning moralistic or paternalistic justifications for limits on free expression and attending carefully to the kinds and evidence of harm resulting from hate speech and pornography. Sumner takes up this task in chapter 5, and finds that the social scientific evidence of harm is scarce and unreliable, particularly where the harm is systemic and diffuse. Applying a normative framework that is both harm-centred and evidence-based, Sumner concludes that legislation that prohibits or authorizes censorship of hate propaganda and obscenity ought to be struck down, and child pornography defined more narrowly.

The Hateful and the Obscene combines philosophical depth and analytical rigour with lucid and engaging prose. Readers of the book will be unsurprised to learn that it was recently short-listed for the Donner Prize, awarded annually in recognition of excellence in Canadian public policy writing.
