DIGNITY AND HATE SPEECH:

JEREMY WALDRON'S DIGNITY-BASED ARGUMENTS

FOR REGULATING HATE SPEECH

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On my honor, I have neither given nor received unauthorized aid on this assignment.

MY PREOCCUPATION WITH HATE SPEECH

I am preoccupied with the problem of hate speech. Questions about speech continue to be central to my study of political philosophy and law. Hate speech, because it raises significant legal and philosophical questions simultaneously, captured my attention early on in college and continues to interest me. I have written five papers about hate speech in the seven semesters I have so far completed at CC. This is my sixth and (maybe) last.

In a paper I wrote in April 2020 I argued that hate speech is incompatible with free speech and hostile to the postulated ends of free speech — truth and progress, safeguarding democratic freedoms, and self-actualization. Looking back on that paper and the others I have written, I realize that I largely neglected dignity-based arguments for regulating hate speech even though I had (unknowingly but intuitively) made such an argument in my first paper on hate speech written in the winter of 2019. Here I consider the dignity-based arguments for hate speech regulation made by Jeremy Waldron in *The Harm in Hate Speech.*

SHIFTING VIEWS

> *"Today fewer students are willing to view virulent racism and white supremacy as mere ideas that do not materially impact them."*[1]

I came of political age around the time Nazis marched on the University of Virginia campus in Charlottesville. Trump, the only president whose election I clearly remember, refused to condemn white supremacists, saying instead that there were "very fine people, on both sides."

[1] Ulrich Baer, *What Snowflakes Get Right: Free Speech, Truth, and Equality on Campus,* (New York: Oxford University Press, 2019), 64.

White supremacy, xenophobia, and antisemitism, far from being ‘mere’ ideas, are forces that have a material impact on how my peers, my communities, and I live our lives. It is difficult to deny that hate speech, discrimination, and hate crimes are related.

Could the slurs targeting my Muslim classmates on Tuesday be entirely isolated from the Thursday assault of a Muslim woman on the local bus? Is the Holocaust denial I overheard in the hallway unrelated to the swastika drawn on my desk, unrelated to the battering of an orthodox man in New York? Can the racist texts sent from one police officer to another be decoupled from the officer’s violent treatment of Black men?

Synagogue shootings and Holocaust denial are discussed in Jewish communities with a mix of resignation and fear. Racial abuse caught on camera and misogynistic internet posts that advocate violence against women are part of everyday online existence. It no longer surprises me when slurs are used on campaign trails or when anti-Semitic conspiracy theories are promulgated on the House and Senate floors. Under these conditions, calls for greater regulation of hate speech are not surprising, although they are often met with alarm.

Numerous surveys tracking college students' views of free speech are conducted each year. Far from showing that college students hate the First Amendment and have turned their backs on free speech, surveys show something much more interesting — that popular understandings of speech, particularly of hate speech, are changing.

College students attest to the importance of free speech and to the necessity of fostering inclusion at the same time. “Close to 7 in 10 college students (68%) regard citizens’ free speech rights as being ‘extremely important’ to democracy. Nearly the same percentage (69%) believe an

inclusive society that is welcoming to diverse groups is 'extremely important.'"[2] College students regard free speech and inclusion as reconcilable.

This reconciliation includes hate speech regulation in some form. An increasing majority of college students — upwards of 70% — believe that colleges should be able to restrict racial slurs and costumes that stereotype certain racial or ethnic groups.[3] But this need not be cause for despair. The kids haven't given up on free exchange: "Nearly three-quarters believe colleges should not be able to restrict expression of political views that are upsetting or offensive to certain groups."[4] The understanding of speech that emerges here distinguishes between speech that offends and slurs that are perhaps of such slight value that we might gain more than we lose by regulating them.

This shift has not come about by accident. The feminist and race scholars of the '80s and '90s worked to bring this change about by incorporating lived experiences into their theoretical works.[5] Working in the realm of what Charles Mills called "non-ideal theory," these theorists developed new critiques of the way things are and of existing theories about how things ought to be, by taking the experiences of oppressed and disenfranchised people seriously. Popularizing these critiques has done much to change how we think about speech.

My aim in this paper is to participate in an ongoing conversation on hate speech in a way that might serve to change minds and clarify new ways of thinking about some of the legal and philosophical issues pertaining to hate speech.

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[2] Gallup Inc., *The First Amendment on Campus 2020 Report: College Students' Views of Free Expression,* (USA: Gallup, 2020), 1. It is worthwhile to note that the report bears the names of the John S. and James L. Knight Foundation, the Charles Koch Foundation, and the Stanton Foundation. It is not clear how involved these foundations were in the creation of this report.
[3] Gallup Inc., *First Amendment on Campus,* 20-28.
[4] Gallup Inc., 21-28.
[5] Baer, *What Snowflakes Get Right,* 93.

STARTING POINTS

It is helpful to first set down some starting points, to outline some ideas that are essential to the conception of speech I use here, to dispel some speech myths, and to respond to common knee-jerk responses to the suggestion that we ought to regulate speech.

Defining Free Speech

One common but mistaken understanding of the right to free speech is that free speech means being able to say whatever one wants whenever one wants without facing consequence or criticism. People do not have "the right to speak their minds and voice their opinions in public without fear of being shamed or shunned."[6] This is principally an American misunderstanding. The right to free speech, as a general rule, consists of protection from government abridgment of one's direct and symbolic speech. The right to free speech does not protect individuals from the criticism of other individuals or shield them from social consequences. Free speech means that, most of the time, individuals can express themselves through direct speech or symbolic speech without the federal, state, or local government punishing them for their speech or prohibiting them from speaking. There are, and have always been, a number of exceptions to the rule that the government can make no law abridging the freedom of speech.

What Free Speech Is Good For

Conspicuously missing from many discussions about free speech and hate speech is any discussion of what free speech is good for. Free speech is not, unless one talks just for the sake of talking, an end in itself. Three things that free speech is commonly thought to be good for are

[6] The New York Times Editorial Board, "America Has a Free Speech Problem." The New York Times. 18 March 2022. https://www.nytimes.com/2022/03/18/opinion/cancel-culture-free-speech-poll.html

democracy, truth and progress, and self-actualization.

In *On Liberty,* J.S. Mill, the proverbial father of free speech, argues that free speech is good for two reasons — because it is necessary to avoid governmental consolidation of power and because it promotes progress and the discovery of truth.[7]

First, Mill argues, free speech is understood to be necessary for democratic freedoms because it is a means of protecting all of our other freedoms. For many, freedom of speech is a sort of insurance policy for all of our other liberties. According to Mill, without freedom of speech, we lack the means to defend our other liberties.

Second, Mill says, the competition of ideas in a free marketplace of speech is necessary for the ends of truth and progress. Opinions, Mill says, are validated by being put in competition with other opinions. Bad opinions will fail when they are refuted, disbelieved, or proved wrong. The better opinions, he argues, will win out and yield truth and progress. The openness of the marketplace is of great import to Mill because the dangers of stifling any opinion, Mill writes, are (1) that the opinion could be true, (2) that the opinion may contain a portion of truth, and (3) that depriving society of the chance to contest a false opinion enfeebles societal opinion and impedes progress.

The third thing that free speech might be good for is self-actualization and personal improvement. The capacity for speech, Aristotle argues, is what makes man a political animal.[8] Though other animals use 'voice' or 'sound' to express pain and pleasure, human speech permits us to discuss good and bad, the beautiful and the ignoble, the just and the unjust. Human speech is inherently political because it allows us to make distinctly political considerations. For Aristotle,

[7] John Stuart Mill, *On Liberty,* (Indianapolis, IN.: Hackett Publishing Company, 1978), 15-53.
[8] Aristotle, *Aristotle's Politics,* translated by Carnes Lord, (Chicago, IL: University of Chicago Press, 2013), I.3 253a.

political participation is our best means of self-improvement because political participation presents us with problems beyond our current capacities, challenges us to think about our impact on a greater political whole, and encourages us to consider the full implications of our speech and action. Building on Aristotle, Hannah Arendt argues that engaging in political speech and being heard is what makes us fully human.[9] This understanding of speech — as a means of self-improvement or self-actualization via political participation — is one of the reasons that free speech, particularly political speech, is so highly valued by the philosophical tradition and considered so deserving of protection.

Speech Acts

Speech act theory, simply put, says that we do things with speech. Utterances can be understood as acts because an utterance does something when it is spoken (e.g., it orders, asserts, promises) and elicits a response when it is heard (e.g., it persuades, frightens, inspires). Key to speech act theory is the idea that what the utterance says, what the speaker is doing, and what the listener does in response are distinct but related.

In *Only Words*, feminist legal scholar Catharine MacKinnon argues that speech can be, in and of itself, a discriminatory act or an assault.[10] Since hate speech, like other speech, does things, hate speech might cause harm rather than merely promote or incite harm. Hate speech might subordinate, it might assault. A large part of my evaluation of Waldron dignity-based argument for regulating hate speech consists of considering what exactly hate speech does — to its listeners and to the communities that speakers and listeners belong to.

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[9] Hannah Arendt, *The Human Condition* (Chicago, IL: The University of Chicago Press, 1958).
[10] Catharine A. MacKinnon, *Only Words*, (Cambridge: Harvard University Press, 1993).

Myths and Knee-Jerk Reactions

Defining Hate Speech

The first "speech myth" I hope to dispel is that it is impossible to define hate speech. In discussions I have had about hate speech, someone usually asserts that it is impossible to define hate speech, implying that any discussion about hate speech regulation is pointless because we cannot concisely and precisely sum up what hate speech is. Yet, other countries, including all the liberal democracies in the world save for the US, have defined hate speech in some way and have hate speech regulations of some sort.[11]

Despite an abundance of definitions and regulatory options to choose from, opponents of hate speech regulation are still apt to ignore the definitions put forth by other countries or to dismiss international attempts to define hate while holding up America as a shining example of truly free speech.

But there are also some American definitions to work with. The obvious examples are the definitions set down by the international treaties we have signed. Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination states that state signatories condemn propaganda and organizations that are based on theories of race or group superiority or that attempt to promote racial hatred and discrimination, and commits states to adopting measures to eradicate acts of and incitement to acts of such discrimination. [Signatories]:

> (a) Shall declare as an offense punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin, and also the provision of any assistance to racist activities including the financing thereof;

[11] In *Hate Speech Law*, Brown helpfully sorts these laws into 10 clusters: (1) Group defamation; (2) Negative stereotyping; (3) Expression of hatred; (4) Incitement to hatred; (5) Threats to public order; (6) Denying acts of mass cruelty; (7) Dignitary crimes and torts; (8) Civil law and human rights; (9) Expression oriented hate crimes; (10) Time, place, and manner restrictions.

> (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offense punishable by law; [and]
> (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

The United States was an early signatory to the convention.[12] The US signed on with reservations about Article 4 and noted it would do nothing contrary to the Constitution of the United States. This reservation is the reason we have not seen the Klan banned, anti-Muslim hate groups fined for canvassing downtown, antisemitic magazines forced out of print, racist senators removed, and police protection for alt-right marches revoked in the years since Article 4 went into force in 1969. The Constitution is currently understood to protect these groups and activities, but it has not always been understood to do so. However, that is not at issue here; the point is that one convention alone gives us ample definitions to begin with.

The less obvious place to look for distinctly American definitions of hate speech are expression- oriented hate-crime laws, and time, place, and manner restrictions. While these laws do not regulate speech *per se*, they increase penalties for crimes when the perpetrator expresses hatred for, or appears to have been motivated by, hatred of the victim.

Consider the Supreme Court's ruling in *Wisconsin v. Mitchell* that speech can be used to "establish the elements of a crime or to prove motive or intent" and that Wisconsin's heightened penalty for racially motivated crimes was permissible.[13] If hate speech regulation were ever to take shape in the United States, it is likely the courts would play a central role in defining and refining the parameters of such speech.

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[12] Mari J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" in *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment,* (Boulder: Westview Press, 1993), 26-31.
[13] *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), 488-489.

Of course, *Mitchell* raises another question for proponents of hate speech (and hate crime) regulation: Ought such regulation be race neutral so that it would prohibit what might be considered anti-white or "reverse racist" speech. In *Mitchell,* Black defendants were punished for a race-motivated crime against a white victim. In our current moment, when "race neutral" rules are being used by school districts to ban lessons about white supremacy and texts about racism, we do well to worry about the intended or unintended consequences of rules regulating hate.

The First Amendment Limit

Americans often adopt a First-Amendment absolutist position as their starting point for thinking about speech. This is what people do today when they invoke the First Amendment in response to the mere suggestion that hate speech ought to be regulated. But hate speech was not always protected by the First Amendment. In the '40s and '50s, regulating hate speech was not considered a violation of the constitutional right to free speech. Two Supreme Court cases in particular — *Chaplinsky v. New Hampshire* and *Beauharnais v. Illinois* — show us just how different past First Amendment jurisprudence was.

In *Chaplinsky v. New Hampshire* the US Supreme Court affirmed that the right to free speech was among the constitutional rights that are protected by the Fourteenth Amendment, yet it still upheld a New Hampshire statute which prohibited name-calling and offensive, derisive, or annoying words or exclamations to be spoken to another person in public. The Court ruled that states could regulate "fighting words" without violating freedom of speech because fighting words

> … by their very utterance inflict injury or tend to incite an immediate breach of the peace… It has been well observed that such utterances are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[14]

[14] *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), 572.

Chaplinsky allowed states to limit speech in order to preserve public peace, listed the unprotected categories of speech, and acknowledged that speech, in and of itself, can "inflict injury."

Fighting words remain unprotected, but the category has narrowed, and the notion that an utterance can inflict injury has been largely abandoned. Although instances of hate speech could be considered fighting words, the Supreme Court has generally not agreed. For the most part, the Court denies that hate speech "tend[s] to incite an immediate breach of peace."[15]

This is due, in large part, to the fact that hate speech is often public rather than personal, meant for the public at large to hear rather than directed at a specific individual. Because hate speech is often public, group defamation statutes have been used in the US and are used in other countries to regulate hate speech.

In *Beauharnais v. Illinois* the US Supreme Court affirmed the constitutionality of an Illinois group defamation statute that stated:

> It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots…[16]

The majority in *Beauharnais v. Illinois* held that Illinois could punish defamation against a group of this sort without violating the First and Fourteenth Amendments. The majority justified their holding by arguing that this form of group libel worsened historical racial strife.

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[15] *Chaplinsky v. New Hampshire*, 572.
[16] Beauharnais v. Illinois, 343 US 250 (1952).

Neither *Chaplinsky* nor *Beauharnais* were ever overturned, but they were weakened over time through subsequent cases. Not long after *Chaplinsky* and *Beauharnais*, the Court rolled back these sorts of speech limits and group protections, preferring to favor strong protection for individual speech rights. A handful of cases show the Court's shift from upholding group protections to favoring individual rights. *R.A.V v. St. Pau*l illustrates just how much the Court's approach to speech, and hate speech in particular, has changed.

In *R.A.V. v. St. Paul*, a group of teenagers were charged under the city's anti-bias statute for burning a cross on a Black family's lawn.[17] St. Paul's Bias-Motivated Crime Ordinance prohibited "the display of a symbol which one knows or has reason to know 'arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.'"[18] The court ruled that the city's ordinance violated the First Amendment because it prohibited otherwise permissible speech "solely on the basis of the *subjects* the speech addresses"[19] and held that states could not use content-based restrictions to achieve a compelling state interest. The threat of censorship, the court decided, outweighed the state interest in ensuring "basic human rights of members of groups that have been historically subjected to discrimination, including the right of such group members to live in peace where they wish."[20]

It is not entirely clear how *R.A.V* should be interpreted. With three concurring opinions, it is evident that there was quite a bit of disagreement among the justices about what exactly made the ordinance unconstitutional. Regardless, *R.A.V* has had the effect of making it incredibly difficult to regulate the content of speech, no matter how compelling the interest in doing so may be.

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[17] *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).
[18] *St. Paul Bias-Motivated Crime Ordinance*, St. Paul, Minn., Legis. Code § 292.02 (1990).
[19] *R.A.V. v. St. Paul,* 433. Emphasis not mine.
[20] *R.A.V. v. St. Paul*, 395.

Prior to *R.A.V*, the standard of strict scrutiny was used to evaluate content-based regulations pertaining to race, nationality, religion, class, and citizenship. If the interest was compelling and the rule narrowly tailored, regulations prohibiting prejudicial and discriminatory hate speech based on their content could be used. After *R.A.V*, content- and subject-based regulations, such as those sometimes instituted by universities to protect minority students from hateful speech, were deemed unconstitutional. Content-based regulations cannot meet the standard of strict scrutiny under *R.A.V.*

This new flavor of constitutional interpretation centers on a fear of censorship and emphasizes the primacy of individual rights while steering clear of content-based restrictions. Hate speech is now broadly understood to be protected. Still, some categories of speech remain unprotected. The fact that various sorts of speech are already regulated might be of comfort to those who fear that government regulation of hate speech will result in increased censorship or draconian regulation of all speech. Thankfully, the slope doesn't seem all that slippery.

Today there are two main exceptions to free speech — action and harm. When speech crosses the action/harm line it becomes constitutionally unprotected. Some speech is understood to be, in and of itself, an action. Most proscribable speech crosses into the territory of action and harm at the same time, but some speech crosses only one line or crosses them separately.

Fighting words are proscribable speech because they cross the action line by tending to provoke a fight. Words that incite "imminent and unlawful action" are called incitement and are not protected. Incitement crosses the action/harm line in one step.[21] True threats, "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," need not even cross the action

[21] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

line or the harm line to be prohibited; the intent to cross the action/harm line is enough. [22] Harassment is considered to be a harmful act even when it consists solely of speech. Defamation (libel when it is written, and slander when it is spoken) consists of false speech, maliciously published or communicated to a third person. Defamation crosses the harm line by resulting in some form of damage, usually to a person's reputation or status.[23]

Hate speech may occasionally fall under any of the categories of unprotected speech — fighting words, incitement, true threats, defamation, and harassment — but most of the unprotected categories are only understood to be unprotected when a particular individual is provoked to fight, threatened, defamed, or harassed. However, hate speech generally targets a group rather than a particular individual. Hate speech might be unprotected if it provoked a person to fight, but it would be unprotected under the fighting words exception. Similarly, if hate speech becomes harassment, it is unprotected because it is harassment, not because it is hate speech. The same is true for threats and incitement. But hate speech doesn't always incite imminent lawless action or make true threats, so we can't count on these exceptions.

The US would do well to wonder why other countries have elected to do what we often balk at the mere suggestion of. As Alexander Brown puts it, if First Amendment absolutists "are to be believed, then almost the entire world is both deluded and gratuitously unfree."[24]

To get at the heart of the hate speech problem, the first question we need to answer is not whether hate speech is protected or even properly protected by the First Amendment (if the brief legal history given above teaches us anything, it is that First Amendment jurisprudence is subject

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[22] *Watts v. United States,* 394 U.S. 705 (1969)

[23] *Times v. Sullivan*, 376 US 254 (1964). Times v. Sullivan established that for something to be considered libel, it must be not only false, but also published with "actual malice" — not just recklessly but intentionally. This made it difficult to institute and uphold criminal and group libel laws, like the one in *Beauharnais*.

[24] Alexander Brown, *Hate Speech Law: A Philosophical Examination,* (New York: Routledge, 2015), 1.

to change), but what hate speech is and what hate speech does. We can deal with what the First Amendment will allow later. First, consider whether hate speech should be allowed and whether it might serve us better to regulate it. That is, consider whether hate speech is harmful, how it is harmful, to whom, and what a polity might lose or gain by tolerating or not tolerating it, and regulating or not regulating it.

DIGNITY

Many recent works arguing for hate speech regulation ground their arguments in the notion of human dignity. Jeremy Waldron's *The Harm in Hate Speech* (2012) has been particularly important in popularizing dignity-based arguments for hate speech regulation. Because *The Harm in Hate Speech* has been widely read, responded to, and criticized, it sits at the center of hate speech discussions and so is the starting point for my inquiry into dignity and hate speech.

What even is dignity?

Broadly speaking, theories of dignity seem to fall into three categories. These categories are inherent dignity, substantive dignity, and recognition dignity. I depend heavily on Neomi Rao's article "Three Concepts of Dignity in Constitutional Law." Her descriptions of these three dignity categories are especially helpful since we are concerned with theories of dignity in law, particularly in speech law.

Inherent Dignity

Theories of dignity that fall into the category of inherent dignity share four principal features. First and most obviously, they understand dignity as something that human beings are born

with. Human beings are naturally endowed with inherent dignity because they are a human being, or on account of some part of their humanness. Regardless of its root or origin, inherent dignity is understood as natural to all human beings. This is the second feature of inherent dignity — it is universal. Because inherent dignity is universal, it also serves as a basis for or articulation of equality between people. Equality is the third feature of inherent dignity; whether presumed or actual, this sort of equality plays an essential role in the development of liberal thought and law. Because inherent dignity is universal and equal between people because they are people, not because they live a certain life or are a certain way, inherent dignity is compatible with the sort of value pluralism embraced by liberal societies — feature four.[25]

The idea that human beings possess inherent dignity is often grounded in human reason, or liberty and autonomy. Rationality-based arguments go something like this: “Human beings have equal dignity because they can choose, not because of what they do choose," or “Human beings have equal dignity because they can think, not because of what they think.” And autonomy- and liberty-based arguments go something like this: “Human beings have equal dignity because they are free beings" or “Human beings have equal dignity because they are ends in themselves.”

Substantive Dignity

Notions of substantive dignity do not often enter into discussions of dignity-based hate speech regulation because substantive dignity adjudicates between values promoting “substantive judgements about the good life”[26] and so is not compatible with the sort of pluralism emphasized by liberal societies that are committed to protecting freedom of speech. In other words, people

[25] Neomi Rao, “Three Concepts of Dignity in Constitutional Law,” *Notre Dame Law Review,* vol. 86, no. 1 (2011): 196-202.
[26] Rao, “Three Concepts of Dignity,” 221.

have no guarantee of dignity if we understand dignity as substantive dignity because one might lack or lose dignity if she "fails to exhibit certain behaviors or qualities."[27] Substantive dignity constrains individual action by "punishing" failure to conform to the standards by which dignity is doled out. Punishment may take the form of social disapproval, or, when positive conceptions of substantive dignity are made into law, by consequences in criminal or civil courts.

Substantive dignity might still have a place in our understanding of hate speech, however, in settings like colleges and universities. There are few places where hate speech controversies are more robust than colleges and universities. In the university setting, those who conform to norms of speech-behavior garner respect and social standing, but those who violate those norms are likely to damage their reputations.

Recognition Dignity

What does it mean to say that our dignity depends on recognition? There are two sorts of recognition at work here — recognition as identification and recognition as acknowledgement. Recognition as identification refers to our ability to identify with our society, to feel a part of it rather than alienated and excluded from it. Recognition as acknowledgment refers to how others see us, whether neighbors and strangers recognize us as their equals. There is, of course, a question as to what it means to be acknowledged as an equal and what it takes to feel a part, rather than apart.

Most theories of recognition dignity agree that civic equality is requisite. But many theories contend that some sort of equal social recognition is necessary as well. Recognition dignity depends on "recognition by others in the political and social community."[28]

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[27] Rao, 222.
[28] Rao, 248.

Theories of recognition dignity are grounded in the belief that a political community is more than a collection of individuals bound together by a contract, contradicting the mainstream American understanding of human beings as autonomous rights-possessors whose associations with others are voluntary, temporary, and tenuous.

Theorists argue with varying forcefulness that recognition in the community is necessary, good, or useful to human beings. So too do theorists differ in how closely tied they understand the individual and the community to be. Joseph Raz, for example, claims that a person's relationship to their society is a vital part of their wellbeing and that personal prosperity normally depends on a person's ability to identify with and not feel alienated from their community.[29] Michael Sandel articulates the connection between the individual and community much more forcefully:

> *"[C]ommunity describes not just what they have as fellow citizens but also what they are, not a relationship they choose (as in voluntary association) but an attachment they discover, not merely an attribute but a constituent view of their identity."*[30]

According to Rao, recognition dignity requires that both the state and the community respect the unique identity of an individual or group. Recognition dignity further requires that the state respect and support the process of a group or individual's "self-creation." This marks yet another departure from the American liberal tradition in which the state is only required to protect what the individual has — negative liberties. The German Basic Law attempts to meet the demands of recognition dignity by committing itself to protecting human dignity via the rights of personality and reputation.

Because Rao fails to escape the individualist thinking that is an important part of her helpful descriptions of the inherent and substantive dignity categories, she mischaracterizes the harm of

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[29] Joseph Raz, *"Free Expression and Personal Identification,"* referenced in Rao's "Three Concepts of Dignity," 247.

[30] Michael Sandel, quoted in Rao's *"*Three Concepts of Dignity."

damaged recognition dignity. This mischaracterization is shared by many critics of recognition dignity theories. In theories of recognition dignity, dignity is something communal, and though Rao understands this, she still shrinks harms done to recognition dignity to individual hurt feelings, rather than a loss of social and political status and community membership. We experience harm to this dignity "when we feel misunderstood, insulted, or demeaned," she says.[31] I contend that the harm is really when we are alienated from the community and relegated to a class of not-quite-full or less-than-equal citizens.

RECENT DIGNITARIAN THEORIES

Jeremy Waldron's *The Harm in Hate Speech* (2012) did much to popularize dignity-based arguments for hate speech regulation. It was the first book I read on the topic. Because *The Harm in Hate Speech* has been widely read, responded to, and criticized, it is at the center of hate speech discussions and has served as a starting point for many helpful contributions to free speech jurisprudence. Similarly, it is the departure point for my inquiry into dignity and hate speech.

In *The Harm in Hate Speech* Waldron takes a step back from the legal debates that make up much of American discourse on hate speech. Standing with one foot in the feminist and critical race theory tradition and one in the Rawlsian liberal tradition, Waldron makes an argument for regulating hate speech on the grounds that hate speech attacks one's assurance of equal dignity and thus one's ability to know that others will recognize her as a political and social equal.

I proceed by walking through Waldron's argument as I understand it, raising questions and criticisms when warranted. I expand or revise Waldron's theory in three areas. First, I try to ground

[31] Rao, 267.

the notion of recognition in the philosophical roots of the American tradition — something Waldron does not do, although doing so perhaps strengthens and clarifies his case. Second, I reframe Waldron's assurance argument — the argument that hate speech regulations are justified on the grounds that people must know they are recognized as equal members of the community — using recognition rather than Rawls. Third, I make a case that Waldron begins to make only by analogy, that hate speech could be regulated on the grounds that it constitutes and causes subordination.

Dignity in Waldron

Waldron grounds his argument in critiques of classical liberalism leveled by radical feminists Catharine MacKinnon and Andrea Dworkin and by critical race theorists Richard Delgado, Jean Stefancic, and Mari Matsuda. As such, Waldron departs from the natural rights tradition, beginning instead with a theory of recognition dignity:

> A person's dignity is not just some Kantian aura. It is their social standing, the fundamentals of basic reputation that entitle them to be treated as equals in the ordinary operations of society. Their dignity is something they can rely on — in the best case implicitly and without fuss, as they live their lives, go about their business, and raise their families.[32]

Hate in Waldron

Waldron focuses primarily on written hate speech. He has in mind the racist messages sprawled across your Twitter feed, the homophobic signs of the Westboro Baptist Church proclaiming that "God hates Fags," the anti-immigrant graffiti scrawled on a downtown wall, the anti-Muslim banners flown during rallies, and the anti-Semitic pamphlets that appear overnight on college campuses.

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[32] Jeremy Waldron, *The Harm in Hate Speech, (Cambridge Massachusetts: Harvard University Press, 2012), 5.*

Written speech of this sort is special because it is both public and enduring.[33] It is the sort of speech that might have once been considered group libel when the United States had such group defamation laws. These messages, Waldron argues, should be considered hate speech because of their public effect, not because they express the speaker's personal hatred or feeling toward a group.[34] Whether the speaker truly hates Jews does not particularly matter. What matters is that his speech serves to "stir up" hatred against Jews, or whatever his target group may be. I do not wish to dismiss spoken hate speech as insignificant, nor to claim that Waldron's theory is not applicable to spoken words.[35] Waldron's framework might easily include slander (defamation of the spoken variety), but expanding Waldron's framework is a task I'll leave for another time. Spoken words pose special problems of their own.

In Waldron's view hate speech must be measured by its effect. It is unlike a hate crime in this way, for hate crimes have more to do with the perpetrator's views, beliefs, or motivation, and hate speech has more to do with what the speech does.

> [Hate speech laws] are trying to punish speech—or prohibit or limit speech—that stirs up hate against an identifiable group. So it is speech that has hatred as its effect, rather than speech that has hatred as its cause, or speech that is just full of hate.[36]

Speech act theory can clarify the distinction Waldron makes here. According to speech act theory, every utterance consists of three distinct but related parts. First, there is the act of speaking and the meaning of the utterance — locutionary act or meaning. There is the illocutionary act or the thing the speaker does with her words. And there is the effect the utterance has on the listener

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[33] Waldron, 37.
[34] Waldron, 33.
[35] Waldron, 37.
[36] Jonathan Friedman, "Campus at a Crossroads: Free Speech, Truth, and Democracy in an Election Year" *Pen America,* 5 February 2020, https://pen.org/campus-crossroads-free-speech-truth-democracy-election-year/.

— the perlocutionary act or perlocutionary effect. Waldron is concerned with the perlocutionary components of hate speech, with the effect speech has on its listeners.

In the first place, hate speech has the effect of stirring up hate.[37] As Frank Collin, leader of the National Socialist Party of America and planner of the Skokie march put it: "We want to reach the good people — get the fierce anti-Semites who have to live among Jews to come out of the woodwork and stand up for themselves."[38]

But if Collin's only aim was to galvanize non-Jews, to wake up dormant antisemitism, he wouldn't have gone through the trouble of finding a Jewish community of Holocaust survivors to march in. Aside from stirring up hatred, hate speech has, and is designed to have, an effect on its victims. It is intended to frighten, shock, and retraumatize. Of the Jewish community members Collin said:

> I hope they're terrified (the survivors). I hope they are shocked. Because we are coming to get them again. I don't care if someone's mother or father or brother died in the gas chambers. The unfortunate thing is not that there were six million Jews who died. The unfortunate thing is that there were so many Jewish survivors.[39]

In the weeks leading up to the planned Skokie march, the NSPA plastered the North Shore area with antisemitic leaflets of the sort Waldron would call libel. The leaflets depicted a caricature of a Jew choked by a swastika, accompanied by an antisemitic tirade blaming Jews for a litany of social ills. Emblazoned at the top of the page were the words, "We are coming!"

These pamphlets — part intimidation tactics, part propaganda for would-be antisemites — demonstrate how hate speech has at least two effects — one on the public at large (potential allies)

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[37] Waldron, 35.
[38] Waldron, *Harm in Hate Speech,* 95.
[39] Kermit L. Hall, *Conscience, Expression, and Privacy: The Supreme Court in American Society*, (Routledge, 2000).

and one on its targets or victims. Hate speech galvanizes and frightens at once. It also, in the case of the NSPA, expresses what might be real hatred for Jews. But this last bit, for Waldron, is beside the point.

Hating Jews in private is not an act that has a sizable ripple effect; it may never take on life as a speech act at all. If, over a Collin family dinner, Collin had said that the real tragedy of the Holocaust was the number of Jewish survivors, the utterance would likely not have stirred up any new hatred and would not have intimidated any Jews.

The principal distinction Waldron makes is between public speech that stirs up hate and intimidates victims, and privately held views. Regulating hate speech, Waldron contends, is not an attempt to regulate the latter; instead, it is an attempt to prevent the former, to prevent stirring up hatred and harming targets. The act of stirring up hatred is, for Waldron, what makes hate speech hate speech.

A problem with Waldron's definition might be that it appears to understate the direct harm of hate speech on its victims by emphasizing the effect of stirring up hatred over the effect of intimidating and frightening. Still, if hate speech usually does both things at once — stirs and scares — regulating it on the grounds that it stirs up hate is one way to mitigate the effect on victims.

Well-Ordered Society

> *… the special evil that hate speech regulations are directed against is not the immediate flare up insult and offense, a shouted slogan or a racist epithet, but rather the way in which something said or thought becomes established as a visible or tangible feature of the environment, part of what you can see or touch in real space or in virtual space as you look around you.*[40]

[40] Martha Minow, "In three-part Holmes Lecture, Waldron seeks to uphold individual dignity through the regulation of hate speech" *Harvard Law Today,* 28 October 2009, https://today.law.harvard.edu/in-three-part-holmes-lecture-waldron-seeks-to-uphold-individual-dignity-through-the-regulation-of-hate-speech-

Waldron's conception of dignity takes root in feminist and race critical theorists' critiques of the liberal tradition, but, to explain the harm of hate speech, Waldron adapts Rawls' notion of a well-ordered society.[41] For this purpose, a well-ordered society is simply a society where certain principles of justice are shared and publicly affirmed.

The notion of a well-ordered society, for Waldron, is well suited for thinking about group defamation because it prompts us to ask what such a society would look like and sound like, and what it would not.[42] Can it be that a society is well-ordered when public hate messages openly contradict basic principles of justice — like equality? Waldron's answer is that if hateful appearances correspond with a hateful reality, then a society where group defamation runs rampant cannot be a well-ordered society. Defamation denies the members of targeted groups the basic assurance that a Rawlsian well-ordered society depends on — the ability to know that the principles of justice are agreed on and will be upheld. Among these basic principles, Waldron lists liberty, equality, and dignity.[43]

For Waldron, as for Rawls, a well-ordered society is not something that has been attained. A well-ordered society is, if you agree with Rawls and Waldron, an ideal to be aspired towards. But a well-ordered society is not so utopian that it could brought about only by a miracle:

> Societies do not become well-ordered by magic. The expressive and disciplinary work of law may be necessary as an ingredient in the change of heart on the part of its racist citizens that a well-ordered society presupposes.[44]

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video/#:~:text=In%20the%20first%20lecture%2C%20%E2%80%9CWhy,put%20into%20the%20visible%20environment

[41] Waldron, 65-69.
[42] Waldron, 69-73.
[43] Waldron, 78-88.
[44] Minow, "Holmes Lecture."

If everyone shared a conception of justice, hate speech would die out; the advocacy of hate in the form of group defamation would cease to exist. We cannot recognize a society as well-ordered if group defamation continues to take place.

We might share with Waldron the hope that hate speech will die out without sharing the view that it ought to be regulated. However, Waldron's discussion of hate speech's harms animates this hope and helps us understand (if not sympathize with) the urgent calls for hate speech regulation.

Correcting the Record on Recognition

I depart briefly from Waldron's assessment of the harms of hate speech to consider the inclusion of dignity in his list of basic principles. Dignity's inclusion might surprise us, especially if this well-ordered society is meant to be American society and not some European one.

Recall that we earlier split recognition dignity into two parts — *identification* with the community and *acknowledgement* by others in the community of one's full membership in the community. In the first place, dignity can be included because recognition dignity is a crucial part of living together in an egalitarian community. By egalitarian, I mean simply a community that has devoted itself to equality in some sense, as all democracies must more or less do. Recognition dignity likely plays an important role in different sorts of communities as well. This is something worth considering further at another time.

But there are also articulations of recognition dignity at the core of the American philosophical and legal tradition that make Waldron's inclusion of dignity in his list of basic principles more compelling and, frankly, more interesting. I must note, however, that Waldron does not nec-

essarily agree with this. Where he discusses thinkers such as Hobbes and Locke, he focuses principally on their works on toleration and dismisses their concerns (particularly Hobbes') about speech as a provocation to fight. He does not discuss the role recognition plays in their works, though doing so strengthens his argument that people should be assured that they will be recognized as equal members of the community.

We do not need to dig into unknown works to find that Hobbes and Locke (among others, surely) understood the importance of recognition and had some reservations about speech. Their concerns are right there, in the open, in their major works.

For Hobbes all so-called laws of nature flow from the presumption of equality:

> If nature therefore have made men equal, that equality is to be acknowledged; or, if nature have made men unequal, yet because men that think themselves equal will not enter into conditions of peace but upon equal terms, such equality must be admitted.

Without this prerequisite — equality — we cannot enter into a covenant with one another and must remain in a state of competition and war.

Some of Hobbes' natural laws — dictates of reason or rules for living together — bear resemblance to a theory of recognition dignity. The Ninth Law of Nature states that every man ought to "acknowledge others for his equal by nature." The notion of acknowledgment, as we have seen, is a key part of theories of recognition dignity. From this acknowledgment of a presumed equality flows a series of other rules intended to mitigate conflict between people. One of these rules is the natural law against contumely that legal scholar Steven Heyman identifies as the passage that "bears most directly on the problem of hate speech"[45]

> [B]ecause all signs of hatred or contempt provoke to fight insomuch as most men choose rather to hazard their life than not to be revenged, we may in the eighth place, for a law of

[45] Heyman, 171.

> nature, set down this precept that *no man by deed, word, countenance, or gesture, declare hatred or contempt of another.*"[46]

When I read Leviathan for the first time, I was particularly struck by this law. It might be read only to warn against fighting words — those that provoke a fight — but this is not the only strong statement Hobbes makes about speech. Hobbes reflected on speech extensively, and his understanding of speech is an essential foundation of *Leviathan* and a crucial part of Hobbes' understanding of human beings and politics. Here I wish to draw attention to a passage that supports the argument Heyman makes in his book *Free Speech and Human Dignity* case — that Hobbes, among others, was critically concerned with speech and that recognition plays a crucial role in foundational works of the American tradition.

Hobbes lists four abuses of speech that correspond with four uses. The fourth abuse occurs:

> …when [people] use [speech] to grieve one another; for seeing nature hath armed living creatures, some with teeth, some with horns, and some with hands to grieve an enemy, it is but an abuse of speech to grieve him with the tongue.[47]

Comparing "grieving" with speech to biting and goring appears to imply that speech can wound. Taken this way, this statement is perhaps as strong as the one on contumely.

It should be mentioned that Hobbes might, and perhaps should, be understood to disagree with a basic premise of recognition dignity — that human beings are bound together in a community that is not merely a collection of individuals who have entered into a contract. For Hobbes, all human relations are contracts founded on the interest of each person. By virtue of being contracts, relationships can be made and unmade, communities dissolved.

Locke was a better libertarian than Hobbes, advocating toleration of controversial thoughts and ideas and maintaining that individuals have a right to hold and express their beliefs. Locke's

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[46] Thomas Hobbes, *Leviathan*, (Indianapolis: Hackett Publishing Company Inc., 1994), I, xv, 20.
[47] Hobbes, *Leviathan,* I, iv, 4.

rights-based theory is more familiar to us and has more bearing on today's jurisprudence than Hobbes' theory of natural law. But Locke, too, had reservations about speech and did not extend freedom of speech to speech that denies the duty to tolerate others, or that asserts the speaker's superiority. Such speech, Locke claimed, should not receive legal protection: "[N]o opinions contrary to human society, or to those moral rules which are necessary to the preservation of civil society, are to be tolerated by the magistrate," for such ideas "…manifestly undermine the foundations of society and are, therefore, condemned by the judgment of all mankind; because their own interest, peace, reputation, everything would be thereby endangered."[48]

Climate of Hatred

Among Waldron's principal concerns is that group defamation will give rise to intercommunal violence.[49] It is difficult to imagine that speech and violence could be unrelated. It seems likely that hate propaganda successfully does what it aims to do — stir up hate.

Past examples support this view, as does recent research indicating a strong link between hateful social media posts and actual instances of hate-motivated violence within respective cities. An NYU research team found that the "prevalence of each type of discriminatory tweet" corresponded "to the number of actual hate crimes reported during that same time period in those same cities."[50]

When the ACLU defended the right of American neo-Nazis to march in the predominately Jewish neighborhood of Skokie, a narrow majority on the Supreme Court maintained that American antisemitism was "not of such magnitude, or so pervasive, to transform toleration into an act

[48] John Locke," A Letter concerning Toleration and Other Writings," *The Online Library of Liberty* (2010), 59.
[49] Waldron, 4.
[50] New York University, "Hate Speech on Twitter Predicts Frequency of Real-life Hate Crimes," 24 June 2019.

of condonation."[51] But today synagogues are being targeted by gunmen, and Jews are attacked more and more often on the streets. We have to ask whether we are still (if we were ever) safely in the territory of toleration rather than condonation. Could early condemnation prevent future violence?

Waldron's view is yes. Though condemning hateful speech will not end intercommunal violence forever, regulating group defamation is a necessary safeguard against the stirring up of future violence.

Assurance

Stirring up hatred and promoting intercommunal violence undermines the ability of vulnerable people and groups to know that they are safe and that they will be treated as equal members of the community. This ability to know is what Waldron calls assurance. Waldron frames assurance in Rawlsian terms.

People need to be sure of certain principles of justice in order to live their lives. This means that only when those principles of justice are publicly conveyed, reiterated, and honored is it clear that those principles of justice are truly shared, and only then can everyone count on them and count on other people to honor them. As Waldron points out, this does not mean that every billboard needs to be emblazoned with the slogan "liberty, equality, dignity," but principles of justice do need to be acted out regularly. Having visible signs of each other's commitment to shared principles of justice allows a people to go about their lives with a basic sense of security, without fear of being terrorized, verbally or physically attacked, discriminated against, or publicly defamed.[52]

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[51] Baer, 55.
[52] Waldron, 83.

As a way of arguing for hate speech regulation, the idea of assurance has an intuitive appeal. At least it did for me when I first began to think of what the harms of hate speech might be. Below is an excerpt from the first essay I wrote on hate speech. In it I outline the consequences of a lack of such assurance.

> Could a black woman who is verbally accosted on her way to work and who is confronted with racist graffiti on her way home every day make the trip without fearing that she is in danger, without thinking she is unwanted, dwelling on that thought throughout her day? Would dwelling on that thought impair her and keep her in some way from identifying with and participating in society? Would her son not inherit a dislike for the country which does not protect his mother or him from hate speech? Could he grow up subjected to the same slurs without suffering a loss of dignity? Or raise his own children to participate in a society that does not value him and that he knows will not protect his children from cruel words that endanger them and that undercut their sense of belonging and instill in their neighbors the idea that his children do not indeed belong? Would he want to raise children in this society at all? All three generations would be inhibited from participating fully in and contributing fully to society. They would be alienated as a result of speech that harms their dignity.

It is on the grounds of assurance that Waldron argues that hate speech regulation is warranted. Other things that hate speech does — stir up hatred and promote violence — are not, in his view, the best justifications for regulating hate speech. Rather, as Teresa Bejan put it in a recent article:

> Waldron argues that laws banning hate speech are justified on epistemological grounds, as a way of communicating assurance to the most vulnerable members of society that their fellow citizens recognize and accept their status as social and political equals.[53]

Framed this way, hate speech laws seek to provide assurance, not merely to prevent harm.

Reframing assurance

> *As much as one may try to resist a piece of hate propaganda, the effect on one's self esteem and sense of personal security is devastating. To be hated, despised, and alone is the ultimate fear of all human beings.*[54]

[53] Teresa Bejan, "Hobbes against hate speech," *British Journal for the History of Philosophy,* 3 February 2022, 4.
[54] *Matsuda, 25.*

Framing assurance in terms of Rawlsian principles of justice seems unnecessary. Better to frame assurance in Waldron's own terms — in terms of dignity. My goal here is to make Waldron's conception of dignity do the work of supporting Waldron's argument. Thought of this way, assurance would mean, in the most minimal sense, that people can be sure that they are recognized as equal members of the community.

If dignity is a person's status as an equal member of the community that entitles them to be regarded and treated as such, then dignity is both something people must be assured of and a thing that carries with it other assurances. Group defamation is calculated to undercut dignity and its accompanying assurances.

Framing assurance in terms of recognition of dignity might also be a better way to respond to the critics who would reframe Waldron's theory in terms of self-respect rather than dignity. While self-respect has to do with what we think of ourselves and in smaller part what we think others think of us, recognition dignity has more to do with how others treat us — whether they acknowledge us as equals and members of the community — as well as how we see ourselves — whether we identify with the community.

The Anti-subordination Case

> *Racist speech is particularly harmful because it is a mechanism of subordination, reinforcing a historical vertical relationship.*[55]
>
> *Once we recognize that speech can subordinate—and further, that it can constitute subordination—we might ask which kinds of speech in fact do so.*[56]

[55] Mari Matsuda quoted in Brown's *Hate Speech Law,* 75.
[56] Ishani Maitra, "Subordinating Speech," in *Harm and Speech: Controversies Over Free Speech* ed. Ishani Maitra and Mary Kate McGowen, (Oxford: Oxford University Press, 2012), 94.

Waldron's assurance-based case for regulating hate speech is based on a conception of hate speech mainly as something that causes future harm in the form of violence or increased hatred. Hate speech in the form of group defamation deprives a person of assurance and impedes our movement toward a well-ordered society (if we are in fact moving that way). So, too, does group defamation threaten to cause future harm in the form of intercommunal hatred and violence.

Waldron acknowledges, by reference to the work of Catharine MacKinnon, but does not articulate very forcefully, the harm that hate speech causes by way of subordination, even though it seems to flow naturally from the theory of recognition dignity that he develops.

Subordination theory might be the bridge between harm to dignity, and oppression and discrimination, if what Waldron means by dignity is equal membership in the community and a person's understanding of themselves as an equal member. Subordination theory is, Brown writes, "an attempt to uncover the ways in which certain social practices tend to support or even constitute the subordination of certain groups."[57]

While it may seem obvious that speech can express the idea of subordination — this is what the statement "whites are superior to blacks" expresses — it is less clear how speech acts can cause or even constitute subordination. Since Waldron is primarily concerned with what hate speech does, rather than with the ideas it expresses, I focus on how hate speech can subordinate and constitute subordination.

[57] Brown, 75.

Subordination as Speech Act

Speech act theorists often hold that the speaker must have authority in order to do things with her speech. That is, she must have the authority to request, command, promise, etc. For this reason, people in positions of power are most capable of subordinating through speech:

> [I]magine a legislator in apartheid-era South Africa enacting a law by saying in the appropriate circumstances, "Blacks are no longer permitted to vote." That law deprives black South Africans of rights and powers they previously held. In doing so, it also ranks black South Africans as inferior to other South Africans, and legitimates discriminatory behavior against them.[58]

Can everyday hate speech subordinate in the same way? Not every hate-speaker is a legislator, though more and more of them seem to be. Do everyday speakers have the authority to subordinate? Building on the works of Catharine MacKinnon (famous for arguing that speech can constitute subordination) and Rae Langton (the thinker who gave us the legislator example), Ishani Maitra answers this question. In short, her answer is "Yes."

There are different ways that people might obtain the authority necessary to enact subordination through speech. An assistant delegated by his boss to oversee his coworkers is formally given authority. So, we see that one can derive authority by delegation, but one might also derive authority from an omission. If a student begins delegating tasks to her classmates, and the teacher does not intervene, she derives authority from nonintervention rather than delegation. These are examples of what Maitra calls positional authority.[59] But a person does not need to have a special social position relative to others to have authority in certain situations. Take, for example, a group of indecisive friends trying to make plans for a Friday night. When that one friend (you know the one) gets worried that nothing will get planned and begins to delegate decisions (where to eat

[58] Rae Langton quoted in Maitra's "Subordinating Speech," 94-95.
[59] Maitra, "Subordinating Speech," 104-108.

dinner, what movie to watch, etc.) to her friends, she becomes an authority without a relatively higher position. Maitra calls this "derived authority."[60]

Since hate speech tends to flow down social hierarchies, occupying a position higher up the hierarchy (being white, being a man, being Christian, being a citizen, being wealthy, etc.) endows an otherwise ordinary person with relative power. This power, Maitra argues, is the power to make norms for others. It is the sort of power needed to enact subordination through speech.

Hate Speech Causes and Constitutes Subordination

I am interested in the ways hate speech causes and constitutes subordination. This sort of subordination has two primary forms — the first political, the second social. I discuss only political subordination here. It seems to me that Waldron's theory of assurance might be read as an account of *social* subordination. Here, I am interested in providing an account of *political* subordination that ties dignity to the deprivation of rights and powers.

Political Subordination or Deprivation of Rights and Power

For our purposes political subordination consists in the unfair deprivation of rights and powers.[61] Speech can subordinate in a handful of ways. For instance, hate speech can subordinate by causing psychological, emotional, and physiological harm to the targets, causing them to withdraw from politics or impeding their ability to participate.

According to the American Academy of Pediatrics, chronic stress caused by racism (especially overt racism like hate speech) negatively impacts the immune and cardiovascular systems

[60] Maitra, 108-111.
[61] Maitra, 94.

and can lead to a number of health problems.[62] Matsuda describes the targets of hate speech as experiencing "symptoms ranging from rapid pulse rate, difficulty breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide."[63] Stereotype threat is a well-documented kind of psychological harm. Chronic stress and stereotype threat negatively impact performance in school and in the workplace, leading to poorer job prospects, lower political participation, and decreased earning. This sort of subordination has more to do with how targets act and see themselves. Returning to our focus on recognition dignity, we see that this sort of subordination harms a person's ability to identify with the community — to recognize themself as a member.

Hate speech can also subordinate by changing the behavior of non-target listeners. Hate speech can subordinate when it trains "hearers to act towards others in ways that subordinate them."[64] Or when it causes non-target hearers "to form beliefs that ... cause those hearers to treat [targets] in ways that subordinate them."[65] This sort of subordination has more to do with how others treat the targets of hate speech. In the language of recognition dignity, this sort of subordination impedes acknowledgment of the target's equal status within the community by causing non-target listeners to treat targets as nonmembers. These listeners don't necessarily need to believe that they are superior to the target group, only to act like they are.

[62] Agnese Mariotti, "The effects of chronic stress on health: new insights into the molecular mechanisms of brain-body communication," *Future science,* vol. 1, no. 1 November 2015.
[63] Matsuda quoted by Maitra, 97-98.
[64] Maitra, 97-98.
[65] Maitra, 97-98.

Right of Recognition and Political Subordination

Steven Heyman's notion of a right to recognition can help us make a dignity-based anti-subordination case against hate speech by connecting dignity to rights and by connecting the harm done to dignity to the political consequences of hate speech.

In his 2008 book, *Free Speech and Human Dignity,* Heyman offers a new approach to First Amendment jurisprudence. He does this by emphasizing the dignitarian dimension of rights in the liberal tradition and by developing a new framework of rights relevant to speech.

Both freedom and dignity, Heyman argues, limit our actions, in addition to being sources of natural rights.[66] Your freedom might limit my freedom, and your freedom might be limited by my dignity. Dignity does not limit dignity in this framework because it wouldn't increase my dignity to harm yours. Dignity is principally a limiting factor on freedom (and perhaps a better one than freedom since freedom tends to come into conflict with itself.) Dignity is also a source of a duty and so places limits on our behavior towards one another. The duty that corresponds with dignity is the duty to respect the legal rights of others, since violating "another's rights is to deny her status as a person who is entitled to respect."[67] Conceived of this way, all rights have a dignitarian dimension.

Laying out the ecosystem of rights in which free speech is situated, Heyman divides the relevant rights into two categories: (1) external rights that have to do with one's body and (2) personality rights that have to do with (a) emotional tranquility and privacy, (b) self-expression through speech and conduct, and (c) image or reputation. The first personality right protects the individual's inner life, the second protects her interactions with others, and the third protects her

[66] Heyman, 38-40.
[67] Heyman, 39.

standing in the community.[68] These rights are increasingly public, and lead Heyman to ask what rights people have as members of the community and what rights communities might have.

Because speech is intersubjective — social, a means of communication between people — it makes sense to conceive of speech rights in the context of the community. Departing from the natural rights tradition, Heyman thinks of people not merely as individual speech right holders joined together by a contract, but as members of a community that might gain new rights and duties in virtue of their membership in the community.

One right that is gained through community membership is what Heyman calls the right of recognition.

> Rights are rooted in respect for personhood. It follows that an individual cannot enjoy rights in relation to others unless they recognize him as a person. Recognition is the most fundamental right that individuals have, a right that lies at the basis of all other rights.[69]

Silencing

Catharine MacKinnon was among the first legal theorists to argue that speech could cause and constitute political subordination. One of Mackinnon's principal arguments is that certain kinds of speech suppress other kinds of speech. For example, Mackinnon argues that pornography "is exactly that speech of men that silences the speech of women."[70] An effect of subordination that MacKinnon had in mind when she first developed her critique of pornography was silencing. According to Mackinnon's account, some speech inevitably, and often purposefully, silences other speech. Mackinnon argues that the primary claim to speech nearly always triumphs. Negative liberties, such as free speech, protect what one has. One cannot protect what one does not have. So,

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[68] Heyman, 41, 47-64.
[69] Heyman, 171.
[70] Catharine A. MacKinnon, "The Sexual Politics of the First Amendment" in *Feminism Unmodified: Discourses On Life and Law.* (Cambridge: Harvard University Press, 1987), 209.

free speech protections invariably favor the speech of those who had speech first. Hate speech appears to work this way, or at least in a similar way. Waldron acknowledges the similarities between hate speech and pornography in passing, but focuses principally on the social dimension of subordination — how hate speech, like porn, undermines assurance, threatens intercommunal violence, and stirs up future hatred, dislike, or contempt.

Those who argue that counterspeech, rather than regulation, should be used to combat hate speech overlook the disparities between unequal claims to speech and the relative power of that speech. There is no opposing opinion, no similarly forceful slurs, that can be employed against a white racist by a black person. And, unfortunately, fact-based counterspeech doesn't seem to do the trick either. Recent research has shown that counterspeech is generally not effective against any strongly held belief. We tend to be irrationally stubborn in the face of contradictory evidence. In many cases, being confronted with counterspeech causes us to cling to our beliefs more strongly.

Protecting hate speech serves to protect the speech of the socially privileged at the expense of the socially disenfranchised. Free speech absolutism, in this view, is free speech discrimination. If, as Mackinnon argues, speech can subordinate, we can understand how hate speech undercuts, impedes, and silences the speech of its targets. Hate speech has no essential role in defending democratic liberties of minorities; rather, its role is to suppress them.

Protecting speech which suppresses speech is a losing strategy. What do we lose? Free speech — the very principle we purport to be protecting. This is not an unfamiliar paradox. Time and time again we confront the tolerance paradox: Tolerance dictates that we be universally tolerant. But to be universally tolerant, one must tolerate intolerance. To resolve this paradox, one decides that for the sake of tolerance, we must, at times, be intolerant of intolerance, lest we allow intolerance to become the general rule. Free speech is similarly paradoxical. By protecting hate

speech, we risk undercutting the very principle we want to protect.

When MacKinnon's argument is reframed using the right of recognition, we see more clearly the connection between dignity and political subordination. We are also better able to envision how hate speech might, by denying people recognition, deprive victims of rights other than speech.

The argument incorporating the right to recognition goes like this. Pornography, by depicting violence against women and the submissive inferiority of women, denies their personhood and so deprives them of rights.

According to Heyman's account, the basis for rights is dual — part freedom, part dignity. At the core of the freedom argument is the contention that a human being is free in that she is the "author of her own thoughts and actions."[71] Outside forces do not determine what she will think or do, and she has the "capacity to actively direct"[72] what she thinks and does using her reason. According to the liberal tradition, human beings have inherent dignity. That is to say that because human beings are autonomous (this has to do with the aforementioned freedom and reason) they should not be treated merely as instruments, commoditized, or valued only for their usefulness to others. Pornography, the argument goes, reduces women to objects, not authors, and treats them merely as instruments.

If hate speech does the same things as MacKinnon argues pornography does — denies full recognition to its targets — then it deprives its targets of full exercise of their rights and political powers.

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[71] Heyman, 38.
[72] Heyman, 38.

CONCLUSION

I have evaluated Waldron's argument that hate speech should be regulated because it undermines assurance and thus one's ability to know that others recognize her as a political and social equal. I have also expanded Waldron's theory in three ways. First, revisiting passages of Hobbes' *Leviathan*, I argued that recognition is part of the American philosophical tradition. Second, I suggested that Waldron's assurance argument can and perhaps should be grounded in his own theory of recognition of dignity rather than in the notion of a Rawlsian well-ordered society. Third, I used Steven Heyman's notion of a right to recognition to argue that hate speech can cause and constitute political subordination.

All that is left for me to do now is to point to some areas that interest me and that I think warrant further consideration.

I noted in my discussion of subordination that Waldron's notion of assurance might be considered a theory of social subordination like those of Rae Langton, Jennifer Hornsby, Ishani Maitra, and Mary-Kate McGowan. Langton, Hornsby, Maitra, and McGowan argue that hate speech constitutes an act of ranking others as inferior and so serves to set and reify social hierarchies in a way that permits and promotes unequal treatment. Comparing Waldron's argument with theories of ranking would serve to clarify how speech acts might promote the lack of assurance that is the basis for Waldron's pro-regulation argument. It might also give rise to a theory that more explicitly links recognition dignity (if recognition dignity is indeed a useful idea) with social subordination. The idea of comparing Waldron's theory of assurance to theories of social subordination as ranking occurred to me late in the writing process, so I was not able to undertake such a comparison here.

Recognition dignity, as an idea, also warrants further consideration. In the first place, an inquiry into whether dignity is an essential part of recognition or whether the two can be separated would be useful. Such an inquiry could shed light on why Waldron and other thinkers writing about dignity have a tendency to use words like "respect" or "status" in place of "dignity." While their tendency to substitute words like "respect" and "status" for "dignity" might be blamed on the vagueness of dignity as an idea, it might also be symptomatic of our broader American political discourse in which dignity does not often figure. We might forgive Waldron and company for being hesitant to use an idea that is unfamiliar at best and, at worst, sneered at. Revisiting philosophical texts, as I have started to do here with Hobbes, to look for things that resemble recognition would be a good place to start thinking about the connection between dignity and recognition.

In the same vein, it would also be worthwhile to take a closer look at Hobbes' views on speech. Waldron dismisses Hobbes as merely concerned with something like fighting words — with speech that is likely to provoke fights. However, as I suggested in my discussion of recognition in Hobbes, it seems to me that Hobbes is not merely concerned with fighting words. In a very recent paper, Teresa Bejan took up an inquiry into Hobbes' views on speech and argues against Waldron that "Hobbes' concerns about the dignitary harms in hate speech went well beyond 'fighting words.'"[73] Similar analyses of other works that make up the philosophical and legal tradition of the United States would serve to enrich our current understanding of speech and the problems of hate speech.

Another question that arises is how notions of recognition dignity and inherent dignity are related and might be reconciled. Heyman's notion of a right of recognition that has its source in inherent dignity and protects recognition dignity by protecting a person's personality, reputation,

[73] Bejan, 1.

and equal standing in the community weaves these two notions of dignity together. It seems to me that, when combined, recognition-dignity- and inherent-dignity-based arguments might paint a fuller picture of the harms in hate speech.

Last, the question "Why dignity?" remains. Why make a dignity-based argument (as opposed to any other sort of argument) for the proscription of hate speech? While much can and will be said in response to this question before the United States moves anywhere on hate speech, here I wish to point to the words of Mari Matsuda:

> "However we choose to respond to racist speech, let us present a competing ideology, one that has existed in tension with racism since the birth of our nation: there is inherent worth in each human being, and each is entitled to a life of dignity."[74]

Making a dignity-based case for hate speech regulation puts forward such a competing ideology — insisting on the inherent dignity of human beings. So, too, is "[a] legal response to racist speech [...] a statement that victims of racism are valued members of our polity."[75] Or, to put it another way, a legal response to hate speech is a statement that targets of hate speech are recognized as equal members of our community.

[74] Matsuda quoted by Brown, 91.
[75] Matsuda, 18.

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