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When Is Hate Speech Wrongful? A Comment on Alexander Brown's Hate Speech as Degradation and Humiliation

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**WHEN IS HATE SPEECH WRONGFUL? A COMMENT ON ALEXANDER
BROWN'S *HATE SPEECH AS DEGRADATION AND HUMILIATION***

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I. INTRODUCTION

In *Retheorizing Actionable Injuries in Civil Lawsuits Involving Targeted Hate Speech: Hate Speech as Degradation and Humiliation*,¹ Alexander Brown presents a rich, complex, and insightful account of hate speech and the harms that it causes. The article focuses on hate speech that “is directly addressed to, or targeted at,” particular individuals.² Brown argues that some forms of targeted hate speech invade the dignity of others by causing them to suffer wrongs he calls “*degradation*” or “*humiliation*,” and that in such cases they should be able to obtain redress through civil lawsuits.³ After developing legal tests for these two wrongs, he proposes that courts should use these tests in cases where the victims of targeted hate speech seek recovery under the American law of intentional infliction of emotional distress or the South African law of *injuria*.⁴ Brown also suggests that these tests can be used to refine Richard Delgado’s proposed tort of racial insult.⁵

In this comment, I offer a brief response to Brown’s article. Part I sketches his view as well as some of the valuable contributions that his article makes to the hate speech literature. Parts II and III assess the tests that he offers for determining whether targeted hate speech constitutes degradation or humiliation. I argue that while these tests successfully identify some instances of wrongful hate speech, they fail to recognize other instances that also cause deep injury. Finally, in Part IV, I explore the implications of this discussion for the way we should understand what makes hate speech wrongful.

II. BROWN’S ACCOUNT OF HATE SPEECH

As Brown observes, the term “hate speech” can cover a multitude of phenomena.⁶ In this article, he uses the term to mean

1. Alexander Brown, *Retheorizing Actionable Injuries in Civil Lawsuits Involving Targeted Hate Speech: Hate Speech as Degradation and Humiliation*, 9 ALA. C.R. & C.L. L. REV. 1 (2018).

2. *Id.* at 2.

3. *Id.* at 3.

4. *Id.*

5. Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

6. Brown, *supra* note 1, at 2.

vituperation (bitter and abusive language) or vilification (viciously disparaging or insulting language) that makes reference to the victim's race, ethnicity, nationality, citizenship status, religion, sexual orientation, gender identity, disability, or other protected characteristic, and which is directly addressed to, or targeted at, the victim, whether in face-to-face, offline interactions, or online.⁷

Like many scholars who support some regulation of hate speech, Brown holds that this speech is wrongful when it violates the dignity of its targets.⁸ However, it is not always clear what the term “dignity” means. One of most valuable contributions of Brown's article is to offer a careful and thorough exploration of this concept. He begins by analyzing human dignity, or the dignity that all people are entitled to.⁹ Following the philosopher Herbert Spiegelberg, Brown identifies three different dimensions of human dignity.¹⁰ The first dimension is “dignity itself,” which he characterizes as “an existential or metaphysical property”—the property of having inherent “worth or value” as a human being.¹¹ The second dimension is “the expression of such dignity,” which occurs both in an individual's “inward feelings and attitudes” and in the individual's “outward behavior and disposition.”¹² The third and final dimension is “the recognition of, or respect for, [both of these aspects of the individual's] dignity . . . by other people.”¹³

Drawing on the work of the legal and political philosopher Jeremy Waldron, Brown also recognizes a second form of dignity.¹⁴ This is what he calls “civic dignity,” or one's status as a full and equal member of the society.¹⁵

7. *Id.* at 2–3.

8. This is a view that I share. *See* STEVEN J. HEYMAN, *FREE SPEECH AND HUMAN DIGNITY* ch. 10 (2008) (arguing that some forms of hate speech are wrongful because they violate the rights of their targets, including their fundamental right to be recognized and treated as human beings and members of the community).

9. Brown, *supra* note 1, at 19–31.

10. *Id.* at 15.

11. *Id.*

12. *Id.*

13. *Id.*

14. *See id.* at 22–24 (discussing Jeremy Waldron, *Dignity, Rank, and Rights*, in 29 *THE TANNER LECTURES ON HUMAN VALUES* (Susan Young ed., 2011)).

15. *Id.* at 23.

Brown then uses these distinctions to determine what makes targeted hate speech wrongful.¹⁶ As he explains, such speech may “violate people’s human dignity in itself and cause impairments of, or injuries to, people’s expression of human dignity” in their inward feelings or their outward demeanor.¹⁷ Targeted hate speech may also “constitute attacks on people’s civic dignity [and] their sense . . . of confidence in their civic dignity.”¹⁸ These forms of speech are wrongful because they violate their targets’ “fundamental rights” to human or civic dignity.¹⁹

As Brown observes, however, the idea that targeted hate speech violates the fundamental rights of its targets is still rather abstract.²⁰ If this notion is to provide concrete guidance to the legal system, we must define more precisely the conditions under which the targets should be entitled to recovery. To this end, Brown identifies two forms of wrongful speech which he calls *degradation* and *humiliation*.²¹ *Degradation* is speech that intentionally attacks the targets’ human or civic dignity and thereby impairs both their inward and outward expression of dignity.²² *Humiliation* is degradation that is aggravated by the fact that it takes place in the presence of other people.²³

Brown then proposes specific legal tests for these forms of conduct.²⁴ In the following two Parts, I discuss the four elements that he uses to define the wrong of degradation, and that are also elements of the wrong of humiliation.²⁵ An exploration of these elements will shed light not only on the specific conditions that should be required for liability, but also on the deeper question of what makes targeted hate speech wrongful.

16. *Id.* at 24.

17. *Id.*

18. *Id.*

19. *Id.* at 26.

20. *Id.* at 22.

21. *Id.* at 25.

22. *See id.* at 28–36.

23. *See id.* at 36–38.

24. *See id.* at 24–27.

25. To establish humiliation, Brown would also require the plaintiff to show two additional elements that arise from the fact that the plaintiff was degraded in front of others. *See id.* at 36–38.

III. TARGETED HATE SPEECH AS A VIOLATION OF DIGNITY ITSELF

The first element of Brown's proposed test for degradation is that

(1) The defendant intentionally judged as inferior or else denied the plaintiff's basic worth (as a human being) or their civic status, or both.²⁶

As Brown explains, this is the most "basic element" of the test, an element which "tries to capture the core of what it means to degrade another person."²⁷

At the same time, Brown insists that the wrong of degradation is not one that can be committed by "just anyone."²⁸ Instead, that wrong occurs only when the speaker has the capacity to make "*authoritative*" judgments or assertions regarding the plaintiff.²⁹ This consideration leads Brown to add a second element to the test:

(2) The degrading performed in (1) was allied to the fact that the defendant had the authority or standing to judge as inferior or deny the plaintiff's basic worth (as a human being), or both.³⁰

Taken together, the first two elements are meant to establish an "objective legal test[]" to determine whether the defendant has violated the "existential or metaphysical" dimension of dignity, that is, dignity itself.³¹

Perhaps the clearest example of a case in which the defendant has the sort of authority required by the second element involves the use of "an *institutionalized role*, or *official position*," as when "a racist judge" uses his power to treat a black defendant in a degrading manner.³² Likewise, a boss may abuse her power in order to degrade a subordinate—a feature that is present in many tort and civil rights actions for racial harassment in the workplace.³³

26. *Id.* at 28.

27. *Id.* at 33.

28. *Id.* at 32.

29. *Id.*

30. *Id.*

31. *Id.* at 26; *see supra* text accompanying note 11.

32. Brown, *supra* note 1, at 32.

33. *See id.* at 39. One notorious case that Brown discusses is *Gomez v. Hug*, 645 P.2d 916 (Kan. App. 1982), in which the plaintiff's ultimate boss, a public

But one can easily think of other egregious instances of targeted hate speech where such authority is much harder to find. Consider an example that Brown borrows from the philosopher Ishani Maitra: an old white man approaches an Arab woman who is seated in a crowded subway car and shouts such abuse as ““Fucking terrorist, go home. We don’t need your kind here.””³⁴ The man’s hate-filled tirade is a gross attack on the woman’s dignity, yet at first glance he does not appear to have the authority that Brown considers necessary to establish the wrong of degradation. Following Maitra, however, Brown contends that if the other people in the subway car reasonably could have rejected the man’s assertions about the woman but chose to remain silent, they have effectively “licensed” the man’s speech and given him the ability to authoritatively degrade her—a situation that Brown describes as a sort of “licensed-authority.”³⁵

Suppose, however, that the only individuals who are present in the subway car are the white man and the Arab woman. In this situation, his conduct might be just as invasive of her dignity (and even more terrifying). On Brown’s account, it is difficult to see how the man could be found to possess any authority in this situation. Yet it is also hard to understand why the law ought to draw the line at this point and deny recovery on these facts while granting it when the speech occurs in a crowded setting.

I believe that we would have the same intuitions in other situations as well. Suppose that an employee is subjected to a relentless campaign of homophobic abuse by a co-worker. On the approach that Maitra and Brown take, the co-worker may be regarded as acting with a sort of authority if a supervisor knows of the abuse and fails to prevent it, or if other employees encourage the co-worker’s conduct or fail to speak up on the victim’s behalf.³⁶ If these conditions do not hold, however, the victim could not satisfy the requirements for the wrong of degradation, regardless of the severity of the abuse or the magnitude of its impact. The same would be true if an individual burned a cross on an African American family’s lawn, so long as that conduct was not actively or tacitly authorized by others in the

official, subjected him to a torrent of vicious anti-Mexican slurs. *See* Brown, *supra* note 1, at 39.

34. *Id.* at 32–33 (quoting Ishani Maitra, *Subordinating Speech*, in *SPEECH AND HARM* 94, 100–101 (Ishani Maitra & Mary Kate McGowan eds., 2012)).

35. *Id.*; *see* Maitra, *supra* note 34, at 111–17. For a fuller discussion of this hypothetical which explores the conditions that are required for this to be true, *see* ALEXANDER BROWN, *HATE SPEECH LAW: A PHILOSOPHICAL EXAMINATION* 78–80 (2015).

36. *See* Maitra, *supra* note 34, at 105–09, 115–17.

community.³⁷ Yet it is difficult to imagine a form of targeted hate speech that constitutes a graver assault on the victim's human dignity and civic status than cross-burning.

In response to this objection, one might expand the concept of authority still further. For example, one might argue that the man in the subway car and the solitary cross-burner are implicitly claiming to speak on behalf of white people in general, or at least on behalf of all those who share the speakers' racist beliefs. This point has some plausibility: speech has more force when it appears to express the views of many people. If the notion of authority were to be understood in this way, however, it would be present in every case of hate speech, and so no practical purpose would be served by making it a requirement. More fundamentally, even if the man on the subway and the cross-burner are regarded as speaking only for themselves, I believe that their speech should still be considered wrongful on the ground that it violates the targets' basic right to be treated with the respect due to human beings and members of the community.³⁸

For these reasons, it seems to me that the second element of Brown's test for degradation is unjustified. Authority can make it easier for an actor to degrade others, but it should not be regarded as a *sine qua non* for finding targeted hate speech to be wrongful.³⁹

Dispensing with the authority requirement is not only appropriate as a conceptual matter, it would also bring Brown's wrongs of degradation and humiliation into closer accord with American tort law. To be sure, some civil wrongs can be committed only by individuals who possess particular forms of authority.⁴⁰ Thus, defendants can be held liable for "constitutional torts" under 42 U.S.C. § 1983 only if they acted under color of state law.⁴¹ Similarly, violations of the ban on employment discrimination in Title VII of the Civil Rights Act of 1964 can be committed only by employers or

37. *Cf. id.* at 109–10 (arguing that a cross-burning would be authoritative if the leaders of the community are made aware of it and do nothing to denounce it).

38. *See* HEYMAN, *supra* note 8, at 170–72.

39. Although his article focuses on the wrongs of degradation and humiliation, Brown leaves open the possibility that recovery should be permitted for some forms of targeted hate speech that do not meet the requirements he lays out. *See* Brown, *supra* note 1, at 46 (acknowledging that "there might be other ways of giving substance to the relevant causes of action in cases involving targeted hate speech," and that it might be possible to show that such speech was wrongful because it "affronted dignity in some other way").

40. Brown, *supra* note 1, at 22–23.

41. 42 U.S.C. § 1983.

supervisors.⁴² But these legal requirements are the exception rather than the rule. Most torts – from intentional wrongs such as battery and assault, to the tort of negligence, to various forms of strict liability, to dignitary torts such as defamation and invasion of privacy – can indeed be committed by “just anyone,”⁴³ regardless of whether the actor possesses any authority in relation to the plaintiff. And while an actor’s abuse of position or authority is one important factor that can be considered in determining whether she is liable for the tort of intentional infliction of emotional harm, it is not a legal requirement.⁴⁴

IV. TARGETED HATE SPEECH AS AN IMPAIRMENT OF THE VICTIM’S EXPRESSION OF DIGNITY

While the first two elements of Brown’s degradation test are objective factors that are concerned with whether an act of targeted hate speech violates dignity itself, the remaining two elements are subjective factors that are concerned with the “psychological impact” of the speech on the victim, and, in particular, on whether the speech has impaired the victim’s inward and outward expression of dignity.⁴⁵ The third element states:

(3) The plaintiff had a feeling or sense that they were being degraded, and this was as a direct result of the degrading performed in (1) and (2).⁴⁶

Brown’s discussion of this condition seems to indicate that, “to count as wrongful degrading,”⁴⁷ the speech must actually undermine “the victim’s sense of human dignity or appreciation of their own civic dignity”—for example, by causing them to “let go of their positive self-impression,” by “lower[ing] or depress[ing] their sense of dignity,”⁴⁸ or by actually making them feel that they have “inferior civic status” or worth as a human being.⁴⁹

When understood in this way, the third element also seems problematic. As Brown observes, the impact of hate speech on its targets’ sense of dignity

42. 42 U.S.C. § 2000e, et seq.

43. Brown, *supra* note 1, at 32.

44. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM § 46, cmt. d (2001) [hereinafter RESTATEMENT (THIRD)].

45. Brown, *supra* note 1, at 35.

46. *Id.* at 34.

47. *Id.*

48. *Id.*

49. *Id.* at 28.

seems to arise from the conflict or “dissonance between how they regard themselves and how hate speakers are authoritatively ranking them as inferior” or worthless beings.⁵⁰ But it is important to recognize that there are two different ways in which this dissonance can be resolved: although (as Brown puts it) “some victims may let go of their positive self-impression,”⁵¹ other victims may feel profound offense at the degrading treatment and may resolve to reassert their dignity as human beings and members of the community. It seems clear that, in either event, the victims have suffered a serious dignitary injury for which they should be able to recover. Thus, it is difficult to see why the Arab woman who is subjected to a racist tirade or the African Americans who awake to find a burning cross in their yard should be denied recovery for the wrong of degradation if they respond by reaffirming rather than losing their sense of dignity. Although it is reasonable to hold (in the words of the third element) that the plaintiff must have “a feeling or sense that they were being degraded,”⁵² this should be taken to refer simply to their awareness that the defendant was assaulting their dignity, rather than to a requirement that they actually come to feel worthless or inferior.

Again, changing the test in this way would bring it into closer alignment with the way that American law defines dignitary torts. For example, the tort of offensive battery is committed when the defendant intentionally subjects the plaintiff to a contact that “offends a reasonable sense of personal dignity.”⁵³ As the Second Restatement of Torts explains, “the essence of the plaintiff’s grievance consists in the offense to dignity involved in the unpermitted and intentional invasion of the inviolability of his person.”⁵⁴ To recover, the plaintiff must be aware that his dignity has been invaded in this way, but he need not believe that his dignity has been *diminished* in the sense that he actually possesses less value or worth as a result.⁵⁵ The same is true of invasion of privacy, which consists of intruding into the plaintiff’s private life or solitude, or exposing her private life to the world, in a way that “would be highly offensive to a reasonable person.”⁵⁶ One can recover for these torts

50. *Id.* at 34.

51. *Id.*

52. *Id.*

53. RESTATEMENT (SECOND) OF TORTS §§ 18-19 (1965-79) [hereinafter RESTATEMENT (SECOND)]. For a recent example, see Donna Bryson, *Taylor Swift Was Groped by Radio Host, Jury Finds*, N.Y. TIMES, Aug. 14, 2017.

54. RESTATEMENT (SECOND), *supra* note 53, § 18, cmt. c.

55. *Id.*

56. *Id.* § 652B (defining the tort of Intrusion upon Seclusion); *id.* § 652D (defining the tort of Publicity Given to Private Life).

only in cases where “a reasonable person would feel justified in feeling seriously aggrieved” by the defendant’s conduct.⁵⁷ But the law defines this grievance in terms of serious offense at the invasion of privacy; the plaintiff need not show that the conduct actually decreased her sense of status or worth or that she came to feel that she somehow had a lesser claim to the inviolability of her private life than before.⁵⁸

A similar point holds with regard to the tort of intentional infliction of emotional harm, which the Third Restatement defines as “extreme and outrageous conduct [that] intentionally or recklessly causes severe emotional harm.”⁵⁹ As the term “outrage tort” suggests, this harm may consist of “extreme outrage” or “anger” at the defendant’s conduct, as well as such feelings “as fright, horror, grief, shame, humiliation, [or] embarrassment.”⁶⁰ But there is no rule that a plaintiff can recover for a dignitary invasion under this tort only if she came to believe that she actually had lower status or worth. Nor does the South African delict of *injuria* or Delgado’s proposed tort of racial insult impose such a requirement. As I have said, I do not believe that such a requirement would make sense, for it would deny recovery to those plaintiffs who are able to hold fast to their sense of dignity in the face of others’ efforts to degrade them.

A similar objection can be raised to the fourth element of Brown’s test for degradation:

- (4) The plaintiff experienced, even if momentarily, a lapse in, or failure of, dignified bearing, and this was as a direct result of the degrading performed in (1) and (2).⁶¹

Brown explains that this element requires a showing that the defendant’s conduct impaired the plaintiff’s outward expression of dignity by causing at least a momentary “loss of psychological or physiological self-control and self-possession” – a condition which “might be evidenced by [such reactions as] severe blushing, physically shaking or trembling, the welling up of tears, flying into a rage, running away, cowering, clamming up, turning pale, [or] profuse sweating.”⁶² In other words, the defendant’s conduct must have caused the plaintiff to have at least temporarily “lost his cool.”⁶³

57. *Id.* § 652D, cmt. c.

58. *Id.*

59. *See* RESTATEMENT (THIRD), *supra* note 44, § 46.

60. *Id.* cmts. a, j; RESTATEMENT (SECOND), *supra* note 53, § 46, cmts. d, j.

61. Brown, *supra* note 1, at 35.

62. *Id.*

63. *Id.* at 43.

As Brown recognizes, his inclusion of this element in the test for degradation is likely to raise the objection that it would deny recovery to individuals who, as a result of their upbringing or temperament, “are able to maintain their dignified bearing” even in the face of “hateful abuse.”⁶⁴ Brown’s response is that “in actuality there might be very few people alive who could genuinely experience being degraded by targeted hate speech under the conditions set out in [the first three elements] and yet not experience the slightest lapse in dignified bearing.”⁶⁵ If that is true, however, there would seem to be little point in making this as a separate requirement, rather than simply allowing the plaintiff’s observed reaction to be used as evidence regarding the impact of the speech. The loss-of-dignified-bearing requirement would also present difficult issues of proof, particularly in cases involving online attacks or face-to-face encounters where no third party was present. More fundamentally, if the speech is shown to have wrongfully impacted the plaintiff’s inward expression of dignity, as Brown’s third element requires,⁶⁶ it is unclear why he believes that it must also wrongfully impact the plaintiff’s outward expression of dignity. Why should not a showing of elements (1)–(3) be sufficient to find that the defendant has violated “the plaintiff’s right to a life of dignity?”⁶⁷

V. THE NATURE AND WRONGFULNESS OF HATE SPEECH

Finally, let me say a few words about the light that this discussion sheds on the nature of hate speech and the basic question of what makes it wrongful. The approach that Brown takes in this article draws on a form of philosophical analysis that was developed over the past quarter-century by Rae Langton and other theorists.⁶⁸ This analysis uses speech act theory to contend that certain forms of expression (such as some kinds of pornography and hate speech) are wrongful because they help to construct social reality in a way that subordinates other people.⁶⁹ In common with most of these theorists, Brown believes that speech is capable of subordinating others in

64. *Id.* at 36.

65. *Id.*

66. *Id.* at 34–35.

67. *Id.* at 51–52.

68. A leading article is Rae Langton, *Speech Acts and Unspeakable Acts*, 22 PHIL. & PUB. AFF. 293 (1993).

69. For discussions of this approach, see Brown, *supra* note 1, at 28–34; Maitra, *supra* note 34, at 94–96, 98–102.

this way only if it is “authoritative.”⁷⁰ It is for this reason that his degradation test includes the second element, which requires that “the defendant had the authority or standing to judge as inferior or deny the plaintiff’s basic worth (as a human being), their civic status, or both.”⁷¹ And this approach also helps to explain the third and fourth elements: that the inward and outward expressions of the plaintiff’s dignity were actually diminished by the defendant’s speech.⁷²

In the present article, Brown elaborates this philosophical approach and applies it to the problem of targeted hate speech in a highly sophisticated, rigorous, thoughtful, and nuanced manner. This approach provides a powerful way to understand some instances of targeted hate speech, such as cases in which employers or supervisors use their power to degrade those who work for them.⁷³ At the same time, however, I believe that this approach has serious limitations, for it fails to deal adequately with some classic forms of targeted hate speech, such as the act of burning a cross on a black family’s lawn. As we have seen, this act may be committed by a defendant who lacks all authority in Brown’s sense.⁷⁴ Yet it seems clear that if any kind of targeted hate speech violates the plaintiff’s right to a life of dignity, cross-burning does so.

This discussion points to a deeper problem with an approach that understands wrongful hate speech in terms of authoritative speech that subordinates others.⁷⁵ That approach emphasizes the ways that individuals who possess various forms of authority can subordinate and degrade other people in a manner that has some appearance of legitimacy.⁷⁶ Although this approach can help us to understand certain kinds of cases, it can also tend to obscure the basic nature of wrongful hate speech. This speech is essentially a form of aggression toward others or a violation of their rights: it is more aligned with force and violence than it is with authority and legitimacy.⁷⁷ Speech of this sort constitutes a wrong like other wrongs. Although this wrong can be committed through the misuse of authority, it can also be committed by individuals who have no claim to authority whatever. To put the point another way, we need to distinguish between *authority* and *power*. Although a solitary individual who targets a black family with a burning cross

70. Brown, *supra* note 1, at 32.

71. *Id.*

72. *Id.* at 34–35.

73. *Id.* at 11–12.

74. *Id.* at 9. See *supra* text accompanying notes 37–38.

75. Brown, *supra* note 1, at 32.

76. *Id.* at 33.

77. *Id.* at 18–19.

may not have any *authority* in Brown's sense, that person nevertheless has the *power* to inflict grave dignitary and emotional injuries on them, and this should be enough to entitle them to bring suit. In short, I believe that while Brown provides great insight into the problem of targeted hate speech, the cases in which he would find liability are only a subset of those in which individuals should be allowed to recover for an invasion of their fundamental rights to human and civic dignity.