

# “Hate Speech” and the New Tyranny over the Mind

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*I*n America, a powerful movement intent on outlawing “hate speech” continues to expand in institutional power and moral vigor with each passing year. Most Americans do not fully grasp what banning “hate speech” entails, or the political and intellectual stakes involved. Should “hate speech” be banned, America will no longer be a self-governing nation: Serious deliberation on the central political questions confronting the country would become impermissible. But the debate over “hate speech” ultimately exposes our nation’s deepest and perhaps irreconcilable moral divide: Are we a republic in which presumptively rational citizens rule themselves politically and where the freedom of the mind is protected—or are we a confederation of oppressed groups whose fragile identities must be honored and sheltered from criticism?

America is the only Western nation that does not criminalize “hate speech.” Canada, Australia, New Zealand, and most nations of Europe already do so. The United Nations relentlessly pressures the remaining holdouts to follow suit: “As a matter of principle,” says the U.N. Secretary-General, “the United Nations must confront hate speech at every turn.”<sup>1</sup>

Meanwhile in America, Members of Congress issue their support for speech restrictions, and Big Tech’s digital oligarchs, enjoying a disproportionate power over society, continue to impose speech restrictions in exchange for access to their platforms. So are America’s colleges and universities more and more governed by an aggressive chorus of students, faculty,

and administrators who demand and impose speech codes. These fronts promises to grow in size, strength, and confidence in the coming years.

Leading restriction advocates want not only to banish “hate speech,” but also to *criminalize* it. In the words of Mari Matsuda, an influential professor at the University of Hawaii Law School, “[F]ormal criminal and administrative sanction—public as opposed to private prosecution—is also an appropriate response to racist speech.”<sup>2</sup> Perhaps most surprising, legal precedents that would bring this revolution fully into existence in America are already embedded in two areas of our legal system: antidiscrimination and harassment laws, and Supreme Court rulings favoring sexual liberation that are based on a new view of “dignity.”

If Americans are to resist this growing movement, they must understand the arguments, the demands, and the consequences of outlawing “hate speech.” No laws of history dictate that America must submit and follow this path.

The debate over “hate speech” reveals a fundamental disagreement about the purpose of America. Either it is political liberty, in which case the freedom of speech is essential for presumptively rational citizens to rule themselves politically and to pursue the truth through science, philosophy, or religion. Or it is the equal self-respect and dignity of marginalized and self-created identities, in which case these must not only be publicly affirmed and celebrated, but also shielded from (even well-meaning) scrutiny and criticism, called “speech violence” or “hate speech.” These two views cannot coexist. Indeed, restriction advocates admit that America’s understanding of speech “comes into tension with the aspiration of equal dignity.”<sup>3</sup> They want to eliminate the former to make way for the latter.

Decent people are rightly unsettled by gratuitously vile words directed at undeserving fellow citizens. We should aspire to be courteous toward others. But today’s proposals to ban “hate speech” are not at bottom about getting rid of racial epithets or Holocaust denial. Nor are these proposals about

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1. António Guterres, United Nations Secretary-General, Foreword, in “United Nations Strategy and Plan of Action on Hate Speech,” May 2029, p. 1, <https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20June%20SYNOPSIS.pdf> (accessed May 6, 2020).
  2. Mari J. Matsuda, “Public Response to Racist Speech: Considering the Victim’s Story,” *Michigan Law Review*, Vol. 87, No. 8 (August 1989), p. 2321. Jeremy Waldron also suggests that written “hate speech” should be criminalized and not remain only a civil tort. Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, MA: Harvard University Press, 2012), pp. 45-46. The influential feminist academic Judith Butler of Berkeley University similarly thinks “that there are probably occasions when” individuals should “be prosecuted for their injurious speech.” That “hateful, racist, misogynist, homophobic speech should be vehemently countered seems incontrovertibly right.” Judith Butler, “Burning Acts: Injurious Speech,” in *Deconstruction Is/In America: A New Sense of the Political*, ed. Anselm Haverkamp (New York: New York University Press, 1995), p. 139.
  3. Alexander Tsesis, “Dignity and Speech: The Regulation of Hate Speech in a Democracy,” *Wake Forest Law Review*, Vol. 42, No. 497 (2009), p. 497, [http://wakeforestlawreview.com/wp-content/uploads/2014/10/Tsesis\\_LawReview\\_01.09.pdf](http://wakeforestlawreview.com/wp-content/uploads/2014/10/Tsesis_LawReview_01.09.pdf) (accessed December 3, 2019).

preventing physical violence against segments of the population. The First Amendment, we should recall, does not protect speech that intentionally incites imminent violence or lawlessness.

Rather, many restriction advocates seek to outlaw speech that they believe causes “harm”—defined in the broadest, most malleable ways—to select, so-called marginalized or oppressed groups.

Such laws would severely restrict political deliberation on any number of critical issues confronting the country. For example, free and open political deliberation and discussions regarding criminality, immigration, and the health of the traditional family would be effectively silenced. All honest discussions of these and other topics, advocates allege, harm the self-respect of marginalized groups. The scope of permissible politics would thus be narrowed to concerns about apparently neutral subjects such as budgets and taxes—although even these might not remain untouched. As a hint of what may come, some academics write that seemingly “race-neutral [political] campaign themes” like welfare policy “carry demonstrably racially loaded undertones.”<sup>4</sup>

Without practice in self-rule and political deliberation made possible by free speech, the habits of character required for republican self-government will disappear in time. The loss of our practice of thinking independently and making judgments about the common good, the national interest, and human merit would give way to the domination of anger and resentment and a corresponding expansion of the state to adjudicate and rule individuals no longer fit for political liberty.

Finally, by banning the speech of the allegedly oppressive majority while directly or tacitly inciting protected groups to make unchallengeable claims to marginalization and voice hatred of the majority, outlawing “hate speech” promises to make the public square even more filled with hatred. The criminalization of “hate speech” leads not just to more “hate speech,” but also to civil strife. Most pernicious of all is the legal and moral acceptance of the premise contained in “hate speech” criminalization: the forced acceptance or celebration of unfalsifiable, self-created identities that are impervious to even mild rational interrogation, which opens the way to despotism.

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4. Gregory S. Parks and Jeffrey J. Rachlinski, “Implicit Bias, Election 2008, and the Myth of a Post-racial America,” in *Critical Race Theory: The Cutting Edge*, 3rd ed., ed. Richard Delgado and Jean Stefancic (Philadelphia: Temple University Press, 2013), p. 201. Contributors to *The New York Times* agree, claiming that discussion of “welfare reform” is a racist “dog-whistle.” Bryce Covert, “The Not-So-Subtle Racism of Trump-Era ‘Welfare Reform,’” *The New York Times*, May 23, 2018, <https://www.nytimes.com/2018/05/23/opinion/trump-welfare-reform-racism.html> (accessed October 21, 2019).

## Criminalization of “Hate Speech” in Western Europe and Canada

America may see its possible future by looking to contemporary Western Europe. Beginning in the 1960s but accelerating in recent decades, these nations started to criminalize “hate speech.” They are in the midst of fully implementing, enforcing, and expanding these laws: Their experiment is still underway. Often legally understood as “incitement to hatred”—as distinct from incitement to violence—the list of outlawed speech continues to grow, as does the number of groups protected from it. Today, speech that is deemed racist, sexist, homophobic, anti-ethnic, transphobic, xenophobic, or critical of religion is criminalized. These laws, as we will see, are in conflict with self-government, undermine the public–private distinction essential to the freedom of the mind, and provoke a new religious fanaticism.

As all of the European Union and Anglosphere’s speech laws are similar, only a few instructive examples follow.<sup>5</sup> In Denmark, anyone who “makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion, or sexual orientation” is liable for up to two years of imprisonment.<sup>6</sup> In Germany, a person speaking against “the human dignity of others by insulting, maliciously maligning, or defaming segments of the population, shall be liable to imprisonment from three months to five years.”<sup>7</sup> In 2014, Belgium began to criminalize “sexist speech,” defined in the law as “any gesture or act that...is evidently intended to express contempt for a person because of his gender, or that regards them as inferior, or reduces them to their sexual dimension, and which has the effect of violating someone’s dignity.”<sup>8</sup> Such gestures of contempt carry a fine of up to €1,000 and 12 months in prison.<sup>9</sup>

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5. For a comprehensive database of all European “hate speech” laws, see Paul Coleman, *Censored: How European “Hate Speech” Laws Are Threatening Freedom of Speech*, 2nd ed. (Vienna: Kairos Publications, 2016).
  6. Penal Code of Denmark, Strfl § 266(b).
  7. German Criminal Code, § 130 Abs. 1 S. 2 StGB. This extends to written content as well: anyone who produces or disseminates written materials that “incite hatred against segments of the population or a national, racial or religious group, or one characterized by its ethnic customs,” or “assault the human dignity of others by insulting, maliciously maligning or defaming segments of the population or a previously indicated group” is “liable to imprisonment not exceeding three years.”
  8. Eugene Volokh, “Belgium Bans a Wide Range of Sexist Speech,” *The Washington Post*, March 21, 2014, [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/21/belgium-bans-a-wide-range-of-sexist-speech/?utm\\_term=.dfb13356429b](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/21/belgium-bans-a-wide-range-of-sexist-speech/?utm_term=.dfb13356429b) (accessed October 21, 2019).
  9. So far, there has been at least one conviction. See BBC News, “Belgium Sexism Law: Man Who Insulted Officer First to Be Convicted,” March 7, 2018, <https://www.bbc.com/news/world-europe-43308600> (accessed December 3, 2019).

By ostensibly protecting general categories—race, religion, national origin, or sexuality—Western Europe’s laws give the impression that all citizens are protected rather than just favored groups. In practice, however, these laws are enforced selectively: The overwhelming majority of documented cases of hate speech investigations, arrests, prosecutions, and convictions aim to protect so-called marginalized groups. One rarely finds arrests or prosecutions, for example, directed against academics, politicians, and citizens who freely malign Christianity, heterosexuality, and the legacy populations of Western European nations, though these nations’ public squares are full of such speech.

To the chagrin of European Union officials, relatively few prosecutions against speakers of offensive language are carried out today.<sup>10</sup> They are, however, working to increase their amount by encouraging member states, through the European Commission Against Racism and Intolerance (ECRI), to create “equality bodies,” tribunal-like administrative agencies with broad regulatory and judicial powers that could supersede each nation’s laws. These agencies would collect “hate speech” complaints and adjudicate cases by means of internal arbitration. They would “[i]ssue legally binding decisions that require action to put an end to discrimination, achieve full equality, and avert future discrimination.”<sup>11</sup> And they would have the power to file lawsuits against their host nations in European courts, compelling them to follow hate speech directives that the ECRI itself creates.<sup>12</sup>

**Undermining Self-Government.** In order to prevent contempt and to protect the dignity of the marginalized, “hate speech” laws come into conflict with self-government by curtailing the public’s ability to deliberate on and discuss essential political issues.

German citizens, for instance, who disagree with their nation’s immigration policy have been intimidated, investigated, arrested, and fined for speech allegedly “capable of inciting hatred and denigration of the human dignity of others.”<sup>13</sup> In 2009, an elected Belgian politician who publicly

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10. While there are relatively few convictions (although intimidating investigations and arrests are carried out), the governmental intimidation is generally felt by the public, speech is chilled, and a clear message is sent out to the public: “[I]f you’re offended by anything you see or hear, call the police. And if you are doing the offending...police in riot gear are just a few careless words away.” Coleman, *Censored: How European “Hate Speech” Laws Are Threatening Freedom of Speech*, p. 59.
  11. Council of Europe, European Commission Against Racism and Intolerance, *ECRI General Policy Recommendation No. 2: Equality Bodies to Combat Racism and Intolerance at National Level*, adopted December 7, 2017, § 17(c), p. 7, <https://rm.coe.int/ecri-general-policy-/16808b5a23> (accessed December 9, 2019).
  12. *Ibid.*, § 29, p. 8.
  13. Chris Tomlinson, “62-Year-Old German Woman Fined over 1,000 Euros for Sharing Anti-Migrant Joke Online,” *Breitbart*, June 4, 2017, <https://www.breitbart.com/europe/2017/06/04/62-year-old-german-woman-fined-1000-euros-sharing-anti-migrant-joke-online/> (accessed December 3, 2019). See also Press Association, “Man, 40, Arrested over Social Media Posts About Refugees,” *Evening Telegraph*, February 16, 2016, <https://www.eveningtelegraph.co.uk/2016/02/16/man-40-arrested-over-social-media-posts-about-refugees> (accessed December 3, 2019).

criticized his nation's immigration and assimilation policies was officially banned from holding public office for 10 years because his speech allegedly led to "feelings of distrust, rejection or even hatred towards foreigners."<sup>14</sup>

In France, Marine Le Pen, the 2017 presidential election runner-up and head of a major political party, in an attempt to alert the public to the brutality of the Islamic State, posted pictures of its crimes to her Twitter account. She was charged with violating the dignity of (presumably) French Muslims. French law carries a penalty of up to three years in prison and a \$90,000 fine.<sup>15</sup> In the ongoing investigation, courts ordered Le Pen to undergo psychiatric evaluations to determine whether she suffers from mental illness and whether her mental state is a threat to public safety.

One need not side politically with any of these individuals to see that such laws render serious discussion of immigration—an issue as fundamental as any to self-government in terms of its capacity to transform a nation—impermissible. Other serious public deliberations of public policies are also frequently prevented by such laws, such as the health of the traditional family (as such speech harms the dignity of the LGBTQ and feminists) and criminality (as such speech harms groups with disproportionately high crime rates).

**The Threat to Private Speech and Thought.** European "hate speech" laws also break the all-important divide between the public and the private spheres—the fundamental barrier ensuring liberty of the mind and conscience.

In France, for instance, the criminal code explicitly states that "*Non-public* provocation to discrimination, hatred or violence against a person or a group of persons on the basis of their origin, membership or non-membership, true or supposed, to an ethnic group, a nation, an alleged race or a particular religion" is punishable.<sup>16</sup> As the law is written, private speech can be reported to the police to launch a criminal investigation and possibly prosecution.

In England, a private conversation between hotel owners and a patron on the relative merits of Christianity and Islam was reported to the police by the patron. While acquitted at trial, the hotel owners were financially ruined. That "ordeal destroyed their business, which has never recovered. One conversation. One false complaint. And it devastated lives as a result."<sup>17</sup>

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14. Factsheet, "Hate Speech," European Court of Human Rights, October 2019, p. 12, [https://www.echr.coe.int/Documents/FS\\_Hate\\_speech\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf) (accessed December 3, 2019).

15. Derek Hawkins, "French Far-Right Leader Marine Le Pen Charged for Tweeting Gruesome ISIS Images," *The Washington Post*, March 16, 2018, <https://www.washingtonpost.com/news/morning-mix/wp/2018/03/02/french-far-right-leader-marine-le-pen-charged-for-tweeting-gruesome-isis-images/> (accessed October 21, 2019).

16. French Penal Code, Art. R625-7 C. pén. Emphasis added.

17. Roger Kiska, "Hate Speech: A Comparison Between the European Court of Human Rights and the United States Supreme Court Jurisprudence," *Regent University Law Review*, Vol. 25, No. 107 (2012), p. 115.

As one scholar nicely summarizes the problem: “The view that law regulates ‘action’ but not ‘opinion’—leaving the mind ever free—is at the very center of the liberal distinction between public and private.” While we “tolerate those whom we neither like nor respect...[n]ow our politics goes farther, making what individuals *think* about one another an explicit concern of public policy.”<sup>18</sup> Such laws are the precursor of a tyranny that targets the mind’s inner thoughts with a view to purifying them.

**Provoking Religious Fanaticism.** Western Europe’s “hate speech” laws also criminalize remarks critical of religion. In their application, however, these laws disproportionately target speech against Islam, while the public square is open to attacks on Christianity.<sup>19</sup>

In 2011, for example, a woman was convicted by the Austrian government for saying in a private seminar that Muhammad’s marriage to Aisha was an act of pedophilia because Muhammad was 56 years old at the time of this marriage, while she was six years old. Ironically, these claims are established by Muslim sources.<sup>20</sup> Nevertheless, the speaker was convicted by a Vienna court for “disparaging religious doctrines” in a manner capable of provoking “justified indignation,” even though there was no actual victim in this case.<sup>21</sup>

On appeal, the Austrian Supreme Court ruled that the speaker’s statements were “value judgments,” or statements of opinion, which apparently are not justifiable forms of speech when discussing protected groups.<sup>22</sup> After another appeal, the conviction was upheld by the European Court of Human Rights, which ruled that the statements were capable of “harming the feelings of the followers of that religion,” and therefore not subject to legal protection. The European Court’s ruling additionally noted the need to forbid such speech to prevent violent Muslim riots.

In other words, the threat of rebellion and violence rather than the truth of a statement and the freedom of the mind come to set the standard of the law. As discussed below, in punishing those who criticize religion and especially Islam, contemporary European laws misunderstand the psychology

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18. Thomas F. Powers, “The Transformation of Liberalism, 1964 to 2001,” *National Affairs*, No. 41 (Fall 2001), p. 68, <https://www.nationalaffairs.com/storage/app/uploads/public/58e/1a4/fc6/58e1a4fc66f55906375175.pdf> (accessed December 9, 2019).

19. Exceptions exist. Consider France’s laws against anti-Semitism and Switzerland’s laws limiting Muslim religious speech.

20. Sahih al-Bukhari 5:58:236, 7:62:64, and 7:62:65.

21. Admin\_HRWF, “European Court/Austria: Conviction for Calling Muhammad a Paedophile Is Not in Breach of Article 10,” Human Rights Without Frontiers International, October 30, 2018, <https://hrwf.eu/european-court-austria-conviction-for-calling-muhammad-a-paedophile-is-not-in-breach-of-article-10/> (accessed December 9, 2019).

22. Other nations’ laws do not allow the truthfulness of a statement to serve as a defense. For example, the German Criminal Code, § 192, states that “Proof of truth of the asserted or disseminated fact shall not exclude punishment under § 185 if the insult results from the form of the assertion or dissemination or the circumstances under which it was made.” § 185 states that “An insult shall be punished with imprisonment not exceeding one year or a fine and, if the insult is committed by means of an assault, with imprisonment not exceeding two years or a fine.”

from which sectarian despotism arises and are bringing about a new religious fanaticism that is unchecked and untamed by rational inquiry.<sup>23</sup>

**Canadian Multiculturalism.** Canada's laws largely follow Europe's model. Ontario's Racial Discrimination Act of 1944, updated in 1985, prohibits the publication of "any notice, sign, symbol, emblem or other representation indicating discrimination or an *intention* to discriminate against any person or any class of persons for any purpose because of the race or creed of such person or class of persons."<sup>24</sup> Action need not follow from an alleged intention. Such "willful promotion of hatred" can lead to two years in prison. The Canadian Human Rights Act of 1999 punishes the repeated telecommunication of messages that expose persons "to hatred or contempt" based on their "race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for which a pardon has been granted."<sup>25</sup>

Revealingly, the Canadian Supreme Court has held that:

[Hate speech] undermines the dignity and self-worth of target group members and, more generally, contributes to disharmonious relations among various racial, cultural and religious groups, as a result eroding the tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality.<sup>26</sup>

A multicultural society that understands equality as requiring the equal self-worth of all groups needs laws that root out all public and private judgments of hatred and contempt. It calls this "open-mindedness." Canada's Supreme Court implies that multiculturalism is in conflict with the freedom of the mind to form judgments contrary to the self-worth of protected groups and the freedom of speech to express them. Accordingly, multicultural political harmony depends on silencing these. Soft tyrannies can be harmonious; in fact, forced harmony is often their aspiration.

**The Threat to Free Speech in America.** A brief glance at today's America might lead one to believe that the First Amendment will protect us from Europe and Canada's course. After all, in 2017, the Supreme Court of the

23. See "Curbing Fanaticism," *infra*.

24. Canadian Criminal Code, § 319. Emphasis added.

25. Canadian Human Rights Act, § 2, <https://laws-lois.justice.gc.ca/eng/acts/H-6/section-2-20021231.html#wb-cont> (accessed December 9, 2019).

26. *Human Rights Commission v. Taylor*, 3 SCR 892 (1990), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/697/index.do> (accessed October 21, 2019). Currently, several cases making their way through Canadian courts deal with the usage of personal pronouns for transgender people. In a recent example, William Whatcott was fined \$55,000 for "misgendering" someone. *Oger v. Whatcott* (No. 7), 2019 BCHRT 58.

United States ruled unanimously in *Matal v. Tam* that “the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”<sup>27</sup> Again, the First Amendment already protects us from intentional incitement to imminent lawlessness.<sup>28</sup> Yet four important fronts intent on outlawing “hate speech” are unifying and growing in America.

*First*, some influential restriction advocates believe that the civil rights movement’s promise to create an anti-racist society was not fulfilled by laws governing public accommodations, employment, and fair housing. These laws only pushed discrimination deeper underground, where it remains in the oppressor groups’ mind. A “forthright focus on speech and language may be one of the few means of addressing and curing [the institutional] racism” that prevents the full implementation of the civil rights movement’s goals.<sup>29</sup> The administrative agencies that issued from the civil rights movement like the Equal Employment Opportunity Commission (EEOC) have already created regulatory precedents to outlaw “hate speech.” The EEOC defines “harassment” and “offensive conduct” in the workplace to include speech, such as “offensive jokes, slurs, epithets or name calling...ridicule or mockery, insults or put-downs.”<sup>30</sup> Legal activism and state action promise to accelerate in the future.

*Second*, the Supreme Court has already accepted some of the underlying logic that could be used to ban “hate speech.” Specifically, over the past 30 years, “dignity” as a legal concept has entered America’s courts through the agenda of liberating sexuality.<sup>31</sup> If “dignity,” as Justice Anthony Kennedy

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27. *Matal v. Tam*, 137 S. Ct. 1744 (2017).

28. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The First Amendment does not protect all forms of speech. The goal of the Speech Clause is to minimize harms to individuals while protecting the sphere of political self-rule and the liberty of the mind. Today, not only is intentional incitement to imminent lawlessness illegal, but so too are defamation to individual reputations, false commercial speech that harms consumers, certain forms of obscenity, true threats, and targeted harassment. For an elaboration of the original meaning of the Speech Clause, see Thomas G. West, “Free Speech in the American Founding and in Modern Liberalism,” *Social Philosophy and Policy*, Vol. 21, No. 2 (July 2004), pp. 310–384; David Lowenthal, *No Liberty for License: The Forgotten Logic of the First Amendment* (Dallas: Spence Publishing Company, 1997); and Walter Berns, *The First Amendment and the Future of American Democracy* (Washington: Regnery Publishing, Inc., 1985).

29. Richard Delgado and Jean Stefancic, *Must We Defend Nazis? Why the First Amendment Should Not Protect Hate Speech and White Supremacy* (New York: New York University Press, 2018), p. 83.

30. Moreover, the “victim [of harassment] does not have to be the person harassed, but can be anyone affected by the offensive conduct,” for anyone can report it. Offensive conduct and words, the EEOC alleges, violate Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act of 1990. U.S. Equal Employment Opportunity Commission, “Harassment,” <https://www.eeoc.gov/laws/types/harassment.cfm> (accessed August 8, 2019).

31. See Marc O. DeGirolami, “Virtue, Freedom and the First Amendment,” *Notre Dame Law Review*, Vol. 91, No. 4 (November 2015), pp. 1500–1502. As DeGirolami notes, in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), the U.S. Supreme Court ruled that the freedom to disseminate information on abortion was a matter of “individual dignity and autonomy.” In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Court ruled that the freedom to make such “intimate and personal choices” as abortion is “central to personal dignity and autonomy.” In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court ruled that the “dignity” of “free persons” inheres when “sexuality finds overt expression in intimate conduct with another person.” This culminated in the Court’s ruling recognizing gay marriage, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which mentions dignity 11 times.

argues in *Obergefell v. Hodges* (2015), means the capacity to choose one's own identity coupled with the corresponding demand that others recognize this identity, then speaking (even indirectly) against a protected identity could constitute "hate speech."<sup>32</sup>

*Third*, America's big tech companies—Google, Twitter, and Facebook—largely imitate the premises of Europe's "hate speech" laws. And they are currently in the midst of expanding restrictions. A leaked Google internal memo shows the company's skeptical view of the freedom of speech, comparing the "American tradition" to the "European tradition": America prioritizes "free speech for democracy, not civility," while the European tradition "favors dignity over liberty and civility over freedom." The memo states Google's support for the European tradition and argues that all tech platforms will move in that direction eventually.<sup>33</sup>

Similarly, Twitter publicly states its commitment to prohibiting "content intended to incite fear or spread fearful stereotypes about a protected category" and "content that degrades someone." Since inciting fear is so broad as to have no intelligible content, anything short of celebration of a protected identity group can be considered suspect, although Twitter is particularly devoted to stopping "hatred, prejudice or intolerance" that "seeks to silence the voices of those who have been historically marginalized."<sup>34</sup>

Facebook's policies explicitly ban the use of what it deems to be "dehumanizing" terms as applied to groups. The problem with "hate speech," according to Facebook, is that it prevents people from authentically expressing their identities. What exactly might constitute obstruction of individual expression of identity will be judged by the moral mirror within the tens of thousands of Facebook's human "hate speech" reviewers and algorithms which monitor and ban content.<sup>35</sup>

*Fourth*, many of America's colleges and universities already actively promote and implement policies to ban offensive thoughts through speech codes. This, of course, is in stark contrast to the original purpose of these institutions: freedom of the mind and the pursuit of truth. Many

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32. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

33. Nick Statt, "Leaked Google Research Shows Company Grappling with Censorship and Free Speech," *The Verge*, October 10, 2018, <https://www.theverge.com/2018/10/10/17961806/google-leaked-research-good-censor-censorship-freedom-of-speech-research-china> (accessed December 9, 2019). Although this memo was leaked, Google did not deny the authenticity of its content.

34. Twitter, "Hateful Conduct Policy," <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy> (accessed June 18, 2019).

35. Billy Perrigo, "Facebook Says It's Removing More Hate Speech Than Ever Before. But There's a Catch," *Time*, November, 27, 2019, <https://time.com/5739688/facebook-hate-speech-languages/> (accessed May 1, 2020).

of America's colleges and universities are now the training ground for a generation of future citizens sympathetic to outlawing "hate speech." A recent poll reveals that only 53 percent of college students—a bare majority—favor freedom of speech, a marked change from the spirit of 1960s campus activists.<sup>36</sup>

As this powerful, multi-front movement continues to grow, Americans should not view the courts as their sole protectors. Courts are not impenetrable fortresses, but rather are swayed both by public opinion and by elite activism. One striking example is *Obergefell v. Hodges*, in which a divided Court held that same-sex marriage is a constitutional right. The Court would never have ventured such a ruling 50 years ago for fear of being labelled a usurper and risk being disobeyed. In 1972, upholding a 1971 Minnesota Supreme Court ruling in the case of *Baker v. Nelson*,<sup>37</sup> a unanimous U.S. Supreme Court held in a one-sentence order that a challenge to Minnesota's law limiting marriage to persons of the opposite sex did not even raise "a substantial federal question."<sup>38</sup> But America's elite institutions—the universities, the press, the mass entertainment industry—had prepared public opinion to adopt the views stated in the *Obergefell* ruling. A similar development is already occurring with outlawing "hate speech."

## What Is "Hate Speech"?

"Hate speech," according to the most influential restriction advocates, is speech that allegedly causes physical harm, causes social harm, or, most important, harms the dignity and self-respect of marginalized groups. According to Mari Matsuda of the University of Hawaii, a prominent voice for speech criminalization, "The definitive elements [of hate speech] are discrimination, connection to violence, and messages of inferiority, hatred, or persecution" directed against "historically oppressed groups."<sup>39</sup>

Similarly, Jeremy Waldron of New York University states that "hate speech" consists of "publications which express profound disrespect, hatred, and vilification for the members of minority groups."<sup>40</sup> The minority status

36. College Pulse, *Free Expression on College Campuses*, study commissioned by the Knight Foundation, May 2019, p. 6, <https://www.knightfoundation.org/reports/free-expression-college-campuses> (accessed December 9, 2019).

37. *Richard John Baker v. Gerald R. Nelson*, 291 Minn. 310, 191 N.W.2d 185.

38. "Supreme Court Order in *Baker v. Nelson*," October 10, 1972, U.S. National Archives, <https://www.docsteach.org/documents/document/supreme-court-order-baker-v-nelson> (accessed December 10, 2019).

39. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," pp. 2320 and 2381.

40. Waldron, *The Harm in Hate Speech*, p. 27. See also *ibid.* pp. 37-38.

considered here is not based on numerical representation (for example, coal miners in West Virginia). Rather, these are “vulnerable minorities,” defined by their race, ethnicity, nationality, or sexuality, “who in the recent past have been hated or despised by others within the society.”<sup>41</sup>

For other advocates, in fact, even the insinuation of dislike or contempt for a group—what is often referred to as a dog whistle—may constitute “hate speech.” “Hate speech,” writes one scholar, can be “disguised as political expression.”<sup>42</sup> It can “be concealed in statements which at a first glance may seem to be rational or normal,” the Council of Europe declares.<sup>43</sup> Nor does such speech need to be directed at a particular individual or therefore involve an actual victim for it allegedly to harm the entire group. Its circulation in society detracts from the self-respect of a marginalized group and undermines its members’ status in the eyes of the dominant group.

At bottom, “hate speech” is essentially relational: It comes from the “dominant” or oppressor group—often openly identified in the American context as “whites”—and is directed against “subordinate-group members,” the marginalized, who, again, are not necessarily numerical minorities, as women also are included.<sup>44</sup> Because there “is no correlate—no analog, for hate speech directed toward whites,” as the oppressor cannot be wounded by speech, such speech is acceptable according to Richard Delgado and Jean Stefancic of the University of Alabama Law School.<sup>45</sup>

Given this, for some advocates, it follows that the only tolerable form of “hate speech” is speech directed against the alleged oppressor group. As Matsuda elaborates, “Expressions of hatred, revulsion, and anger directed against historically dominant-group members by subordinate-group members are not criminalized by the definition of racist hate messages used here.”<sup>46</sup> “Hate speech” and hatred as such, in other words, are tolerable.

In fact, the very purpose of “hate speech” regulation is one-sided: The marginalized—who by their alleged marginalization are seeking liberation—are permitted to speak freely, while the oppressor group must be silent. For example, Malcolm X’s expression “white devil”<sup>47</sup> is as tolerable as it

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41. Ibid., pp. 66 and 96.

42. Tsesis, “Dignity and Speech: The Regulation of Hate Speech in a Democracy,” p. 501.

43. Anne Weber, *Manual on Hate Speech*, Council of Europe, September 2009, p. 5, [http://icm.sk/subory/Manual\\_on\\_hate\\_speech.pdf](http://icm.sk/subory/Manual_on_hate_speech.pdf) (accessed December 9, 2019).

44. Matsuda, “Public Response to Racist Speech: Considering the Victim’s Story,” pp. 2334 and 2348; Delgado and Stefancic, *Must We Defend Nazis? Why the First Amendment Should Not Protect Hate Speech and White Supremacy*, pp. 9, 83, 84, and 127.

45. Delgado and Stefancic, *Must We Defend Nazis? Why the First Amendment Should Not Protect Hate Speech and White Supremacy*, p. 95.

46. Matsuda, “Public Response to Racist Speech: Considering the Victim’s Story,” p. 2361.

47. Ibid., pp. 2363–2364.

is to say today that “[t]he greatest terrorist threat in this country is white men.”<sup>48</sup> Society must tolerate speech “that comes from an experience of oppression.”<sup>49</sup>

Some criminalization advocates not only tolerate, but encourage “hate speech” directed against the so-called oppressor group: If the liberation of oppressed groups comes to depend on disrupting or undermining the power of the oppressor, then “hate speech” toward the latter is ipso facto encouraged. Today, advocates view such speech as courageous, heroic, and necessary, both for the purpose of supposed liberation and for the deeper purpose of finding and securing an identity for the marginalized: An “angry, hateful poem by a person from a historically subjugated group” should be interpreted as “a victim’s struggle for self-identity in response to racism.”<sup>50</sup> Not only is such speech encouraged in America’s racial politics, one sees it as well in the LGBTQ movement’s open hostility to Christianity: The public legitimacy of their sexual identities has come to depend on undermining the alleged oppressor group whose speech can make them doubt their identity. It may even be the case that through “hate speech” toward oppressor groups, the marginalized can eventually achieve the goal of obtaining a “*dominant* or equalized position” in society.<sup>51</sup>

While some restriction advocates claim that they desire facially neutral speech regulations that purport to protect all groups from “hate speech,” the unmistakable underlying goal of such laws is to decrease the speech of the oppressor and permit or increase the speech of the marginalized.<sup>52</sup> Why, after all, would judges or administrators equally enforce laws if they concedes the premise that the marginalized have a truer, more just voice struggling for self-respect and dignity, while the only obstacle in their way is the oppressor group, who uses speech to defend its own dominance?

To protect the allegedly marginalized who are seeking liberation, self-respect, and dignity from critical or even reasonable speech, the public square must undergo an essential transformation. As Delgado and Stefancic note, speech regarding *facts* that may call into question a group’s self-respect

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48. Joseph A. Wulfsohn, “CNN Commentator to Republican Guest: ‘White Men Who Think Like You’ Are the ‘Greatest Terrorist Threat’ in US,” Fox News, August 20, 2019, <https://www.foxnews.com/media/cnn-angela-rye-white-men-greatest-terrorist-threat> (accessed October 21, 2019).

49. Matsuda, “Public Response to Racist Speech: Considering the Victim’s Story,” pp. 2363–2364.

50. *Ibid.*, pp. 2361–2362.

51. *Ibid.*, p. 2362. Emphasis added. However, for Matsuda, once this group achieves either a “dominant or equalized position” in society—presumably to be judged by the group itself—we are told that it will lose its protection to express “anger.”

52. Delgado and Stefancic, *Must We Defend Nazis? Why the First Amendment Should Not Protect Hate Speech and White Supremacy*, pp. 70–72. Waldron, however, is a notably moderate exception. Consider Waldron, *The Harm in Hate Speech*, p. 121.

would be viewed as “deplorable” and constitute “hate speech.” For instance, speaking of the statistically documented disparities in educational preparedness of affirmative action recipients is not permissible speech.<sup>53</sup> Labeling as “hate speech” factual, provable claims would extend to any number of issues that conflict with the self-respect of the marginalized. One already sees this conflict underway between medical doctors and transgender activists.

Once the truthfulness of a claim is no longer held to qualify it as protected speech, the alleged victim’s idiosyncratic view of his self-respect and his anger at its being questioned become the arbiters of justice. Not just a victim’s rational, evidence-based testimony or bodily harm, but the victim’s sense of self-respect, regardless of the truth, assume a posture of sanctity.

Beyond narrow factual claims, on this logic, so too would broader factual disputes be judged impermissible. Because “even a determined judiciary will not be able to enforce equality and racial justice” by banning “hate speech,” ridding society of the underlying sentiments contained in “hate speech” requires that the dominant group’s culture and opinion of itself be reshaped so that positive depictions of marginalized groups predominate in the minds of oppressor groups and in society.<sup>54</sup> Presumably, advocates must replace the dominant group’s cultural images and narratives with new mythologies about the marginalized—while also removing these from scrutiny or criticism. It would thus become impermissible to dispute the truthfulness of the narratives of the marginalized: for instance, that all of history is patriarchal oppression designed to subjugate women, or that gender is a social construct to be freely chosen, or that the United States is founded fundamentally on white supremacy.<sup>55</sup>

A society devoted to political liberty and natural rights must be radically transformed to bring into existence the new moral doctrine hidden beneath the criminalization of “hate speech.” If the “legitimate object of the law” becomes “avoiding the spread of hatred,” as some criminalization

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53. Delgado and Stefancic, *Must We Defend Nazis? Why the First Amendment Should Not Protect Hate Speech and White Supremacy*, p. 92. On this reading, it is reasonable to conclude that if a particular group commits more crimes than others, even if factually true, it is harmful to that group’s self-respect to make these facts explicit. German laws also exclude the truth of a statement as a defense. See note 23, *supra*. Consider also Coleman, *Censored: How European “Hate Speech” Laws Are Threatening Freedom of Speech*, pp. 8–9, and Matsuda, “Public Response to Racist Speech: Considering the Victim’s Story,” p. 2341. Although Matsuda is ambiguous on the merit of scientific findings that are viewed by marginalized groups as “racist” even if scientifically true, she maintains that “[i]f the harm of racist hate messages is significant, and the truth value marginal, the doctrinal space for regulation of such speech is possible.” *Ibid.* Restriction advocates such as Waldron, however, would not go so far. Consider Waldron, *The Harm in Hate Speech*, p. 122–123.

54. Delgado and Stefancic, *Must We Defend Nazis? Why the First Amendment Should Not Protect Hate Speech and White Supremacy*, pp. 85 and 156–157.

55. *Ibid.*, pp. 156–157. See also Arthur Milikh, “The Tyranny of the Marginalized,” *Claremont Review of Books*, Vol. XX, No. 1 (Winter 2020), <https://claremontreviewofbooks.com/the-tyranny-of-the-marginalized/> (accessed May 7, 2020).

advocates contend, rather than the security of life, liberty, and property, the mind must be the target of the law's censure.<sup>56</sup> The law must restrict oppressor group speech because a “focus on speech and language may be one of the few means of addressing and curing...unarticulated feelings, practices, and patterns of [racist] behavior.”<sup>57</sup> The law, in other words, must enter the mind's inner recesses to judge and punish its motives.<sup>58</sup> Today, “implicit bias” testing in universities and corporations attempts to perform this task.

Descending into the mind and punishing thoughts contradicts the foundation of political liberty: that the mind's faculties—one's thoughts and therefore one's speech—belong to oneself. As James Madison puts it, man has “an equal property in the free use of his faculties.”<sup>59</sup> Man's faculties belong to himself, and his speech, as a product of his mind, also belongs him. This is closely related to Madison's observation that “a man's conscience...is more sacred than his castle,” the violation of which is coequal to breaching the social contract.<sup>60</sup>

In a reversal of Madison's position, restriction doctrines teach that the mind of the oppressor must belong to the marginalized so that the former comes to reflect the notions of self-respect of the latter. These new moral and legal standards teach citizens that they have a right to dominate others and to be obeyed. Their fellow citizens should exist for them and should bend to their wills. Such beliefs simulate the self-understanding of a self-sufficient god, lacking the need for any external authority to moderate or validate them. But since the desire that others must exist for you cannot be satisfied, one must punish those who rebel. Justice is no longer about equal rights, which protect individuals against oppression, but about vengeance and compelled respect. America, we might recall, promises the equal protection of rights, not equal self-respect.

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56. Matsuda, “Public Response to Racist Speech: Considering the Victim's Story,” p. 2347.

57. Delgado and Stefancic, *Must We Defend Nazis? Why the First Amendment Should Not Protect Hate Speech and White Supremacy*, p. 83.

58. Relatively moderate criminalization advocates like Jeremy Waldron state they are not interested in “attitude control” or “thought control.” Waldron, *The Harm in Hate Speech*, p. 38. Yet it would seem that accomplishing the stated goal of the full dignity of marginalized groups, a prerequisite to creating Waldron's vision of a “well-ordered society,” requires that the source of discriminatory feelings—the mind and its judgements—ultimately though tacitly be targeted by the law with a view to their eventual disappearance.

59. James Madison, “Property,” *National Gazette*, March 27, 1792, National Archives *Founders Online*, <https://founders.archives.gov/documents/Madison/01-14-02-0238> (accessed May 7, 2020). See also *The Papers of James Madison*, Vol. 14, 6 April 1791–16 March 1793, ed. Robert A. Rutland and Thomas A. Mason (Charlottesville: University of Virginia Press, 1983), pp. 266–268.

60. *Ibid.*

## The Purported Harms of “Hate Speech”

Criminalization advocates cite four specific harms that are caused by “hate speech”: physical harm, political harm, violence, or—most important—harm to dignity. These claims do not withstand scrutiny.

*First*, criminalization advocates allege that “hate speech” causes physical harm. According to Mari Matsuda, “Victims of vicious hate propaganda have experienced physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, headaches, dizziness, and suicide.”<sup>61</sup> According to Delgado and Stefancic:

[The effects of hate speech] may also include mental illness and psychosomatic disease. The affected person may react by seeking escape through alcohol, drugs, and other kinds of anti-social behavior. The rates of narcotic use and admission to public psychiatric hospitals are much higher in minority communities than in society as a whole.<sup>62</sup>

So too does “hate speech” allegedly cause hypertension, high blood pressure, and even strokes.<sup>63</sup>

In addition, offensive speech “inflicts psychological harm” and “long-term emotional pain” upon the victim, the main effect of which is self-hatred.<sup>64</sup> “[S]peech that communicates low regard for an individual because of race inscribes disabling stereotypes and apathy in those constantly subjected to it.”<sup>65</sup> Thus, much “of the blame for the formation of these attitudes” in children but presumably also in adults “lies *squarely* on value-laden words, epithets, and racial names.”<sup>66</sup> Nearly all cultural ill can be blamed on offensive speech. Eliminate offensive speech, the logic seems to go, and eliminate not only self-hatred, but presumably social pathologies as well.

Restriction advocates exclude the notable examples of individuals like Frederick Douglass and Martin Luther King Jr., among others, who during the rule of slavery, segregation, and hostile public opinion somehow did

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61. Matsuda, “Public Response to Racist Speech: Considering the Victim’s Story,” p. 2336 and footnotes.

62. Richard Delgado and Jean Stefancic, *Must We Defend Nazis? Hate Speech, Pornography, and the New First Amendment* (New York: New York University Press, 1997), pp. 5–6.

63. *Ibid.*, p. 10.

64. *Ibid.*, p. 9.

65. *Ibid.*, p. 13.

66. *Ibid.* Emphasis added.

not suffer the aforementioned pathologies but instead were capable of clear-minded thought and self-possessed action. So too have America's Jews, Mormons, Catholics, and Asians been discriminated against, both in the law and in speech, throughout American history without suffering the same maladies. Nor does the majority group suffer from these pathologies, despite the large amount of hostile speech directed against them in the press, the academy, and the popular culture today.

*Second*, according to criminalization advocates, "hate speech" is a weapon used to prevent the political participation of the marginalized, for it signals that they need not vote or engage politically in the face of an unpersuadable oppressor group. While one might think that the freedom of speech presumes that rational citizens are capable of persuading and being persuaded through reasoned arguments, criminalization advocates disagree. Some allege that because of unequal power differentials embedded in the structures of society and in language, marginalized groups cannot rationally appeal to a majority.<sup>67</sup> Accordingly, because of the mental distortions that power imparts on the oppressor group, power must first be equalized before persuasion is possible. As Charles R. Lawrence III argues:

Prejudice that is unconscious or unacknowledged causes even more distortions in the [marketplace of ideas]. When racism operates at a conscious level, opposing ideas may prevail in open competition for the rational or moral sensibilities of the market participant. But when an individual is unaware of his prejudice, neither reason nor moral persuasion will likely succeed. Racist speech also distorts the marketplace of ideas by muting or devaluing the speech of blacks and other non-whites. An idea that would be embraced by large numbers of individuals if it were offered by a white individual will be rejected or given less credence because its author belongs to a group demeaned and stigmatized by racist beliefs.<sup>68</sup>

If speech is merely a reflection of power, the mind is not open to persuasion, but serves instead as a simulacrum of interests protected by force. Oppressor groups not open to persuasion must thus be compelled to oblige the marginalized, at the very least through speech censorship, but through other means as well. Thus, not speech but power equalization

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67. For a short genealogy of this development, see William Voegeli, "Racism, Revised," *Claremont Review of Books*, Vol. XVIII, No. 4 (Fall 2018), <https://www.claremont.org/crb/article/racism-revised/> (accessed October 23, 2019).

68. Charles R. Lawrence III, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," *Duke Law Journal*, Vol. 1990, No. 3 (June 1990), p. 470. See also Delgado and Stefancic, *Must We Defend Nazis? Why the First Amendment Should Not Protect Hate Speech and White Supremacy*, pp. 67 and 81.

(possibly, for example, through mass immigration and the creation of new minority-group coalitions to form a new majority against the old oppressor majority) is required so that marginalized groups can form a plurality and overcome the distortion of oppressor minds.

How it is that oppression does not distort the reason of the marginalized so as to make their minds uncomprehending of others' reasoned speech is never addressed by these advocates. Rather, marginalized groups are frequently presented as possessing the fullest rational capacity. One may almost come to believe that the experience of marginalization itself grants rational clarity: Somehow, the marginalized can judge fairly in their own cases, and possess what appears to be a nearly infallible (or at least an unquestionable) perspective.<sup>69</sup> If possessing the truth is a good or the best thing, on this logic, it is a gift to be marginalized. Yet these groups, as noted, are simultaneously presented as being distorted by various pathologies and by self-hatred stemming from "hate speech."

*Third*, restriction advocates argue that "hate speech" causes acts of violence—even when not explicitly called for by the speaker. "Words of fear and loathing can, and do, have real consequences," says the United Nations.<sup>70</sup> A society that bans "hate speech," in other words, would have fewer hate crimes. And yet, even though both the United Kingdom and France criminalize "hate speech" directed at Jews, violent anti-Semitic hate crimes in 2018 were 13 times more likely to occur in the U.K. and four times more likely to occur in France than in the U.S., which does not criminalize such speech.<sup>71</sup> As Human Rights Watch observes, "a careful review of the experience of many other countries... has made clear that there is little connection in practice between draconian hate speech laws and the lessening of ethnic and racial violence or tension."<sup>72</sup>

In America, where "hate speech" is not criminalized, hate crimes are falling over time.<sup>73</sup> As one analyst has calculated, the "total number of hate crimes tallied by the FBI going back to the year 1996 was 8,759 from 11,000 agencies. In 2017, with 16,000 agencies reporting, the total was actually

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69. Consider Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," pp. 2335, 2340, and 2356.

70. News release, "Target Hate Speech and Hate Crimes, Zeid Urges States: Statement by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein International Day for the Elimination of Racial Discrimination," United Nations, Office of the High Commissioner for Human Rights, March 21, 2017, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21407> (accessed December 9, 2019).

71. Tel Aviv University, Lester and Sally Entin Faculty of Humanities, Moshe Kantor Database for the Study of Contemporary Antisemitism and Racism, *Antisemitism Worldwide 2018: General Analysis*, p. 138, <http://www.kantorcenter.tau.ac.il/sites/default/files/Antisemitism%20Worldwide%202018.pdf> (accessed December 9, 2019).

72. Quoted in Nadine Strossen, *Hate: Why We Should Resist It with Free Speech, Not Censorship* (New York: Oxford University Press, 2018), pp. 136–138. See also

73. See Jacob Mchangama, "The Harm in Hate Speech Laws," *Policy Review*, No. 176 (December 2012 & January 2013), pp. 95–102.

lower. The overwhelming majority of municipalities reported zero hate crimes....”<sup>74</sup> There is simply no question that America has become a more tolerant society over the past 60 years without “hate speech” laws. The criminalization of “hate speech” is not necessary for hate crimes to diminish.

Nor do “hate speech” laws seem to reduce discrimination. A 2017 European Union survey showed little change in reported discrimination compared to seven years earlier, despite further criminalization of offensive speech across the continent.<sup>75</sup> After the survey, the E.U. Agency for Fundamental Rights was forced to conclude that the “[l]ack of progress in preventing and countering racism indicates that laws and policies may inadequately protect the people they are meant to serve.”<sup>76</sup> The E.U., however, took this as an indication that even more restrictive speech laws are needed rather than as an opportunity to question its premises.

Some restriction advocates cite genocide as the ultimate outcome of “hate speech.” In a statement released by the United Nations Office on Genocide Prevention, Special Advisor Adama Dieng explains: “Genocide is a process. The Holocaust did not start with the gas chambers. It started with hate speech.”<sup>77</sup> Advocates always cite the examples of the Holocaust, the genocides in Rwanda and Sudan and, surprisingly, even the Spanish Inquisition.<sup>78</sup> Given that America has among the freest speech laws in the world, on this logic, we would expect relentless calls to genocide or even genocide itself to take place.

It is deceptive to assert that “hate speech” laws could have prevented the rise of Nazism. Not only did the Weimar Republic already have actively used laws that banned anti-Semitic speech,<sup>79</sup> but Hitler additionally understood that the freedom of speech was a roadblock to total rule: His first emergency declaration ended the freedom of speech and press.<sup>80</sup> In asserting that “hate

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74. See testimony of Robby Soave, Associate Editor, *Reason*, in hearing, *Confronting White Supremacy (Part I): The Consequences of Inaction*, before the Subcommittee on Civil Rights and Civil Liberties, Committee on Oversight and Reform, U.S. House of Representatives, 116th Cong, 1st Sess., May 15, 2019, p. 18, <https://docs.house.gov/meetings/GO/GO02/20190515/109478/HHRG-116-GO02-Transcript-20190515.pdf> (accessed December 9, 2019). Soave observes that “The FBI reported...7,175 crimes in 2017, versus 6,121 crimes in 2016, which represents a 17 percent increase. But it is important to note that nearly a thousand additional municipalities submitted data to the Federal Government in 2017.” See also Heather Mac Donald, “The Frenzied Search for Racism,” *City Journal*, February 18, 2019, <https://www.city-journal.org/jussie-smollett-bigotry> (accessed November 25, 2019).
75. European Union Agency for Fundamental Rights, *Second European Union Minorities and Discrimination Survey: Main Results*, 2017, pp. 13 and 16. [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2017-eu-midis-ii-main-results\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-eu-midis-ii-main-results_en.pdf) (accessed December 9, 2019).
76. European Union Agency for Fundamental Rights, *Fundamental Rights Report 2018*, 2018, p. 77, <http://www.refworld.org/docid/5b18f1b44.html> (accessed December 9, 2019).
77. United Nations, Twitter post, March 31, 2019, <https://twitter.com/UN/status/1112249668849860610> (accessed December 9, 2019). And yet, at other times, even Dieng doubts the effectiveness of such laws: “We must recognize the limits of legislation to combat hate speech.” Quoted in Strossen, *Hate: Why We Should Resist It with Free Speech, Not Censorship*, p. 133.
78. Tsesis, “Dignity and Speech: The Regulation of Hate Speech in a Democracy,” pp. 505–511.
79. Strossen, *Hate: Why We Should Resist It with Free Speech, Not Censorship*, pp. 135–136.
80. Coleman, *Censored: How European “Hate Speech” Laws Are Threatening Freedom of Speech*, pp. 11 and 19.

speech” laws could have prevented the rise of Nazism, restriction advocates misunderstand the powerful causes that accounted for it. German belief in the destiny of a racial identity, caused by a rejection of modern civilization, foreclosed their belief in a general humanity endowed with natural rights. Such powerful intellectual movements, the cause of great revolutionary vigor, are not stopped by “hate speech” laws.<sup>81</sup>

Advocates of speech regulation offer another classic example of violence stemming from speech: the Ku Klux Klan’s cross burnings on the lawns of innocent African American families. Such actions are terrible, yet they were already illegal: Laws against criminal trespass, against damaging property, and against threats of violence were already on the books. Regrettably and unjustly, they were not being enforced. In *Virginia v. Black*, the Supreme Court held that cross burnings perpetrate “a threat of impending violence” and hence can be prohibited by state law.<sup>82</sup> Moreover, under a plausible reading of the First Amendment’s Free Speech Clause, the Ku Klux Klan would be considered an organization engaged in sedition, advocating as it did the overthrow of constitutional government, and would have been outlawed.<sup>83</sup>

*Fourth*, and most important, restriction advocates ultimately seek to criminalize “hate speech” because of its alleged harm to dignity. Dignity is an abstraction praised by nearly everyone today, but its contemporary meaning is not well-understood. The fulfillment of dignity has come to mean that someone must be respected by others as he would like to be respected. Banning “hate speech” and judgments contrary to the dignity of the marginalized, advocates promise, will establish their “equal respect” in society. On this logic, the deeper, unstated goal of outlawing “hate speech” becomes silencing the faculty of judgment of the oppressor group, the very core of which is discrimination in the broad, technical sense of forming judgments that distinguish between the noble and the base and the true and false. To succeed in silencing this power of the mind, one must silence reason itself, a goal that appears to be central to the full celebration and inclusion of all marginalized identities.

## Harm to Dignity

Today’s understanding of dignity marks a radical break from our two preceding intellectual traditions—the biblical and the classical liberal. While

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81. For a penetrating analysis of the cultural and intellectual atmosphere in Germany in the leadup to Nazism, see Leo Strauss, “The Living Issues of German Postwar Philosophy,” published in Heinrich Meier, *Leo Strauss and the Theologico-Political Problem*, (Cambridge: Cambridge University Press, 2006), pp. 115-139.

82. *Virginia v. Black*, 538 U.S. 343 (2003).

83. Lowenthal, *No Liberty for License*, pp. 14–16, 21–25, and 63–68.

neither relies expressly on the word “dignity,” both nevertheless articulate what modern dignity theorists are seeking to establish through this concept: something permanently true of all human beings that endures throughout our changes (in circumstance, character, and growth) and is worthy of respect. The classical liberal tradition grounded dignity in our rational faculty, and the biblical tradition grounded it in the soul. Not satisfied with the previous traditions, contemporary dignity theorists seek something new and better: dignity as the need for others to affirm someone’s self-created identity and thus their self-respect.

**The Biblical and Liberal Traditions.** While the Old and New Testaments do not use the word “dignity,” the Bible does teach that there is something dignified about human beings who, alone among all living things, are created in the image and likeness of God.<sup>84</sup> Human beings are endowed with God’s breath, or an eternal soul responsive to God, which connects us to His divine order. Through the soul, our lives are directed toward a prescribed end according to the laws revealed by God.

The second understanding of dignity, distinct from but perhaps not in conflict with the first, finds its clearest expression in the writings of John Locke and in the broad theoretical consensus among America’s Founders. Although the Declaration of Independence, the Constitution of the United States, and the other works of the Founders do not reference dignity, they all see in our rational faculty the basis for our possessing unalienable natural rights.

Among other things, reason gives us the capacity for foresight, which in turn means that human beings, unlike animals, can be held accountable for their actions.<sup>85</sup> Because our reason can control our passions, appetites, and impulses, we are accountable to and cognizant of the laws of nature and are potentially suited for political self-rule. Thus, Locke refers to the “the dignity and excellency of a rational creature.”<sup>86</sup> In very brief summary, the capacity for rational self-possession is the cause of our self-respect and constitutes the closest approximation to the contemporary meaning of dignity in the American tradition.

Dignity in both traditions, it should be noted, has an ambiguous status: Its basis is innate, but its fullness must be attained. In the Biblical tradition, the breath of God is contained in all human beings, but one cannot

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84. Genesis 1:26.

85. Peter C. Myers, “From Natural Rights to Human Rights—And Beyond,” Heritage Foundation *Special Report* No. 197, December 20, 2017, pp. 8–9. <https://www.heritage.org/progressivism/report/natural-rights-human-rights-and-beyond>.

86. John Locke, “Some Thoughts Concerning Education,” *The Works of John Locke*, 12th ed., Vol. III, § 31, (London: 1824).

relentlessly rebel against God's commands and still have full dignity. In the natural rights tradition, human beings possess reason, but we are not by nature fully dignified, as we are given to violating others' rights (for which reason governments are formed). One may say that we all possess a minimum of dignity *in potentia* in both traditions and that both contain within them intelligible standards of behavior by which one can judge noble and base actions. Thus, both traditions provide a path by which to become fully dignified, the one achieved through rational self-possession and the other through obedience to God's commands.

**The Search for a New Dignity.** In contrast to the political theory beneath America's constitutional order, many of the national constitutions and international accords established since 1945 are explicitly based on a radically new understanding of dignity. In fact, for some contemporary scholars, omitting the new view of dignity from America's founding documents explains the questionable "value, scope, and limits of [America's] constitutional rights."<sup>87</sup> For them, dignity should somehow stand over and above the Constitution, the Declaration, and the understanding of human nature upon which they are based.

The new national constitutions arising in the wake of the Second World War and the Holocaust sought to ground themselves in a new faith, semi-consciously defined against the old alternatives. Before this period, dignity was rarely viewed as a central political concept.<sup>88</sup> As Mary Ann Glendon observes, in the generation before World War II, influential intellectuals like Max Weber and Oliver Wendell Holmes had learned to look at humans scientifically, as merely material beings. Other leading intellectuals of that generation, under the sway of Darwinism, found no special, durable qualities in human beings, seeing them not only as mere body, but also as body changing by the accidents of evolution and therefore neither stable nor ultimately intelligible.<sup>89</sup> The post-World War II dignity movement attempted to rebel against these doctrines while also tacitly accepting their premises. For instance, rather than simply rejecting the theoretical teachings of modern natural science or Darwinism, dignity advocates sought to discover something stable and respectable in human beings without reference, however,

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87. R. George Wright, "Dignity and Conflict of Constitutional Values: The Case of Free Speech and Equal Protection," *San Diego Law Review*, Vol. 43, No. 3 (August 2006), p. 528.

88. For the evolution of the term "dignity," see Michael Zuckert, "Human Dignity and the Basis of Justice: Freedom, Rights, and the Self," *Hedgehog Review*, Vol. 9, No. 3 (Fall 2016), <https://hedgehogreview.com/issues/human-dignity-and-justice/articles/human-dignity-and-the-basis-of-justice-freedom-rights-and-the-self> (accessed December 9, 2019).

89. Mary Ann Glendon, "The Bearable Lightness of Dignity," *First Things*, May 2011, <https://www.firstthings.com/article/2011/05/the-bearable-lightness-of-dignity> (accessed October 24, 2019).

to the soul or reason. Confusion about this central concept has not only led to its capture by political activists, but also has made it so incoherent as to be dangerous.

So fashionable has this term become that some academics assert it as though its meaning is self-evident and requires almost no argumentation: “[P]hilosophically, we may say that dignity is inherent in the human person—and so it is.”<sup>90</sup> While many dignity advocates reference the works of Immanuel Kant as their starting point, Kant’s understanding of dignity is unacceptable by today’s egalitarian tastes because it is closer to the two older traditions.

Kant teaches that dignity consists in man’s capacity to employ the distinctly human faculty of reason in grasping, and subordinating his wills to, the universal moral law. This act is rational self-legislation, and it demands that individuals overcome themselves as beings attached merely to themselves and their own.<sup>91</sup> Dignity here both depends on reason and requires a rare capacity for exercising self-restraint and self-abnegation. This reading implies that while all possess dignity in principle—since the universal moral law is accessible to all—only those who act accordingly may properly be said to fully possess dignity.<sup>92</sup>

Kant’s view of dignity, however, is in conflict with contemporary theorists’ moral attachment to equality. The Kantian view is insufficiently egalitarian, as it establishes a standard of excellence that is surely not achievable by all. As one scholar observes, the *Oxford English Dictionary* gives 11 definitions of dignity, and the one he most esteems is “the quality of being worthy or honorable; worthiness, worth, nobleness, excellence.” Yet this elevated definition troubles him.<sup>93</sup> If dignity is an expression of excellence, it requires a standard of high and low, which in turn also necessitates shame, or the capacity to evaluate oneself and others in reference to an intelligible hierarchy.<sup>94</sup> In order to resolve the conflict between dignity and equality—that is, to allot full dignity to everyone without reference to standards of excellence—modern dignity advocates are prepared to get rid of excellence to make “Every man a duke, every woman a queen.”<sup>95</sup> All must be honorable without attaining anything worthy of honor, or worthy without worthiness.

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90. Waldron, *The Harm in Hate Speech*, pp. 60 (quote). Consider also *ibid.*, pp. 136-143.

91. Immanuel Kant, *Groundwork for the Metaphysics of Morals*, ed. Mary Gregor (Cambridge: Cambridge University Press, 1998), pp. 42-48.

92. See Susan Meld Shell, *Kant and the Limits of Autonomy* (Cambridge, MA: Harvard University Press, 2009). For an alternative reading, see Wright, “Dignity and Conflict of Constitutional Values: The Case of Free Speech and Equal Protection.”

93. Wright, “Dignity and Conflict of Constitutional Values: The Case of Free Speech and Equal Protection,” p. 528.

94. See Clifford Orwin, “Welfare and the New Dignity,” *The Public Interest*, Vol. 71 (Spring 1983), p. 88.

95. Jeremy Waldron, *Dignity, Rank, & Rights*, ed. Meir Dan-Cohen (New York: Oxford University Press, 2012), p. 34.

Other contemporary theorists additionally reject the Kantian view because it is ultimately grounded in our rational faculty. In the elusive chase to disassociate dignity from reason, scholars including Martha Nussbaum see reason as too inegalitarian because it involves “pejorative comparison with nonhuman animals.”<sup>96</sup> The very faculty that once accounted for our dignity in the American tradition—reason—Nussbaum finds inadequate for the sake of human equality with the subhuman: We should not “exalt rationality as the single good thing,” as this “denigrate[s] forms of need and striving that are parts of our animality.”<sup>97</sup> Human beings, in other words, must be animalized to find what is respectable in them. If we hold reason as the highest thing in us, Nussbaum regrets, we come to “respect only a small sliver of ourselves,” for the old view presumably excludes respect for our passions, appetites, and desires.<sup>98</sup> Such a definition points to the enslavement of the mind to powerful passions and nearly limitless appetites—which is, one may say, indeed a form of reanimalization.<sup>99</sup> Where dignity is understood primarily in terms of sentience, rights based on our rational faculty, like speech, are depreciated.

Some influential speech-restriction scholars ultimately identify dignity as “a matter of status—one’s status as a member of society in good standing—and [something that] *generates demands for recognition* and for treatment that accords with that status.”<sup>100</sup> Human beings require “sacral respect” issued to them by others, “not just nonchalant forbearance” like that allegedly offered by the Founders and Locke.<sup>101</sup> As another scholar puts it, dignity requires treating someone “with recognition of her dignity,” which specifically excludes attitudes of contempt, hatred, and discriminatory feelings.<sup>102</sup> Recognition of dignity thus comes to require the absence of contempt, hatred, and discriminatory feelings. On this view, dignity becomes a demand, for one cannot believe in one’s dignity without acceptance and celebration of it by others, who owe us unthinking “sacral respect.”

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96. Martha Nussbaum, “Human Dignity and Political Entitlements,” in *Human Dignity and Bioethics: Essays Commissioned by the President’s Council on Bioethics* (Washington: The President’s Council on Bioethics, March 2008), p. 354.

97. *Ibid.*, p. 363.

98. *Ibid.*, p. 358.

99. Or it is worse than merely reverting to an animal-like existence. Nature moderates animal desires and passions in a way that is not true of human beings. Man has the potential for great cruelty, barbarism, and rebarbarization in a way that animals do not. See Aristotle, *The Politics*, trans. Carnes Lord (Chicago: University of Chicago Press, 1984), 1253a31-a40.

100. Waldron, *The Harm in Hate Speech*, p. 60. Emphasis added.

101. Waldron, *Dignity, Rank, & Rights*, p. 34. As Thomas West shows, however, there is abundant evidence that America’s Founders were concerned with the moral and even material well-being of others. See Thomas G. West, “Poverty and Welfare in the American Founding,” *Heritage Foundation First Principles* No. 53, May 19, 2015, <https://www.heritage.org/poverty-and-inequality/report/poverty-and-welfare-the-american-founding>.

102. Alan Gewirth, “Human Dignity as the Basis of Rights,” in *The Constitution of Rights: Human Dignity and American Values*, ed. Michael J. Meyer and William A. Parent (Ithaca: Cornell University Press, 1992), p. 15.

Once dignity no longer depends on reason, where the capacity to rule oneself rationally is primary, and once dignity no longer depends on the soul, where human beings live in relation to a divine order, dignity greatly relies on its being granted to groups and individuals by others: “We accord people dignity on account of the sorts of beings human persons are.”<sup>103</sup> We are fundamentally needy beings whose self-worth must be confirmed through the opinions of others. Dignity theorists seem to want it both ways: On the one hand, they want dignity to be innate while not finding its grounding in reason or the soul; on the other hand, while asserting that it is innate, they claim that it must be accorded to individuals and groups through recognition by others (and by the law). This confused, radical break from the preceding tradition leads quickly to the view that speech can cause devastating harm to dignity.

The dignity-as-recognition view is best summarized (though perhaps not fully espoused) by the influential professor Charles Taylor. Human dignity, writes Taylor, consists in the “universal potential” for “forming and defining one’s own identity, as an individual, and also as a culture.”<sup>104</sup> One’s identity should not merely be given, forced, or tacitly assigned by the dominant groups in society. The marginalized in particular “ought to purge” themselves of the “imposed and destructive identity” given to them presumably by male, white, or “European” society.<sup>105</sup>

In doing this, one’s identity may become authentic: “Being true to myself means being true to my own originality, which is something only I can articulate and discover. In articulating it, I am also defining myself.”<sup>106</sup> On this view, authentic identity creation would consist first in liberation from given,

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103. Waldron, *The Harm in Hate Speech*, p. 86. Waldron is ambiguous regarding the origins of dignity. On the one hand, he follows Locke and claims that we possess free will as rational actors. On the other hand, he thinks laws are insufficient to reinforce dignity: We can believe in our own dignity only if others recognize us as dignified beings. Waldron is a careful thinker but never seems to resolve this crucial point.

104. Charles Taylor, “The Politics of Recognition,” in *Multiculturalism: Examining the Politics of Recognition*, ed. Amy Gutmann (Princeton, NJ: Princeton University Press, 1994), p. 42.

105. *Ibid.*, p. 26. Consider Taylor’s comment regarding society as “white domination” in *ibid.*, p. 42. Moreover, it is the marginalized understood as women and non-whites who especially, it would seem, are denied an identity. See *Ibid.*, pp. 36 and 43. The bold, foundational arguments for this view are laid out by Herbert Marcuse. See Herbert Marcuse, “Repressive Tolerance,” in Robert Paul Woolf, Barrington Moore, Jr., and Herbert Marcuse, *A Critique of Pure Tolerance* (Boston: Beacon Press, 1969), pp. 95–137. <http://la.utexas.edu/users/hcleaver/330T/350kPEEMarcuseToleranceTable.pdf> (accessed December 9, 2019).

106. Taylor, “The Politics of Recognition,” in *Multiculturalism: Examining the Politics of Recognition*, p. 31. See also Charles Taylor, *The Ethics of Authenticity* (Cambridge, MA: Harvard University Press, 1991), p. 33. The assumption that all human beings are presumptively “capable of understanding ourselves, and hence of defining an identity,” is a statement of remarkable boldness and seductive flattery. By contrast, one should consider the actual difficulties of achieving self-knowledge, the requirements thereof, and its rareness in the example of Plato’s Socrates as discussed in Dustin Sebell, *The Socratic Turn: Knowledge of Good and Evil in an Age of Science* (Philadelphia: University of Pennsylvania Press, 2016).

false, and inauthentic individual and group identities.<sup>107</sup> But identity creation alone is not enough: The commandment to rebel from given identities and create an authentic one is followed by the equally necessary demand that “*Everyone* should be recognized for his or her unique identity.”<sup>108</sup> Fairness “demands equal chances for everyone to develop their own identity,” combined with the recognition by others of these identities, based on their “gender, racial, culture, or to do with sexual orientation.”<sup>109</sup>

Thus, one’s created identity crucially comes to depend on others’ recognizing that identity as one would like it to be recognized. Nonrecognition or misrecognition inflicts grievous harm; both become forms of oppression that imprison “someone in a false, distorted and reduced mode of being” and cause “self-hatred.”<sup>110</sup> To withhold recognition of a self-styled identity is to inflict harm by denying someone that which he most needs to be himself. Recognition, in other words, is not merely an optional courtesy, but a “vital human need.”

So too does censure or condemnation of a chosen identity bring great harm. Thus, “the demand for equal recognition extends beyond an acknowledgement of the equal value of all humans potentially, and comes to include the equal value of what they have made of this potential in fact.”<sup>111</sup> Speech that imparts judgements or doubts regarding the goodness or authenticity of a self-created identity, even if based on rational inquiries, becomes a form of oppression.<sup>112</sup> Such arguments almost effortlessly end up sanctifying dignity as a self-created cause for self-respect—which, in practice, becomes a bouquet of desires and self-declared myths that ultimately depend on others’ confirmation of their “truth.” Nevertheless, the surest way to lose one’s dignity and social status in this scheme is not by inventing an identity, but by denying that identity can be invented.

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107. Consider also the nearly unbelievable invocations and flattery concerning identity creation in Richard Rorty, *Achieving Our Country: Leftist Thought in Twentieth-Century America* (Cambridge, MA: Harvard University Press, 1998), pp. 22–24. The future of identity creation is radically open, while the highest wisdom of the past, in religion and philosophy, proves false: “[N]o past human achievements, not Plato’s or even Christ’s, can tell us about the ultimate significance of human life. No such achievement can give us a template on which to model our future. The future will widen endlessly. Experiments with new forms of individual and social life will interact and reinforce one another. Individual life will become unthinkably diverse and social life unthinkably free.” *Ibid.*, p. 24. And America is “the first thoroughgoing experiment in national self-creation: the first nation-state with nobody but itself to please—not even God.” *Ibid.*, p. 22.

108. Taylor, “The Politics of Recognition,” in *Multiculturalism: Examining the Politics of Recognition*, p. 38. Emphasis in original.

109. Taylor, *The Ethics of Authenticity*, p. 50.

110. Taylor, “The Politics of Recognition,” in *Multiculturalism: Examining the Politics of Recognition*, pp. 25 and 26.

111. *Ibid.*, pp. 42–43.

112. Taylor acknowledges problems stemming from what he calls the vulgarization of authenticity and struggles against them. He denies that arbitrary feelings alone should be judged as authentic. Taylor, *The Ethics of Authenticity*, pp. 36–41. Nevertheless, the standards that he seems to leave for judgments concerning authenticity—standards that would dam the outgrowth of vulgar authenticity—are only vaguely posed as falling into “horizons of important questions,” having “properties of human significance,” being “sacred,” and non-trivial. Consider also *ibid.*, p. 66.

The two great philosophers from whom this amalgamation of thought ultimately arises (Jean Jacques Rousseau and Friedrich Nietzsche) would look down on such sanguine speech as sophistry aiming to flatter democratic man into believing that all can be wise, creative, and free in the fundamental sense,<sup>113</sup> but by promising that self-creation is easily available to all and by misunderstanding the depth of what is at stake in this task, contemporary dignity theories lead their followers into disappointment, resentment, and worse.

The new view of dignity creates brittle human beings who can have little self-respect without others confirming their worth. They thus exist within the psychological confusions and uncertainties of vanity, living engrossed in and dependent on the judgments of others. They learn to demand respect without justification or virtue. They first attempt to persuade and then compel others to believe in their unfalsifiable, self-created identities. Given the psychological impossibility of this task (not to mention its undesirability), they can cultivate a punitive (if not tyrannical) desire to crush not just those who disbelieve them, but even the truth so that they can preserve their self-created self-respect. Dignity becomes so frail and confused that it generates the demand to silence others' speech and thoughts so that they can continue to believe their good opinions of themselves. In sum, these doctrines create both the pretense to godlike power and childlike frailty, not to mention unhappiness.

Nor does easygoing self-creation lead to the seductive promise of political peace. Taking a broader view and considering what would likely happen to a nation if it were earnestly guided by this doctrine, all self-created identity groups would eventually become so different from one another that they would agitate against each other, thus preventing the possibility of like-mindedness, comity, and unity—in a word, nationhood. As Taylor summarizes:

What we are asked to recognize is the unique identity of this individual or group, their distinctness from everyone else. The idea is that it is precisely this distinctness that has been ignored, glossed over, assimilated to a dominant or majority identity. And this assimilation is the cardinal sin against the ideal of authenticity.<sup>114</sup>

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113. For Rousseau, the discovery of our true inner being requires a rediscovery of the sentiment of existence, which is accessible only to the rarest human intellects and requires reasoning through the psychic distortions brought on by man's accidental sociality. For Nietzsche, self-creation is similarly possible only for the rarest human beings: philosophers and artists like himself who, in the face of the abyss, can create new gods and nations. Yet for Nietzsche, nearly all other human identities depend ultimately on the gods created for them by higher-order geniuses.

114. Taylor, *The Ethics of Authenticity*, p. 38.

In practice, one is meant to believe that this radical form of identity creation will somehow yield harmless, tame, and polite human beings capable of living together in a democratic society. Advocates hope that democracy and pluralism, ideals in the end higher for them than authenticity itself, will circumscribe and moderate the formation of identities, but in practice, real identities based on deep, genuine beliefs are often un stomachable to each other.<sup>115</sup> Such identities may even seek to harm those who blaspheme against their gods. Why compromise one's authenticity for the sake of democracy and pluralism? The Third Reich, for instance, aimed to create an identity anchored in race. A self-created identity may dictate the desire to rule over others on the basis of one's superiority in authenticity. If earnestly practiced, this doctrine may lead nations into two directions: either war among identity groups or the domination of one identity group over another.

## Curbing Fanaticism

The underlying psychological appeal of the new dignity consists in the longing of a people who no longer believe in either a divine or a rational order providing them with an eternally true principle on which to ground their self-respect. But contemporary dignity theories do not deliver. In fact, they point to a new form of fanaticism incompatible with political self-rule.

One possible solution can be gleaned from Thomas Jefferson's widely influential arguments concerning how fanaticism can be tempered by reason. In Jefferson's day, he thought religion was the source of fanaticism. Today, identity politics is and promises to be as piously cruel as yesterday's religion. Both want to be rid of their adversary: rational inquiry.

According to Jefferson, the early American settlers who ran from religious persecution began to persecute in their new settlements, passing laws enforcing the baptism of children, banning blasphemy, and imprisoning members of other sects. Their fanaticism culminated in burnings and torture.<sup>116</sup> For Jefferson, this characterizes a general tendency within all sects: Each sect claims to possess the singular true teaching and is thus orthodox onto itself. Since "man is an imitative animal," he learns to punish from his God.<sup>117</sup> Inherent in the nature of unmoderated orthodoxy is the desire

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115. While Taylor acknowledges the possibility of such conflict, he never resolves the matter. Consider Taylor, *The Ethics of Authenticity*, pp. 62–63. For insightful thoughts on this question, see Stanley Fish, "Boutique Multiculturalism," *Critical Inquiry*, Vol. 23, No. 2 (Winter 1997), pp. 378–385.

116. Thomas Jefferson, "Notes on the State of Virginia," Query XVII, in *The Portable Thomas Jefferson*, ed. Merrill D. Peterson (New York: Penguin Books, 1975).

117. *Ibid.*

to impose belief onto others: Saving souls through the conversion of non-believers was a religious duty that, without legal restraint, culminated in coercion of belief and brutality.<sup>118</sup>

Jefferson's solution to taming the psychology of orthodoxy is perhaps strange at first glance: the freedom of religion and the freedom of speech. Jefferson's logic unfolds in the following way. The objective of civil law is the protection of natural rights and the subordination of ecclesiastical authority to it: "The legitimate powers of government extend to such acts only as are injurious to others," defined mainly in terms of life and property. The separation of church and state redefines harm as largely material or physical, rather than as affronts against religious opinions.<sup>119</sup> All individuals, in other words, are tolerated—for toleration does not require either love or even fellow feeling, but the firm belief that all are entitled to the security of natural rights. Once rights are secured, moderating religious fanaticism requires the free circulation of opinions, both in religion and in other spheres, like science. In their free circulation, there is contestation, and religious dogma becomes tame and docile when removed from the power of the law and when subject to the "only effectual agents against error": namely, "reason and free inquiry."<sup>120</sup>

Viewed from the perspective of Jefferson's analysis, rational inquiry into the various claims to marginalization and dignity moderate their fanaticism. By making criticism of identity, and, in the case of Europe, religion, illegal, however, "hate speech" laws nurture the punitive passions contained in orthodoxy. If identity groups are removed from rational criticism, they become divinized and held as sacred. This is especially dangerous in the American context when, as noted, these identities are defined explicitly against alleged oppressor groups. In Europe, one readily sees the developing ferocity of Islam unchecked by rational inquiry. "Hate speech" laws may bring about the very violent tendencies they claim to diminish. Free speech thus stands as the roadblock on the path to fanaticism.

## Conclusion

Many well-meaning, decent Americans do not yet clearly see the underlying goals or the political implications of "hate speech" laws. They should first recall that America's laws already ban incitement to imminent violence

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118. *Ibid.*

119. *Ibid.*

120. *Ibid.*

of any kind; they already protect citizens against individual defamation. Perhaps even more powerfully, the law of opinion already opposes hatred and contempt for protected groups in the public square. There is thus no need for “hate speech” laws.

Restriction advocates, to various degrees, are committed to creating a world that is hostile to political liberty and freedom of the mind—viewing these, in fact, as conflicting with their genuine goal of dignity and equal self-respect. If the law’s aim becomes securing “each person’s proper pride and dignity against the soul-shriveling humiliation that a discriminatory rebuff can give rise to,” despotic measures must ultimately be instituted.<sup>121</sup>

In civil conditions, one can neither compel the earnest respect of others nor force one’s own self-respect, though it is possible to destroy political liberty in the attempt. Should such laws be implemented in America, the public square will be transformed into an arena where forced silence and false celebration rather than free political deliberation are the norm and where the state uses its power to act out resentments against oppressor groups. There will be more hatred and more political instability.

Thus, at least two possible outcomes may await America: despotism if “hate speech” advocates fully have their way or rebellion if they do not. On the one hand, the obedience of a free people to the goals beneath such laws is not produced through the kind of compulsion prescribed. If laws repress speech slowly, the nation will make of citizens mindless subjects incapable of political judgement and suited to being ruled by the state or by a triumphant marginalized group acting through it. On the other hand, free citizens, while still living with the memory of political liberty, will come to despise this new order and may well rebel against it. In such a rebellion, a new fierce spiritedness could be born that judges democracy and equality to be contemptible and grotesque ideals. An unstable mixture of the two is imaginable.

In the coming years, the public should be prepared for so-called moderate voices who in time may grow friendly to speech regulation and claim that “America would be even more American” if it enacted “hate speech” laws.<sup>122</sup> Moderate voices, however, are moderate only insofar as their desire for immediate peace blinds them from soberly judging what awaits the nation.

Courageous and patriotic politicians must fight for the freedom of speech by reminding the public of its purpose and the consequences of losing it.

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121. Waldron, *The Harm in Hate Speech*, p. 84.

122. Delgado and Stefancic, *Must We Defend Nazis? Why the First Amendment Should Not Protect Hate Speech and White Supremacy*, p. 105.

Many of today's elites have already been at least partly convinced of the need to outlaw "hate speech," and in late democracies throughout the world, the will of the majority is more and more disregarded by them. But public jealousy of free speech and anger at possible future usurpations, along with other possibilities, will be the only imperfect barriers that in the long run may protect this right.

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