

HATE SPEECH AND GOVERNMENTAL RESTRICTION



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Introduction

The aim of this thesis is to investigate the possible justifications for legal restrictions on hate speech and to judge their merits. Is unrestrained expression of ideas and moral beliefs, a necessary condition for a liberal society? And does the restriction of hate speech by law, undermine the basic foundation of tolerance within liberal societies? These questions determine what freedom of expression means, in relation to the criminalization of hate speech. Many agree that harming others should not be tolerated, as it limits the freedom of others. In almost every case, hate speech is, either purposefully or not, offensive to a number of people. This raises the issue of where to draw the line between harm and offense. Can hate speech incite so much fear and offense that it can be seen as harm? To answer these kind of questions, two different defenses of hate speech limitation will be reviewed. The purpose of analyzing these two defenses of restricting hate speech is to answer the main research question is: *To what extent should the government restrict hate speech?*

The structure of this thesis will be as follows: the first chapter will contain an overview of free speech legislation and relevant theories on the subject. In order to determine where governmental restrictions should be placed, it is important to know and understand its contemporary situation. By examining where the current lines are drawn on the subject of free speech, can it eventually be evaluated. Thus I hope to determine whether or not hate speech laws should be increased or decreased. My focus will be on the United States and on Europe, as these Western democracies are compatible and similar enough. Yet, their approach to the issue of free speech is a very different one, as there are two models: the American and the European model. Both will be discussed in chapter one. Chapter one will also give an overview of the Harm and Offense principle, which are central concepts by John Stuart Mill and Joel Feinberg within the free speech debate.

Chapter two will introduce Jeremy Waldron's dignity argument, which counts as one of the leading defenses of the restriction of hate speech. His approach is marked by a careful examination of leading free speech defenders and contrasting their views with his own. He concludes that hate speech harms its targets by damaging their social standing, or rather their dignity, within society. This thesis will examine the validity of that conclusion and scrutinize the assumptions that underlie Waldron's theory. If Waldron succeeds, free speech should be limited by banning hate speech, in order to protect the dignity of all members of society.

Caroline West has a very different approach to the contemporary hate speech debate. She redefines the concept of free speech in such a way that hate speech may work to undermine it. West's concept of free speech and her arguments will be outlined and discussed in chapter three. If her theory holds, then restricting hate speech may enhance the free speech of others. This relatively new approach to the hate speech debate may yield an important defense for those that wish to ban hate speech.

By analyzing both Jeremy Waldron's and Caroline West's arguments (the two most obvious defenses of hate speech regulation), new insights into the merits of hate speech restrictions may be found. Chapter four will bring together the analyses of previous chapters and reflect on the outcomes they have produced. Here, the answer to the central research question will be forged and provide a better understanding of the benefits and disadvantages, of restricting hate speech.

Answering the main research question should give more insight concerning the dilemma, with the right to free speech on one side and the supposed harmfulness of hate speech on the other. The complexity of the issue will be tackled by examining major works on the subject, most notably by: Jeremy Waldron, Caroline West, John Stuart Mill, Edward Baker and Joel Feinberg. Collectively they could lead to an in-depth understanding of the issue, but more importantly it should provide new insights and make way for new theories and solutions concerning the issue of hate speech. Additionally, the American and European model will be compared, to determine the morally superior approach, along with the connecting literature.

Chapter One

1.1 WHERE TO DRAW THE LINE

A dilemma arises when dealing with the issue of hate speech: should the government intervene by persecuting, or should citizens be protected by the right to free speech? The term “hate speech” does not have a universally accepted definition (European Court of Human Rights 2013). Hate speech is commonly considered to include slander, discrimination, anti-Semitism and several forms of verbal assault. Groups can also be targeted by hate speech, which can in extreme cases be experienced as a real threat; for the assaulted and society as a whole. The aim of restricting hate speech, is usually to overcome such types of extremism. It is also a common conviction to protect certain minorities in society from discrimination.

On the other hand, liberal societies place a high value on the right to free speech, meaning civilians have the right to freely express their views and opinions. The importance of free speech is usually amplified, by pointing out the injustice of oppressing alternate points of view. Especially minorities can fall victim to such oppression by the dominant majority. Free speech should generate substantive debate in society. It is commonly believed in Western democracies that civilians should be able to: express themselves, criticize each other and by doing so, start a debate. The advantage being, that society can develop and move forward through dialogue.

There are different perspectives on the issue of hate speech, although the issue can generally be described as a dilemma. The main question that presents itself is: does the offense that hate speech causes outweigh the negative effects of limiting free speech? Allowing hate speech to be publicly told (without consequence) might result in harm being inflicted on certain members of society. Protecting minorities from discrimination and offering groups protection, is a common motivator to implement hate speech laws. John Stuart Mill’s ‘harm principle’ addresses the types of harm that can derive from hate speech, but he also discusses the importance of individual liberty, meaning the populous shouldn’t be censored.

1.2 HARM PRINCIPLE AND OFFENSE PRINCIPLE

One of the most well-known defenses of the right to free speech, is that by John Stuart Mill. His work is categorized as classic utilitarianism, which entails the study of ethics and the aim to maximize utility. In his essay entitled ‘*On Liberty*’, which was published in 1859, Mill examined the limitations that could rightfully be imposed on an individual. Mill concluded that: power can only rightfully be exercised over any member of society, to prevent harm to others, as a famous passage states: *'But as soon as mankind have attained the capacity of being guided to their own improvement by conviction or persuasion (a period long since reached in all nations with whom we need here concern ourselves), compulsion, either in the direct form or that of pains and penalties for non-compliance, is no longer admissible as a means to their own good, and justifiable only for the security of others'* (Mill 2008, 15). Speech should therefore be restricted, only when there is a security risk to others. Freedom of speech is seen as an important human right, but cannot be favored above all other human rights; like for example, the right to safety. The right to free speech cannot hierarchically be

placed above all others, but this takes nothing away from the value of free speech, which was emphasized by John Stuart Mill.

The object of Mill's essay '*On Liberty*' is to assert one basic principle, which is: '*that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection*' (Mill 2008, 14). Any doctrine should be presentable in Mill's view, unless it causes harm to others. He makes a distinction between legitimate and illegitimate harm. Speech that causes legitimate harm should not be restricted or punished in any way by the government, whereas illegitimate harm should be restricted. Endangering the assaulted with a direct threat, that causes a security risk, would classify as illegitimate harm. Mill displays an example of hate speech towards corn dealers, with the speech: '*Corn dealers are starving the poor*'. When published on paper, such speech would be considered legitimate harm, but when said outside the house of a corn dealer, in front of a mob that could act on hearing this speech, it would be considered illegitimate harm by John Stuart Mill. In the latter case the corn dealer's life is jeopardized by such hate speech (causing illegitimate harm) and should therefore be restricted. According to Mill's Harm Principle, only speech that causes illegitimate harm can justify as a restriction on free speech (Mill 2008, 62).

John Stuart Mill argued that the expression of opposing opinions would benefit society as a whole (Mill 2008, 21). Lending voice to deviating views would force people within society to reflect on their beliefs surrounding certain topics. Additionally, the debate itself would help people to come to a better understanding of one's positions as well as compel them to listen to the position of others. Ultimately, this would help liberate each individual from the oppression of groups as well as shape different modes of living, for different minded individuals. Mill's stand has been greatly influential in the liberal tradition, although critique has been raised on the compatibility with Mill's stand against harm to others. Apart from a case in which harm is inflicted on another individual, Mill is against the restriction of free speech.

The main reason that Mill is such a strong supporter of the right to free speech, is because he values the search for knowledge and truth. Mill does not believe in censorship (unless illegitimate harm is inflicted on others), as even false information can be useful by demonstrating its untruthfulness. More opinions will lead to a more elaborate search for righteousness, which will benefit society in the long run. Censorship will restrict speech and deduct part of the discussion. Restricting hate speech would not only strike these offensive opinions, but also the contradicting opposing opinions. Trying to convince others of their wrongfulness, would also underline your assurance. Mill stresses the importance of social debate and the importance of discussion, which are tools for social development. Restricting free speech and censoring opinions would undermine these liberties (Mill 2008).

Joel Feinberg's Offense Principle can be seen as an extension of Mill's Harm Principle. The premise of the Offense Principle is that speech can also be restricted when it causes offense, not solely when it causes harm to others. If speech causes a disliked state for the assaulted, due to wrongful conduct by others and who are resented for it: that speech should be classified as offense, according to Feinberg (Feinberg 1985, 49). He argues that the Harm Principle presented by Mill doesn't deal with the full scope of free speech. The Harm Principle can't in all cases be sufficient, as Feinberg is of the opinion that it should reach further. Hate speech that causes serious offense, could therefore be legitimately restricted. Feinberg states that it is the government's job to protect people from serious offense, as it is properly the state's business (Feinberg 1985).

The standards for determining whether or not free speech should be limited by the Offense Principle are numerous. Many aspects of the potentially offensive speech need to be taken into account, before passing such judgment. Feinberg names key aspects, like the social value of the speech. Absurdities would contain less social value, as there is no credibility to them. The general interest of the community is called into question here, meaning that certain hate speech can vary in level of offensiveness, depending on the community that receives it. Another key aspect is the ease with which it can be avoided, because the offense doesn't always strike where it hurts the most. If citizens can easily avoid the offensive speech, then it diminishes the level of offense (Feinberg 1985). If people can't avoid hate speech, it would become more menacing, as there is no getting around it. This is something that would especially occur with hate speech in the community of the offended.

The intensity of the offense is also an aspect that needs to be taken into consideration, to determine if free speech should be restricted, in line with the Offense Principle. The level of hatred that accompanies the speech is hard to measure, but Feinberg pleads for a thorough examination of each individual case. The intensity of the offense is related to the motivation of the speaker. What motivates the offender to utter these words, and in what state of mind was he in. His motivation for verbally assaulting others, needs to be considered and would also determine the level of offense (Feinberg 1985). The number of people offended by the hate speech is also a point of notice. Legislation should not be altered for one oversensitive individual, Feinberg instead states that a higher amount of offended people, makes for a stronger case against the hate speech in question. The Offense Principle is criticized for its vagueness, as the standards for determining a case of offense are often unclear. Feinberg stresses that even though causing offense is deemed to be of lesser importance than causing harm, it can have serious implications leading to the same result as when an individual is harmed (Feinberg 1984, 45 -51).

1.3 GOVERNMENTAL INTERVENTION

Steven J. Heyman states that hate speech has the tendency to violate personal security and increases the inequality within society. Thus he argues that it should be restricted by legislation (Heyman 2008). On the contrary, libertarians often call for less governmental intervention, or even an absolute freedom of speech. The First Amendment of the United States Constitution protects the right to free speech. Speech does have its limitation in the U.S. however, but more so in the European Union; where each nation has its own specific legislation concerning the issue of hate speech.

Will Kymlicka mentions that intervention by the government regarding freedom of expression can not only be used to protect a minority against society as a whole (external protections), but also be misused by the leaders of that minority in order to place internal restrictions on their members (Kymlicka 1995, 43). Oppressing minorities, is one of the most alarming potential consequences of governmental restriction on free speech. Freedom of expression in relation to minorities can present a multitude of approaches. According to Kymlicka there is no single formula that can be applied to all minority groups. Governmental restriction should therefore be carefully considered, as not to oppress or alienate certain members of society.

Thomas Scanlon's Freedom of Expression Theory contains his views on governmental restriction of speech. The legitimization of restricting free speech is central in Scanlon's

argument of Freedom of Expression. Scanlon argues that reason (Kantianism) should be the determining factor in dealing with the issue of freedom of expression. A legitimate justification for censorship or restriction would therefore be vital. Scanlon states that, in order to determine whether speech should be restricted, one should examine if the act of expression directly causes harm (Scanlon 1972).

If someone shouts fire in a public theater, that would constitute as directly causing harm. The phrase '*shouting fire in a public theater*', is commonly associated with the Supreme Court Justice Oliver Wendell Holmes, Jr. and frequently used to prove that free speech has its limitations. Holmes is best known for his 'Clear and Present Danger' doctrine, which placed significant limits on the First Amendment right to free speech. The Clear and Present Danger doctrine has become a standard concept within the United States justice system. It was first used in World War I, against the spreading of anti-drafting leaflets.

No Western democracy has absolute freedom of speech and each country has to decide where to draw that line; between speech that is allowed and hate speech for which one could be lawfully persecuted. Usually the amount of harm inflicted on others is taken into account, before passing such judgment. In examining where these lines are currently drawn, a clear distinction can be made between the American-model and the European-model, both of which will be discussed below. Having a clear view on what the current state of affairs is on the area of hate speech, will help to put the debate on hate speech in perspective.

1.4 THE AMERICAN MODEL

The legal dimension of hate speech in the United States, compared to other developed democracies, holds a unique place; due to its leniency and tolerance on the subject of free speech. According to Ronald Dworkin free speech cannot be absolute, but he stresses the importance of a constitutional structure that guarantees freedom of speech (Dworkin 2002). The United States Constitution protects freedom of speech with its First Amendment, making it a constitutional right. The First Amendment encompasses: freedom of speech, freedom of religion and freedom of press. It is the first of ten amendments that constitute the Bill of Rights, which was installed in 1791.

The First Amendment states that freedom of speech cannot be abridged by any law created by the United States Congress, although the Supreme Court has managed to forbid certain types of speech. Hate speech is a type that could be forbidden, which varies with each case. However, the Constitutional right to free speech, remains a strong defense for people accused of hate speech in the U.S. The legal framework in the United States tends to benefit those appealing to their constitutional right to freedom of expression. A well-known example was the Supreme Court case *Snyder v. Phelps*.

The Westboro Baptist Church was established by Fred Phelps in 1955 in Topeka, Kansas. The church is infamous for its extremist views, especially against homosexuality. In the early 90's members of the Westboro Baptist Church began organizing pickets, against homosexual activity. These pickets are carried out in a public space, usually comprising of shouts and the waving of banners. There are approximately 40 church members, most of which are part of the Phelps family. However, the pickets they've organized have been numerous. Several pickets are organized daily and these are spread out across the United States. In 1998 Westboro Baptist Church controversially picketed the funeral of Matthew Sheppard, who was brutally killed for being a homosexual. The controversy surrounding the Phelps family has

grown further since the war in Iraq, as they've started to picket funerals of fallen marines and soldiers.

Matthew Snyder was a marine, whose funeral was picketed by members of the Westboro Baptist Church. His Father Albert Snyder sued Fred Phelps and his church, for intentional infliction of emotional distress. The Supreme Court case (*Snyder v. Phelps*) generated widespread media coverage. The Supreme Court ruled in favor of the Phelps family, which was protected by the First Amendment right to free speech. Major arguments given for the verdict were that the picketing: was carried out on a public sidewalk and never interfered with the funeral service itself. The Westboro Baptist Church is considered to be a hate group and has a poor public image; showcasing the legal strength the First Amendment has.

In comparison to other Western democracies, the United States are the only country without any clear hate speech laws. A case like *Snyder v. Phelps* would have had, by all accounts, a different outcome in most European countries. Except for directly threatening with violence or inciting others to it, any type of speech would be permissible and protected by the First Amendment. Any Supreme Court case would be viewed separately, although the constitutional right to freedom of speech would traditionally be upheld. Only if hate speech presents a clear and present danger to others, could it be assumed that it would be lawfully persecuted.

1.5 THE EUROPEAN-MODEL

European citizens are legally protected by the right to freedom of expression, but the European Court of Human Rights has aimed to overcome extremism within the European Union. In doing so, certain types of speech can be excluded from protection, and restrictions on hate speech have been sharpened to eradicate extremism (European Court of Human Rights 2013). In addition, the 2008 Framework Decision by the Council of the European Union, promotes criminal law within nation states and is aimed at combating certain forms of racism and xenophobia. However, the Framework Decision has not been fully implemented in all EU states. Historically racism has been a major issue in Europe, but the contemporary approach is to eradicate it altogether. The question remains what impact that has on freedom of speech within the European Union.

European countries generally have more legal restrictions on freedom of expression than the United States. Especially on the subject of racial discrimination strict rules apply. In the United Kingdom the *Public Order Act of 1986* states that stirring up racial hatred makes one guilty of an offense. In Poland it is illegal to intentionally offend religious feelings, due to article 256 and 257 of its criminal code. Therefore Poland stands out as one of the most restrictive countries on the issue of hate speech. Even though European Union nations differ internally on the subject of hate speech, none resemble, or come close to the liberal American stand on free speech. A certain type of hate speech could be deemed unpopular or extreme in the United States, whereas that same type of speech could well be, and probably would be illegal in an European country.

This raises the question: to what extent should hate speech be permitted? Is the European approach to the issue of hate speech preferable, or could it be the other way around? In that case the liberal American stand would be exemplary for member states of the European Union. Jeremy Waldron (2012) considers it unlikely that hate speech legislation will ever be

passed in the United States, mainly because the ideal of free speech is firmly embedded within American society. He does however, discuss the harm that can emanate from hate speech, and stresses the injustice that can originate from it. He makes the case that civilians are entitled to protection of the law, and the sense of security that comes with it. This sense of protection is discarded by hate speech, making it unjust. Waldron therefore, considers the European-model exemplary for the United States (Waldron 2012). The following chapter will outline Jeremy Waldron's theory in more detail and analyze the assumptions that help him come to his eventual conclusions.

Chapter Two

2.1 WALDRON'S DIGNITY ARGUMENT

Jeremy Waldron's defense of limiting hate speech is on the basis of dignity, which is put forward in his book *'The Harm in Hate Speech'*. According to Waldron, all members of society should have a sense of inclusiveness. A well-ordered society should not fall victim to hate speech, because this increases the risk of excluding vulnerable minorities. Waldron stresses the dangers involved with hate speech and stresses the importance of equality within society; which he considers is something to strive for. Hate speech undermines the dignity of the assaulted and creates inequality between different groups within society. It is a public good, to be treated with dignity and to be included in an equal society (Waldron 2012). In contrast, hate speech assaults and damages the reputation of citizens, which could for example be on the basis of their race, religion or sexuality.

Members of a society should live in the confidence of governmental protection and go about their business without interference or disturbance of that confidence. There should be no need for fear of facing either violence, discrimination, exclusion or hostility. This feeling of safety and security is an essential public good, according to Waldron, which is particularly important in the comfort of their own community. Spreading hate speech through flyers and putting up banners would therefore be especially harmful, as it can permanently pollute the environment of the assaulted. A common libertarian argument on the issue of hate speech is that: even though speech can be hateful and offensive, you can't take away the right to say it. Waldron considers such an argument misguided, because the harm that hate speech can cause is simply too grave (Waldron 2012, 3-6).

Waldron defines dignity as: *'a person's basic entitlement to be regarded as a member of society in good standing, as someone whose membership of a minority group does not disqualify him or her from ordinary social interaction'* (Waldron 2012, 105). This does not entail dignity in the sense of someone's self-esteem. Waldron states clearly that dignity is the object of legislative concern, offense on the contrary is not and protecting someone's feelings (on the basis of offense) would not qualify as a good reason for restriction on free speech. These hate speech laws should be designed to protect people's dignity (Waldron 2012, 105-111).

The main distinction between indignity and offense is described by Waldron, as an assault on someone's feelings, versus an assault on someone's social standing. Offense can rouse certain feelings of resentment, annoyance, vexation, etc. It has an effect on their feelings, unlike an assault on indignity. In the latter, feelings might also be affected, but it is their social standing, inclusion and decent treatment that should be protected by the legal system (Waldron 2012, 107). Laws that would protect people's dignity, could indirectly also protect the feelings of the assaulted, but that is not its main purpose. The outcome of the hate speech should be assessed, by registering its influence on the social standing of the assaulted (the targets of the hate speech in question). The distinction between indignity and offense is hard to make, because when someone's social standing is diminished it is usually combined with the irrelevant (in Waldron's mind) feeling of distress (Waldron 2012, 111).

Waldron finds the distinction between an attack on a body of beliefs and someone's social standing a clear one. There is a concern however on Waldron's behalf, for a lack of empathy for victims of religious hate speech, when their religious views are attacked. Waldron notes that blasphemy was commonly punishable by law, but not always in equal manner, when a comparison is drawn between different types of religion. Hate speech legislation has the sole concern of protecting someone's dignity, distress caused due to an assault on religious views is therefore not covered by Waldron's ideal legal treatment of hate speech (Waldron 2012, 118-126). Restricting religious hate speech is therefore harder to sustain than restricting racial hate speech, in Waldron's dignity argument.

Not only would hate speech be unjust towards the victimized for degrading or corrupting their dignity, but it is also a threat for social order and stability. Waldron explains that hate speech can have the effect of a slow-acting poison, over time it becomes harder to protect everyone's dignity. Maintaining this public good becomes harder and less natural, even for people with the best intentions (Waldron 2012, 4). The fare-up of a few particular incidences can have a profound and disproportionate effect across society as a whole. This poisonous process of hate speech spreading and taking hold in society attacks the basic justice, to which ever member in society is entitled. Waldron argues that the dangerous consequences of this process can be averted by altering hate speech legislation. The European model serves as a good example in Waldron's mind, for passing laws that would avert the harm in hate speech in the United States.

According to Waldron, hate speech legislation should be aimed at protecting people's dignity and reputation. It should promote an equal social status for all members of society, which entails that no one should be socially excluded in their community (Waldron 2012, 106). Waldron's vision is that contemporary hate speech legislation in the United States is too liberal on the subject of hate speech. He considers the European model to be exemplary for the United States and points out the shocking lack of hate speech laws in America when compared to other developed democracies. European states do have hate speech laws, protecting people's dignity, reputation and equal status. Britain's Race Relations act of 1976, protects its citizens against racial discrimination. Waldron considers such laws to be superior, in comparison to United States legislation. This would be a critique on the stronghold the first amendment has on the American Justice system (Waldron 2012, 185).

2.2 BAKER'S LIBERTY THEORY

A major work on the subject of free speech, was written by Edwin Baker in 1989 titled: *Human Liberty and Freedom of Speech*. Baker states that individuals should be protected from governmental restrictions, by the First Amendment right to free speech. Thus he was an opponent of restrictions on hate speech. Baker presents his liberty theory, in which a key concept is individual autonomy; as freedom of expression promotes self-realization. Baker stresses the importance of free speech as a constitutional right, because it protects expressive activity. Each individual should be able to present its values, which are in any case equally legitimate. Restricting hate speech would violate individual autonomy and it's the role of the government to prevent that from happening (Baker 1989).

Baker considers formal autonomy fundamental to respecting people as individual beings in a social world. Free speech allows the speaker to present his or her view to the world (Waldron 2012, 162). This gives the receiver the opportunity to discover new principles and understand

a person in the world of ideas. Herein lies the importance of self-disclosure, with not just the possibility to present a point of view, but also the possibility of interaction and the exchange of ideas. Baker argues that freedom of speech is superior to other freedoms, in the sense that persuasion and critique can affect the world around us. Thus everyone should be able to present themselves, simply out of respect for the autonomy, personhood and the agency of each individual (Baker 1989).

Waldron opposes Edward Baker's liberty theory, because he considers it to undermine the public good of social dignity (Waldron 2012, 165). He also suggests that minority groups are vulnerable to the corrosive effects of hate speech, he values their protection from hate speech above that of Baker's individual autonomy. Waldron does admit that there's a price to pay for restricting freedom of expression; he states that a certain amount transparency is lost, due to these restrictions; for some sentiments are driven out of the marketplace of ideas, hate speech is thereby effectively driven underground. However, it would be worth to protect the assaulted and overcome the negative effects of hate speech (Waldron 2012, 95).

2.3 CRITIQUE ON WALDRON'S DIGNITY ARGUMENT

Waldron poses the question: *'Is the concept of dignity too vague?'* (Waldron 2012, 136). The answer seems to be yes. Somehow he equates the term "dignity" with the concept of "social standing", as if the two are synonymous. The real vagueness however, comes from its practical usage concerning hate speech laws. There is no real clarification on where the actual line, between offensive hate speech and hate speech leading to indignity, is drawn. The effect hate speech has on the social standing of an individual (thus creating inequality), can only be measured by the weight that hate speech carries. Hate speech can pose a threat, by inciting others to act accordingly. It is through actions though, that inequality is created. Waldron argues the differ, that hate speech can alter the social standing of an individual, without additional actions.

Waldron convincingly poses his conviction of equality and states that everyone is fundamentally deserving of respect. It's hard to argue with that, but it serves as a weak foundation for implementing more hate speech laws. A stronger argument for more hate speech laws, would be to punish extreme and unjust psychological harm. Picketing a funeral, as in the case of *Snyder v. Phelps*, could be seen as unjust. Not because this could have an effect on the social standing of the family members, but rather because of unjust emotional distress caused. If the vast majority finds the hate speech despicable (as is the case with funeral pickets by members of the Westboro Church), then perhaps this speech can have the opposite effect, as to what Waldron expects. Social standing could go from unbalanced to leveled, through the sheer sympathy of the surrounding community. With such sympathy, certain members of society could gain respect and improve (or rather maintain) their social status.

The Westboro Church's Funeral pickets are condemned by virtually all members of society, because they sympathize with the fallen marines (who are targeted by members of the Westboro Church). Their sympathy is strengthened by the hate speech of Westboro Church members, which could be seen as a positive effect derived from hate speech. It can be a reminder to include and protect the assaulted, as is the case for people whose funerals are picketed. The social standing of the assaulted could be raised, when undergoing this process of hate speech and consequent sympathy. The social standing, of the assaulted families with fallen marines, could be increased by acknowledging the sacrifice they've made. After first

losing a son in the war, followed by the commotion of hate speech, this would likely enhance the awareness for their troubled situation. The awareness and acknowledgement of their struggles would earn them respect within their communities. Hate speech could generate a feeling of injustice among members of society, which could lead them to compensate and right a wrong. Victims of hate speech could thereby increase their social standing and gain the “dignity” (as Waldron calls it), that they deserve.

Waldron says that he does not propose the term dignity as a legal principle, nor that it should compete with the First Amendment right. It should clearly state the desirability and importance of hate speech legislation (Waldron 2012, 138). Waldron repeatedly argues that hate speech can damage the reputation and social status of people. He fails to clarify in the slightest how this process takes place and how hate speech laws can effectively prevent such harm, even though these questions are central to his theory. Nonetheless these questions remain unanswered, although he does arouse sympathy for his cause of protecting dignity.

The association with the term dignity is confusing and perhaps more importantly, the complexity of implementing hate speech laws is underestimated. Its practical implications for the United States are one thing, but even its moral pros and cons are not fully taken into consideration. More hate speech laws means: more restrictions on the First Amendment right to free speech. Waldron believes that hate speech should not be given a voice, he calls the protection of hateful speech misguided. Protecting dignity and social standing are in his mind more precious. Restricting hate speech however, would also mean more censorship and suppression of speech. These negative effects of hate speech laws should not be underestimated, as it is hard to determine the exact boundaries that speech would have (even with the best intentions). Unnecessarily censoring and oppressing views is always a risk, for it could lead to the diminishing of social debate and the exchange of thoughts and views within society.

Waldron suggests that the European model is exemplary for the United States, but doesn't consider his dignity argument to be a legal principle to defend such legislation. Waldron instead aims to promote equality and calls for a protection of social status and argues that everyone is deserving of a basic level of respect. This statement is very clear, but doesn't provide any in-depth understanding of the issue of hate speech. Waldron makes the distinction between indignity and offense, whereas offense is brushed off as irrelevant, for feelings do not require governmental protection. The reason for this distinction remains unclear, as there is a clear and non-discussed overlap between the two components.

Jeremy Waldron considers hate speech to be dangerous, because it is a slow-acting poison that may step by step create inequality within society. Especially signs that have a more permanent impact on the environment would somehow alter people's perception and change the social standing of the assaulted. Even its indirect influence should not be underestimated according to Waldron. It seems that such a social impact would only rarely work and in a contemporary Western democracy like the United States even less often. Measurement of hate speech is near impossible, but it could be argued that hateful messages would likely be regarded as ridiculous all-around. If so, it stands to reason that there is no harm to anyone's dignity, thus no real need for an increase in hate speech laws. But data on the possible effects of hate speech is scarce and unreliable, therefore judgments concerning the effects of hate speech are unreliable either way.

Waldron further states that it is *'wrong to ignore harm to minorities in particular, since they depend more than the rest of us on socially secured principles of mutual respect'* (Waldron 2012, 158). Free speech is balanced here, not against the value of dignity, but that of equality. Equality between minorities and *'the rest of us'*. What Waldron seems to be proposing here, albeit in a disguised manner, is that hate speech should be restricted in order to give (special) protection to minorities. Here Waldron dwells into the realm of group rights versus individual rights. According to Waldron, minorities as a group deserve protection at the cost of an individual's right to free speech (or rather, hate speech).

2.4 KYMLICKA'S LIBERAL THEORY

Will Kymlicka made a (somewhat) helpful distinction between external protections and internal restrictions, in which external protections prevent a minority group to be unfairly burdened by decisions made by the majority of society and internal restrictions protect a minority group from dissent from within its own ranks (Kymlicka 1995, 35).

The only appearance of hate speech in the theory of Kymlicka is the following quote: *'in the case of hate speech laws, the motivation was to provide a form of external protection- that is, to protect blacks and Jews from racist elements in the larger society'* (Kymlicka 1995, 43). Clearly, Kymlicka views hate speech laws as a form of external protection; though he makes no further mention of them in the rest of his theory. Kymlicka's afore mentioned quote was used to illustrate that a line between external protections and internal restrictions isn't always as clear cut as their definitions suggest; which is true in the case of hate speech laws. Even if they start out with the aim to protect vulnerable minority groups within society, they may end up being used by those minority groups to suppress internal dissent. The banning of hate speech may give additional weight to claims of minority groups that seek to suppress disgruntled members from among their own ranks. Hate speech laws (or group libel laws) may be used to restrict or ban blasphemous speech within religious communities, according to Kymlicka. Kymlicka uses the example of Muslim leaders trying to use group libel laws in order to manage blasphemy or apostasy within their own community to clarify his point (Kymlicka 1995, 43).

But the bigger point here, is that hate speech laws, contrary to what Kymlicka's liberal theory of minority rights suggests, do seem to impact individual liberty, as they restrict people from spreading hate speech in public. Governmental restrictions are external, but do have the ability to impact individual liberty. Censorship can have a profound impact, as Kymlicka's main focus is on minority groups. Hate speech laws however, impact the whole of society and as such diminish everyone's liberty. It is a sacrifice Waldron seems to be willing to make, in order to preserve the dignity (or social standing) of all members in society.

2.5 CONCLUDING REMARKS ON WALDRON'S DIGNITY ARGUMENT

What seems to underlie the dignity argument of Waldron, is not so much the wish to expel hate speech, as the wish to expel discrimination from society. Note the following passage: *'... given the nature of harms we have been describing: these include not just a heightened prospect of violence and discrimination, but also a jolting failure or undermining of the assurance that people need to rely on: the assurance that they can go about their daily life and their ordinary business without fear of being denigrated and excluded as sub-human or second-class citizens'* (Waldron 2012, 160).

The assurance Waldron refers to here, seem to have more to do with actual discrimination than hate speech. He seems to willfully blur the distinction between excluding certain groups (discrimination) and speech that says a certain group should be excluded (hate speech). Actions of excluding certain members of society, does not equal hate speech; even though hate speech can be discriminating, mainly by proposing to exclude certain groups. But this passage also reveals two assumptions that are pivotal in understanding Waldron's theory. First, that hate speech does harm its targets and secondly, that hate speech leads to '*a heightened prospect of violence and discrimination*'. The view that hate speech harms its targets, is mainly a matter of defining harm. For Waldron, harm relates to a damaging or corruption of one's social standing (dignity) within society, which adds significant weight to the already tricky concept of dignity.

The second assumption is that hate speech increases the prospects or chances of violence and discrimination. This seem to be an empirical matter, but there is yet to be a study that shows a causal relation between hate speech and racial violence or discrimination. It might stem from reason, that hate speech occurs more in places where feelings of discrimination are harbored among members of society and that in those places there is an increased tendency toward discrimination and violence. But it is something else entirely to state that hate speech is the cause of discrimination or violence.

Furthermore, when Waldron discusses Dworkin's perspectives of rights, it becomes clear that Waldron places very little value on one's ability to spread hate speech. He says: '*Compared to the prospect of this sort of dignitary harm, the irritation and annoyance of having to replace a threatening, abusive and insulting form of hate speech with some more moderate expression of one's social antipathies would seem quite mild. Of course, there is a check to autonomy; but we are unfree in all sorts of ways in modern society; and usually it is taken for granted that - unless more can be said - a slight loss of freedom is justified by the prospect of preventing real harm to other people*' (Waldron 2012, 160).

Here, restricting hate speech is not seen as a significant check on freedom of expression, but as a mere annoyance for those would-be hate speech distributors. However, replacing a "threatening, abusive and insulting form of hate speech" for a "more moderate expression of one's social antipathies", is hardly the answer. Hate speech can be formed out of perfectly polite phrasing or words and it is hardly the vulgarity of the speech that is important, but rather the message that hate speech tries to convey. A message that is not any less harmful (in Waldron's theory) if it is stripped from its "threatening, abusive and insulting" phrasing. If someone has the view that one race is superior to another for instance, then the sheer utterance of that view in public is already hate speech, the phrasing isn't nearly as significant as the overall message, so it is hard to see how this can be replaced by a "more moderate expression of one's social antipathies".

To illustrate this point, it is worth recollecting the example Rae Langton uses in her essay entitled "*Beyond Belief: Pragmatics in Hate Speech and Pornography*", which exhibits an extract from a German article from 1943: '*We as a people will survive this war only if we eliminate weakness and 'politeness' and respond to the Jews with an equal hatred. We must always keep in mind what the Jew wants today, and what he plans to do with us. If we do not oppose the Jews with the entire energy of our people, we are lost. But if we can use the full force of our soul that has been released by the National Socialist Revolution, we need not fear the future. The devilish hatred of the Jews plunged the world into war, need and misery. Our holy hate will bring us victory and save all of mankind*' (Heimer 1943). Note the lack of

epithets; this extract hardly contains the "abusive and insulting" language Waldron seems to be referring to, but is by all accounts a clear example of hate speech (Langton 2012, 72).

But the dismissive attitude towards restricting hate speech that Waldron continuously displays, conceals the impact this has on freedom of expression. It is no small thing to limit the ability of people to speak their minds, to silence them and outlaw their opinions and views to the private sphere. It appears that Waldron's dignity argument has very little regard for the hate speech it tries to restrict and although many would (hopefully) agree that hate speech does not contain much substantive matter, that does not mean that hate speech should be banned lightly. By limiting hate speech the would-be distributors are deprived from the ability to spread their views, ideas and opinions. Furthermore the appearance of hate speech within society may give rise to a more robust defense of the anti-discrimination perspective. Even Waldron's own theory is in a way probed by the existence of hate speech within society, which is an example of how the existence of hate speech can improve the debate on discrimination and the inequality between different groups.

The next chapter displays a very different defense of hate speech regulation. Caroline West argues that through redefining the concept of free speech, hate speech can actual be a limitation on freedom of expression. On the face of it, this approach shows great promise to yield new insight into the consequences of hate speech and alternative justifications for limiting hate speech.

Chapter Three

3.1 THE FREEDOM ARGUMENT

The debate on hate speech has often pitched the value of freedom of expression against another value, such as dignity or equality. The theory of Waldron for instance proposes that hate speech undermines the dignity of its targeted members (Waldron 2012). Therefore limiting freedom of expression could enhance, or rather protect, the dignity of citizens of society. But the essay by Caroline West entitled *Words That Silence? Freedom of Expression and Racist Hate Speech*, approaches this debate in another fashion (West 2012, 224). She emphasizes the importance of evaluating whether or not hate speech could undermine the value of freedom of speech itself. To do so, she sets out to develop a broad concept of freedom of expression, containing three critical conditions that need to be satisfied in order for there to be anything worthy of the label freedom of expression (West 2012, 223). Note that she does not assert that racial hate speech necessarily undercuts freedom of expression, she merely desires to show how it could.

According to Caroline West, hate speech could interfere with freedom of expression if it functioned in a way that would prohibit the fulfillment of any of the three conditions; namely: minimal distribution, minimal comprehension and minimal consideration (West 2012, 223).

This framework of free speech is a compromise between two schools of thought on when speech is free. The first view on free speech is that it is free insofar as the government does not interfere by imposing coercive restrictions on what people are allowed to say. West rightfully rejects this view by suggesting that there can be other actors, such as large companies, that may impede the possibility for people to speak. The other conception of free speech is that speech requires an audience that is both sympathetic and receptive to the speaker in order to deserve the label of free speech. But it is obvious that such a conception on free speech would be very hard to attain and perhaps even harder to maintain. The conclusion West draws is that the correct conception of free speech lies somewhere between these two extremes. Therefore free speech, according to Caroline West, requires more than the mere absence of interference by the government and less than the realization of a sympathetic and receptive audience (West 2012, 222-223).

She believes that in order for speech to be free it needs three basic ingredients: minimal distribution, minimal comprehension and minimal consideration (West 2012, 223). Minimal distribution of speech is important, according to West, because words (and pictures and the like) are the vehicle of ideas and views that are required to spread those sentiments from one person to another (West 2012, 225-226). West therefore stresses the importance of uninhibited distribution of words. Such value of free speech traces back to John Stuart Mill, who believed that only if people were unrestrained in spreading their views and opinions, society could arrive at some sort of truth. Even views that are false could further our understanding of our own beliefs by forcing us to debate the flaws of the opposing views (Mill 2008, 22).

The value of minimal comprehension is somewhat less apparent, but rather flows from logical reasoning. If speech stands no chance of being understood by any audience, then there is no chance of any exchange of ideas or beliefs, therefore free speech requires some sort of minimal comprehension. The alternative, that speech is understood perfectly by any member

of the audience is fairly implausible. Therefore West opts for a minimal comprehension criteria for free speech (West 2012, 226-229). What that exactly entails remains unclear, all the author says on the matter is that when an audience wants to hear a message, that there is no agent who is systematically preventing that from happening, for this would violate the freedom of expression of the speaker in West's framework of free speech (West 2012, 228). For the government this merely means it ought to refrain from systematically interfering with the possibility of comprehension. But the condition leaves the government open to occasionally interfere with the comprehension ability of a speech act. Furthermore such a minimal comprehension condition gives the government no duties to establish or enhance any form of comprehension.

Finally, the minimal consideration condition is similar to the minimal comprehension condition as it requires speech not to be systematically prevented from being considered in order for it to deserve the label free speech (West 2012, 229-232). These three conditions are essential, because they form the basis of the argument to restrict hate speech on grounds of limiting freedom of speech itself. If hate speech could function in such a way as to violate any of these three minimal conditions, then arguably, hate speech could raise limits on freedom of expression. Nonetheless, the banning of hate speech would be a restriction of freedom of speech in and of itself, so even if hate speech would restrict freedom of expression it by no means follows that it is therefore clear that hate speech merits restriction. The cost and benefits of such a restriction need to be weighed carefully. Caroline West's conception of free speech creates a distinctive dilemma; no longer does the freedom of speech need to be balanced against other values, but rather it needs to be balanced against its own virtues and vices. Such an approach, if successful, would undermine the claim that the commitment to freedom of speech needs to be unconditional and absolute.

The conception of what constitutes free speech as proposed by Caroline West is a commendable attempt at defining the meaning of freedom of expression. She points out that freedom of speech requires more than the mere distribution of words and that comprehension and consideration are valuable components of free speech. The three minimal conditions that she offers, however, remain relatively vague. What exactly minimal distribution entails continues to evade precise definition. Furthermore, the non-interference requirement for both minimal comprehension and minimal consideration are equally fragile. Though it may be true that free speech necessitate the three proposed elements, how much of each is needed is another matter. The lines she draws for each of them leave a lot of room to suit even opposing views of what free speech is. And this defect in her argumentation is one of the main causes of the sketchiness that prevails in the second part of her essay.

3.2 MINIMAL DISTRIBUTION CONDITION

In part two, Caroline West endeavors to show how racial hate speech could violate each of the three before mentioned conditions. She sets off by clarifying how racial hate speech could breach the minimal distribution condition. The first argument presented is that racist hate speech can have a threatening effect on its targets, this diminishes the production of speech by crippling the willingness to distribute. However, West fails to mention any examples of racial hate speech that can be interpreted as threats but aren't actual threats. All the examples she does mention are clearly directed at single individuals and extremely threatening. Even countries, like the United States, with a very broad tolerance of racial hate speech would not allow any of the examples used by West such as writing "Death Nigger" on a person's door or

"the knights of the Klu Klux Klan are watching you" (West 2012, 234). It takes away much of the potency of the argument. For there is something to be said about the connection between racial hate speech and racial violence. In extreme cases racial hate speech, even when not directed at individuals, can carry the weight of violence. But the line between threats against individuals and racial hate speech are relatively clear, there may be some borderline cases, but in most instances the distinction can be easily drawn. By promising violence in the future against a specific group or individual, hate speech becomes a threat and in no Western society enjoys the legal protection of free speech laws. This supports the claim that racial violence should be punished more harshly than violence without a racial component, which in most countries is already case. If crimes are perceived as racially motivated, than they fall under the category of hate crimes, which aggravates the offense in the eye of the law in almost all countries, including the United States.

But hate speech can be experienced as threatening regardless of whether or not it contains promises of violence. Jeremy Waldron provides a clear example of such a form of hate speech in the case of *Beauharnais v. Illinois*. The issue was the publication of a leaflet which called for the protection against "the negro" and all the "aggressions... rapes, robberies, knives, guns and marijuana" that "the negro" brings with him (Waldron 2012, 47-48). The leaflet did not propose any violent action, only that white people should unite. Nevertheless, such a message of hate speech can certainly be experienced as threatening by, in this case, people of color, for they are made acutely aware of the extremely discriminatory views that are harbored by people in their vicinity. Such racist sentiments are connected with racial violence, perhaps not in the causal relation that Waldron refers to, but rather in the sense that racist hate speech and racial violence often coincide. The realization of this fact may cause subjects of hate speech to indirectly be silenced; not silenced by force or coercion, but silenced by the fear of retaliation aimed at themselves or their loved ones.

West continues by stating that racist hate speech may also have lifelong silencing effects, as they may lower the self esteem of its targets (West 2012, 236). Whether hate speech actually causes its targets to internalize self-oppressive attitudes is an empirical matter, however, the example she uses fails to strengthen her position. The example in question is parental abuse, in which children are continuously labeled as lazy for instance, which can have severe effects on their self-esteem. It's an odd passage, for many would be quick to point out that, although it is disagreeable that parents constantly call their children lazy, it is not (and should not be) illegal. Secondly, there is an important difference to be made between being called names by people who you value and respect or at the very least who are in charge of your well-being and being called names by complete strangers. Furthermore, West once again, blurs the line between individual assaults and racial hate speech.

But even though hate speech can cause its targets to be silenced, this does not mean the overall production (or distribution) of words is lessened. As Mill suggested, even the most idiotic contributions could help public debate (Mill 2008, 59). In the case of hate speech, it is certainly true that many would (rightfully) rally to the support of its targets, Caroline West being one of them. In the end, may racist hate speech not lead to a (more comprehensive) public debate on the merits (or the lack thereof) of the arguments presented? Furthermore, and perhaps more importantly, will it not solidify the beliefs of people that hold anti-racist beliefs, for they are now forced, or rather probed, to reaffirm their argumentations and beliefs. This might also constitute as a side-effect of banning hate speech; it could very well lessen the distribution of anti-racist arguments.

Obviously it is generally a good thing if anti-racist arguments are no longer needed, but it creates a danger which was recognized by John Stuart Mill. If views are uncontested due to censorship, we cannot fully understand the grounds for our own opinion, for we are not pushed to defend it (Mill 2008, 42). David Brink regards this as one of the key insights of Mill; that censorship turns true opinions into dogmatic ones, which renders them meaningless (Brink 2001, 122). West recognizes that allowing hate speech may enhance the net production of words by inciting debate. However, she states that it is equally important to safeguard a fair distribution among different members of a community of the opportunity to produce words. If certain members are (systematically) excluded from producing words as a result of hate speech, then an overall increase in the production of words does not necessarily create a more substantiated debate, nor would it necessarily enhance free speech (West 2012, 237-238).

The question whether a negative effect on self-esteem merits the protection of the government is also a valid point to be raised. Many forms of speech or expression impact self-esteem, such as advertisement and entertainment, oftentimes this impact is negative, but rarely if ever, this is sufficient or even reasonable ground for banning. There is a distinction to be drawn between the ability to speak and the desire to speak, the former, all would agree is subject to governmental protection, but is the second? Caroline West does not explicitly say so, but her silencing argument against hate speech seems to only be compatible with a more broad protection by the government. It is true that when people are deterred from entering public debate, that their interests will not be fully incorporated into the deliberations.

Many would agree with West that a necessary condition for freedom of expression is that there is no interference from outside actors. But it is a very different thing to state that it is necessary for freedom of expression to protect or even encourage the desire in people to speak. The minimal condition for distribution is a valid condition only insofar as it enables people that want to speak to have a platform, not if it encapsulates the protection and encouragement of the mindset of would-be speakers. For there is a distinct difference between freedom of speech and freedom of consequence of that speech. Saying something unpopular in public should not necessarily be illegal, but it is also not illegal for the receivers of that message to voice their disagreements or to apply consequences. If someone states that he or she dislikes children, then that is perfectly legal in almost every country in the world, but his or her chances of receiving a job as a teacher in an elementary school will not have improved anywhere. Such consequences may stop people from uttering unpopular opinions in public, but that doesn't mean they have no freedom of speech, for there is an option to express their views. Like every action, speech will create a reaction from its audience, one that may be positive or negative. To strive for a world in which every reaction is either positive or neutral would be a foolish and undesirable endeavor. However, the reactions to speech are obviously allowed to be negative, but not in the form of threats directed at the speaker.

According to West, racist hate crimes are usually accompanied by racist hate speech, therefore hate speech may be associated with racist violence. She goes on saying that: "[f]or this reason, it is very plausible to think that racially hostile speech could sometimes quite reasonably be interpreted by its targets as constituting a threat" (West 2012, 234). Notice how the word hostile is used to blur the line between hate speech and threats. But it is true that hate speech and hate crimes often coincide, but that is hardly sufficient grounds for banning hate speech. Knife attacks are always accompanied by knives, but is that sufficient reason to consider knives as threatening and outlaw them? Furthermore, when something is experienced as threatening, does that merit an abolishment? Surely there is a difference between something being threatening and something being experienced as threatening. However, it is undeniably

true that because targets of hate speech experience such speech as threatening, that this reduces their distribution of words (and the like). In this regard hate speech does indeed limit the free speech of its targets, for their production of speech has been undermined by hate speech.

3.3 MINIMAL COMPREHENSION CONDITION

The comprehension and consideration conditions seem like important elements to the concept of free speech, but neither of them are without difficulties. Both comprehension and consideration rely on attitudes of the audience in order to succeed, which extends the traditional meaning of freedom of speech. The minimal conditions for both elements state that they should not be interfered with by outside actors, but it is hard to see how such a thing is possible without venturing into the realm of science fiction. Obviously, the devices West describes would hamper both comprehension and consideration, but it is unclear what could achieve such a feat in real life. In the second part of the essay, in which she attempts to show how racial hate speech could undermine free speech, the science fiction devices are traded in for real life examples of when comprehension and consideration failure occur. She begins with the comprehension failure, for which the argument of Ishani Maitra is used. According to Maitra, pornography can produce belief among its consumers that when a woman says "no" she means "yes". Thus pornography silences women, for they are no longer able to communicate their refusal to have sex (Maitra 2004, 204).

This line of argumentation rests on the assumption that audiences are persuaded by the pornographic content, that they change their belief system in such a way as that women are unable to communicate their refusal to have sex. In her paper, Maitra presents the question whether pornography can be held accountable for the belief systems of its consumers. Which relates to the question: if person A persuades person B, is person A responsible for actions committed by person B due to his or her changed belief. Intuitively, the answer seems to be no, if someone convinces me that killing is a good thing, then that person is not liable when I go out and kill somebody. So even if (and it is by no means empirically clear that it is) pornography would persuade its public into believing women mean "yes" when they say "no", it shouldn't be held responsible for actions committed because of that belief. This means that when a person chooses to ignore a woman's refusal to have sex, pornography would not be to blame.

West's point isn't necessarily assigning blame, rather, that in the afore mentioned case, women are unable to communicate their refusal, because of held beliefs; beliefs, that have been formed due to pornography. In a similar manner, hate speech could undermine the comprehension of people targeted by hate speech, because many have changed their belief system about those people. Worse still, in the case of pornography the affected audience fails to grasp the actual communicative intentions of women, while in the case of racial hate speech, affected audience members are prevented from recognizing that the targets of racial hate speech have any communicative intentions at all (West 2012, 240). To illustrate said point, West uses the example of a parrot: when a parrot utters a sentence, the audience will dismiss its communicate intentions. Because members of the audience do not believe the parrot has sufficient cognitive abilities, the parrot is unable to communicate in such a way as to be comprehended (West 2012, 241). If racial hate speech, West argues, changes the belief system of audience members into thinking that the targets of hate speech do not have adequate

cognitive abilities, then racial hate speech would undermine the target's ability to make themselves understood.

To emphasize her position, the author refers to several quotes from professional journals in which black people are said to have limited cognitive abilities. Although the quotes are all from the first decade of the twentieth century, it is undeniable that ideas of limited cognitive among ethnic minorities have been widespread throughout history. But despite all the hate speech that occurred throughout the twentieth century, racial discrimination has decreased significantly. If racial hate speech has the potency it is ascribed by West, shouldn't racial discrimination have increased, or at the very least, remain at the same level as at the beginning of the twentieth century? Even if it were true that racial hate speech has a strong persuading effect on people, then at the very least people are also persuaded by arguments against discrimination, racial superiority etc. The author doesn't claim to know whether racial hate speech works in such a way and instead, says that it is empirically unclear whether hate speech could create a comprehension failure through its persuasive effects (West 2012, 243). But even if racial hate speech would create an understanding failure as is described by West, would that merit the limitation of hate speech? And an even more pressing question: is hate speech to blame? For if it is possible for people to be persuaded by anti-discrimination arguments, is therefore it really necessary to ban hate speech, in other words, is it necessary to limit the freedom of speech, simply because some are convinced by its arguments.

What seems to underlie the notions of West is that hate speech is a peculiar kind of argumentation. This idea is also reflected in the work of Rae Langton, who compares hate speech with a virus which infects the minds of the audiences. Her examples are of anti-Semitic newspaper articles from Nazi-Germany and a broadcast of a Hutu radio station against Tutsi's. She says: "[h]ate speech of this form has helped to make history, as the examples illustrate (Rae Langdon 2012, 75)." But note how neither of the examples occurred in a society which had freedom of expression. What the examples illustrate is merely that propaganda can have disastrous effects, not that hate speech in a free society can have disastrous effects. All examples by Langton (Nazi Germany, Tutsi Radio) take place in a non-freedom of expression environment, in which counterarguments cannot be heard. Is there an example in which hate speech persuaded large audiences in a free society? It seems that racial hate speech may be tempered by anti-discrimination reasoning within a free society. The argument of comprehension failure by West therefore lacks strength as it is founded on the idea that people are unable to overcome the persuasive effects of racial hate speech.

The argument put forward describes how perceived limited cognitive ability of the speaker can render his or her words useless. But that would mean that the author would restrict hate speech (or racial hate speech in this case) because she is afraid of the persuasive effects of such speech (West 2012, 241-242). However, does the assumption that racial hate speech can have such a strong persuasive effect not discredit the idea of public debate and its virtue, as proposed by Mill? The comprehension failure argument of West hinges on the idea that people are actually convinced of the correctness of racial hate speech, which may be problematic to prove.

3.4 MINIMAL CONSIDERATION CONDITION

West's final condition of freedom of speech is that of minimal consideration. Words or speech, must have some chance of entering into the deliberations of audience members and to affect

their belief system. John Stuart Mill as well, stressed the importance of updating one's belief system according to new opinions heard. But the strength of a Millian type of defense of freedom of speech lies in the protection of false beliefs. According to David Brink, a stark defender of freedom of speech: "... Mill also suggests that freedom of expression is needed to keep true beliefs from becoming dogmatic. In this suggestion, I think, lie the resources for a more robust defense of freedom of expression, in part because it is intended to rebut the case for censorship even on the assumption that all and only false beliefs would be censored (Brink 2002, 123)."

But West's argument takes her into another direction, instead of proposing that even false beliefs (such as hate speech) are necessary from preventing true beliefs from becoming dogmatic, she believes hate speech may work in such a way as to undermine the possibility of consideration. In West's mind, hate speech may work to create beliefs among its audience that targeted people are not worth listening to or paying attention to. This argument closely resembles West's beef with the comprehension condition, in fact the similarity between both is striking and it remains unclear as to what she believes the difference is. The author also seems to skirt the realms of Waldron, stating that racist hate speech may cause the targeted groups to be held in lesser esteem within society. In this sense, West believes, targeted members of society won't be regarded as worth listening to, for which hate speech is to blame (West 2012, 244). Again, this line of thought hinges on the assumption that the public is significantly convinced by racial hate speech, for hate speech to be regarded as a threat.

In this, the flaws of West's conception of free speech become evident. Few would contest that free speech requires some form of unrestrained distribution of speech acts. But the comprehension and consideration conditions prove to be more problematic. It requires not only that the speakers are able to produce the speech they wish to, but that the audience holds certain views towards that speaker. According to the proposed concept of free speech, freedom of expression exists only if members of the public do not hold certain members of society in a lesser regard than others. Because such an attitude would cause either a comprehension failure or a consideration failure. In reality, what Caroline West attempts to do here, is turn the right to free speech into a duty to free speech, not necessarily a duty of the government, but a duty of members of society to be, at the very least, neutral or even receptive towards other citizens. Her proposed restriction of hate speech is not only limiting hate speech, it is limiting discriminatory thoughts among members of society. But the question this raises is twofold: is hate speech to blame and would restricting hate speech solve anything?

As West herself concedes, the answer to these questions is unknown. There is limited empirical evidence either way, mainly because it would be hard to measure the persuasive power of any form of speech among a significantly large audience. But even if it were true, and perhaps to some extent it is, that hate speech would have a persuasive effect within society, it is equally true that forms of anti-discriminatory speech are as persuasive. Instead of banning or limiting hate speech to prevent comprehension or consideration failure, wouldn't it make more sense to increase the amount or scope of anti-discriminatory views?

3.5 CONCLUDING REMARKS ON CAROLINE WEST'S FREEDOM ARGUMENT

What remains after all is said and done, is West's condition of a minimal distribution. It is here that she finds herself on firmer ground. If hate speech would in fact be considered as

threatening, not only by its targets, but more importantly from a legal point of view, then that may well serve as a strong case against banning (certain kinds of) hate speech. In this regard it is unhelpful that West illustrated her point with examples of hate speech that would clearly fall into the category of threats (writing the words "death nigger" on someone's wall), but nonetheless there is a case to be made against hate speech from this perspective. If hate speech scares its targets into silence, then restricting hate speech could enhance the overall free speech in society. It is this element that makes Caroline West's line of argumentation unique, free speech is not weighed against another value, such as dignity with Waldron or equality, but instead, different interpretations of free speech are balanced against each other. In this regard it makes sense that the free speech of the targets of hate speech is prioritized above the free speech of those wishing to spread hate speech. For very few would argue that the latter attribute more to the public debate than the former.

However, if with the above in mind, the banning of hate speech should not be done lightly. If Mill is right about the value of freedom of expression, then even false opinions (like hate speech) perform an important function within society. According to Mill, they would enhance people's understanding of their own, non-discriminatory views and force them to defend those views (Mill 2008). In Brink's perspective, hate speech would prevent non-discriminatory ideas from becoming dogmatic, a condition which would render such views meaningless, for people would abide by them solely out of habit and tradition, without having a clear understanding of their importance for a free society (Brink 2002).

Chapter Four

4.1 COMPARISON BETWEEN WALDRON AND WEST

By redefining the concept of freedom of expression, Caroline West offers a unique perspective on the discussion surrounding hate speech. Through her three minimal conditions for free speech and by showing how hate speech can undermine these conditions, she pits free speech not against other values, like dignity or equality, but against the value of free speech itself. According to West, racial hate speech may function in such a way as to limit the free speech of the targeted member of society. The challenge for policy makers therefore, in the eyes of West, is to balance the free speech rights of different people within society against one another.

But upon analysis, the three minimal conditions seem to change the definition of free speech beyond recognition. The minimal distribution condition, emerges as acceptable by all accounts and concepts of free speech, but the minimal comprehension condition and minimal consideration condition appear to be more problematic. Both conditions depend on hate speech to be sufficiently convincing to undermine the newfound definition of free speech. There is little evidence either way whether hate speech is as convincing as that, but it appears that even if it were as convincing as West's theory needs it to be, the results would be offset by arguments against hate speech.

In the end what remains is the minimal distribution condition, but even if only this part of West's theory would be salvaged, it would still generate a remarkable new approach to the discussion of free speech. Though, it is unclear whether hate speech functions in such a way as to silence its targets, if it did, it would have far reaching consequences for the hate speech debate. They are far-reaching parallels to be made between the hate speech debate and the discussion on pornography, in particular the silencing argument by Catharine Mackinnon. Caroline West believes that hate speech can carry with it a significant threat of racial violence and discrimination for it to silence would-be speakers among the targeted group.

Unlike Waldron, who points towards a causal relationship between the two, West merely says that hate speech and racial violence have a tendency to coincide. Therefore the occurrence of hate speech can be experienced as sufficiently threatening by members of the targeted audience as to silence them. The problem is that hate speech, although it may be experienced as threatening, is not in and of itself a threat. Not even the starkest defenders of free speech would argue that threats be legal; hate speech can 'only' be experienced as threatening. But the end result remains the same, the total amount of produced words diminishes on account of hate speech. From this perspective it is reasonable to restrict hate speech, not on the basis to preserve dignity as Waldron would have it, but to protect the free speech of people targeted by hate speech. Do note however, that the overall freedom of speech within society does not necessarily increase, the free speech of hate speech distributors is simply traded in for the free speech of its targets.

But for this version of the silencing argument to be successful, one needs to accept the premise that if someone's desire to speak is diminished, his or her freedom of speech is diminished. For in no way are targets prevented from speaking in a society that would allow hate speech. And here the concept of free speech becomes vital, because at what point does

one acquire the right to free speech? According to Caroline West herself, it is a combination of being able to distribute words or speech without interference, to have a chance of being understood and finally of having a chance to have your views considered by your audience. None of these conditions appear to be violated when someone's desire to speak has diminished or disappeared. So by West's own reasoning, someone does not lose his or her free speech if his or her desire to speak has diminished. But if hate speech is (reasonably) experienced as threatening by its targets, they may not have free speech, due to the fear of its consequence. This would very much interfere with their freedom of expression according to most definitions of free speech. For few would argue that people under threat are free to speak in any meaningful way. Hate speech in West's perception, functions in a similar way, as it is experienced as threatening by its targets and can therefore undercut their ability to speak without fear for their safety.

The freedom argument, as proposed by Caroline West, suggests that hate speech instead of being an expression of free speech, is undermining it. Therefore limitations on hate speech could in fact enhance freedom of expression instead of restricting it. West's argumentation builds upon the claims of Catharine MacKinnon, which proposes the regulation of pornography. According to MacKinnon, the free speech of men in the realm of pornography, silences the free speech of women. From her perspective, the regulation of pornography could actually work to enhance freedom of expression instead of suppressing it (MacKinnon 1993).

West redefines freedom of expression and adds three elements to the concept of freedom of expression: distribution, comprehension and consideration. All three should be present to some degree, otherwise hate speech is considered harmful and therefore legitimately open for restriction. Hate speech can undermine all three elements. The distribution of hate speech can be perceived as threatening and targets can be silenced because of it. In the process of comprehension the cognitive understanding can be lacking, thus creating the impossibility to make themselves understood. Hate speech can through consideration exclude individuals, due to unjust incredibility. Hate speech itself can undermine the free speech of the assaulted. West considers the free speech of the assaulted more important, than the free speech of the speaker (West 2012). Her comprehension and consideration condition however, fail to convince. But the minimal distribution condition by itself, creates a revealing perspective on the hate speech debate.

4.2 RESTRICTING FREE SPEECH

A libertarian view on the issue of hate speech, would be to condone it on the basis of the individual's freedom to speak its mind. From this perspective, the right to free speech is valued more than protection from verbal assault. The only way then to legitimately restrict speech, would be to prevent a direct threat and the endangerment of the offended. Presenting such a clear and present danger would also be the exception within the United States legal system, carried out by the Supreme Court. As such the First Amendment of the U.S. constitution can only be overruled in light of such extreme threat. The American-model is therefore in accordance with Mill's Harm Principle, who states that: *'the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant'* (Mill 2008, 14). Any addition to Mill's Harm Principle would start to resemble the European-model, as these have hate speech laws offering less freedom of expression.

Feinberg, Waldron and West all seem to be supporters of the European-model, with its hate speech laws. Only Waldron explicitly mentions that he is, but like all European countries, they go about it in their own way. The problem with restricting free speech is, that specific boundaries are difficult to set, making it hard to create a distinction between legitimate and illegitimate restrictions. Even if each individual case is examined (as the Supreme Court in the U.S does), it still remains a matter of interpretation. Judging a case of hate speech occurrence, is therefore a subjective activity.

Feinberg mentions certain aspects that need to be taken into consideration when determining its offense. On the one hand his Offense Principle can be criticized for its vagueness, but it is hard if not impossible to create very specific boundaries on free speech; which should then in turn exclude certain types of hate speech or even hate speech altogether. The aspects that Feinberg does mention (in order to evaluate the level of offense, and its cause to be restricted) are for instance: the level intensity, the number of offended people, the easiness to avoid the offense and the social value placed on such hate speech (Feinberg 1984). Assessing these aspects of hate speech are surely open to interpretation and can have a variety of outcomes. Waldron's dignity argument and West's Freedom argument are no exceptions, as both are prone to a certain level of subjectivity. It therefore stands to reason that assessing hate speech, on its legitimacy for restriction and its severity, would above all be an assessment based on morality.

Both Waldron and West warn us for the dangers of hate speech, but there is a duality to this negative effect. On the one hand Waldron and West perceive hate speech as harmful, which is the reason for restricting free speech. On the other hand, there is the danger of oppression and censorship; which perhaps happens too often in third world countries, with dictators setting the boundaries to their own liking. Whether speech should be restricted or not is often a matter of opinion, but who decides where these lines are drawn? If more room is given for restriction, the First Amendment right to free speech loses its strength. A weakening of this constitutional right would irreversibly mean that free speech is no longer a force to be reckoned with (at least legally). Oppressing unpopular views would henceforth be a probability and the immoral negative effects that come along with it. There is a big difference between being discriminated against and feeling discriminated against. Once hate speech legislation is passed, the two might become inseparable. Common sense is not enough to regulate the free speech, because the issue is simply too complex. The United States are in addition, too vast, for all negative effects to be overseen. Each European country has its own body of legislation on the issue of hate speech. This kind of change to the U.S. justice system is very improbable, since it is near to impossible to find the necessary support for one particular approach on hate speech. Waldron therefore rightfully states that it is highly unlikely that hate speech legislation will ever be passed in the United States.

4.3 CONCLUSION

Upon scrutiny, Jeremy Waldron's defense of regulating hate speech fails to convince. Waldron does not succeed in unraveling the mist surrounding his concept of dignity as a principle against hate speech. His analysis of how the processes of hate speech work in relation to people's social standing in society are insufficient to support his conclusion.

Caroline West offers a more robust defense in favor of regulating hate speech. Though only part of her framework stands up against analysis, she nonetheless succeeds in adding a

surprising element to the debate on hate speech. The idea that hate speech undermines the value of free speech itself, creates a new dimension to the issue of regulating hate speech.

The minimal distribution condition from West's framework of free speech is one that almost all can agree on; for the distribution of words and pictures is the basis for sharing ideas and views between different people. As West herself puts it: "the freedom to distribute words and their expressive equivalents is taken to be important because, and insofar as, words (and pictures and the like) are the vehicle by which people communicate their thoughts and views to others. It is not the sound or scrawls per se that are valuable and worthy of protection. Words in themselves are merely instruments or tools. It is the ideas and opinions that words are used to express that are the (either intrinsically or instrumentally) valuable things" (West 2012, 226).

When it comes to it, this is the value of free speech; namely the ability to exchange ideas, opinions and views with one another. If hate speech would undermine that ability of its targets, then restricting hate speech might be necessary in order to protect freedom of expression. But then the vital question becomes whether hate speech obstructs the ability of others from expressing themselves.

Perhaps not in a literal sense; no one is gagged or otherwise physically silenced by hate speech. But hate speech may be experienced as intimidating or even threatening by its targets, which would naturally result in the silence of these members of society. West points to the coinciding of racial hate speech and racial discrimination. Unlike Waldron who seems to gesture towards a causal relation between the two, West merely emphasizes that the two are related; that in places where racial violence occurs more frequently, racial hate speech is likely to occur more often as well. Therefore targets of hate speech can feel threatened (even if they are not threatened in a legal sense) and thereby silenced. This would also be the main criticism of restricting hate speech on the basis of the minimal distribution condition. For it is based on the psychological response of targets to the experience of receiving hate speech. But this would be an oversimplification of the matter. For West is surely right about racial hate speech coinciding with racial violence or discrimination. Therefore, upon hearing (or seeing) hate speech, its targets would know there is an increased chance of racial violence in their direct vicinity. And this is what causes the disablement of their free speech.

The other argument presented by West in the case of the minimal distribution condition; that of the lowering of self-esteem, carries significantly less weight. Even if it were true (and it may be) that racial hate speech would decrease the self-esteem of its targets, this would be an insufficient basis for the restriction of hate speech. Diminishing one's self esteem, though undoubtedly unpleasant, is insufficient grounds for legal intervention. Otherwise, criticism and many other forms of speech, which can have the same effect, would need to be limited as well. A lower self-esteem may decrease someone's desire to speak, it may cause him or her to not enter into a debate, but the concept of free speech, even the one proposed by West herself, does not include the protection of people's desire to speak, only the protection of their ability to do so.

Nonetheless, the minimal distribution condition brings a surprising new perspective to the longstanding debate surrounding hate speech. By evoking a threatening experience to the targets, hate speech has the capacity to undermine the free speech of its targets. This process challenges the traditional defense of allowing hate speech in the name of free speech. Instead, this insight offered by West, forces policy makers to either prioritize the free speech of hate

speech distributors or of their targets. The value of free speech is no longer at odds with other values such as equality or dignity, but rather it has become a non-absolute value, which needs to be balanced carefully when deciding whether or not hate speech should be banned. In light of the process revealed by West, which shows how hate speech can limit the freedom of expression of its targets, it is easy to see how restricting hate speech can help substantiate public debate and fortify the imperative value of free speech.

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