

*The New York Times***Opinionator**

JUNE 4, 2012, 9:00 PM

The Harm in Free SpeechBy *STANLEY FISH*

Jeremy Waldron's new book, "[The Harm in Hate Speech](#)," might well be called "The Harm in Free Speech"; for Waldron, a professor of law and political theory at New York University and Oxford, argues that the expansive First Amendment we now possess allows the flourishing of harms a well-ordered society ought not permit.

Waldron is especially concerned with the harm done by hate speech to the dignity of those who are its object. He is careful to distinguish "dignity harms" from the hurt feelings one might experience in the face of speech that offends. Offense can be given by almost any speech act — in particular circumstances one might offend by saying "hello" — and Waldron agrees with those who say that regulating offensive speech is a bad and unworkable idea.

But harms to dignity, he contends, involve more than the giving of offense. They involve undermining a public good, which he identifies as the "implicit assurance" extended to every citizen that while his beliefs and allegiance may be criticized and rejected by some of his fellow citizens, he will nevertheless be viewed, even by his polemical opponents, as someone who has an equal right to membership in the society. It is the assurance — not given explicitly at the beginning of each day but built into the community's mode of self-presentation — that he belongs, that he is the undoubted bearer of a dignity he doesn't have to struggle for.

Waldron's thesis is that hate speech assaults that dignity by taking away that assurance. The very point of hate speech, he says, "is to negate the implicit assurance that a society offers to the members of vulnerable groups — that they are accepted ... as a matter of course, along with everyone else." Purveyors of hate "aim to undermine this assurance, call it in question, and taint it with visible expressions of hatred, exclusion and contempt."

"Visible" is the key word. It is the visibility of leaflets, signs and pamphlets asserting that the group you belong to is un-American, unworthy of respect, and should go back where it came from that does the damage, even if you, as an individual, are not a specific target. "In its published, posted or pasted-up form, hate speech can become a world-defining activity, and those who promulgate it know very well — this is part of their intention — that the visible world they create is a much harder world for the targets of their hatred to live in." (Appearances count.)

Even though hate speech is characterized by First Amendment absolutists as a private act of

expression that should be protected from government controls and sanctions, Waldron insists that “hate speech and defamation are actions performed in public, with a public orientation, aimed at undermining public goods.” That undermining is not accomplished by any particular instance of hate speech.

But just as innumerable individual automobile emissions can pollute the air, so can innumerable expressions of supposedly private hate combine to “produce a large-scale toxic effect” that operates as a “slow-acting poison.” And since what is being poisoned is the well of public life, “it is natural,” says Waldron, “to think that the law should be involved — both in its ability to underpin the provision of public goods and in its ability to express and communicate common commitments.” After all, he reminds us, “Societies do not become well ordered by magic.”

Waldron observes that legal attention to large-scale structural, as opposed to individual, harms is a feature of most other Western societies, which, unlike the United States, have hate speech regulations on their books. He finds it “odd and disturbing that older and cruder models remain dominant in the First Amendment arena.” But as he well knows, it is not so odd within the perspective of current First Amendment rhetoric, which is militantly libertarian, protective of the individual’s right of self-assertion no matter what is being asserted, and indifferent (relatively) to the effects speech freely uttered might have on the fabric of society.

It was not always thus. At one time, both the content and effects of speech were taken into account when the issue of regulation was raised. Is this the kind of speech we want our children to see and hear? Are the effects of certain forms of speech so distressing and potentially dangerous that we should take steps to curtail them? Is this form of speech a contribution to the search for truth? Does it have a redeeming social value? Since [New York Times v. Sullivan](#) (1964) these questions, which assess speech in terms of the impact it has in the world, have been replaced by a simpler question — is it speech? — that reflects a commitment to speech as an almost sacrosanct activity. If the answer to that question is “yes,” the presumption is that it should be protected, even though the harms it produces have been documented.

Waldron wants to bring back the focus on those harms and restore the reputation of [Beauharnais v. Illinois](#) (1952), in which the Supreme Court upheld a group libel law. The case turned on the conviction of a man who had distributed leaflets warning Chicagoans to be alert to the dangers of mongrelization and rape that will surely materialize, he claimed, if white people do not unite against the Negro. Speaking for the majority, Justice Felix Frankfurter wrote that “a man’s job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial group to which he willy-nilly belongs as on his own merit.”

With the phrase “on his own merit,” Frankfurter gestures toward the view of dignity he is rejecting, the view in which dignity wells up from the inside of a man (or woman) and

depends on an inner strength that asserts itself no matter how adverse or hostile external circumstances may be, including the circumstance in which the individual is confronted with signs, posters and pamphlets demeaning his race or ethnic origin or religion or sexual preference. In this picture, the responsibility for maintaining dignity rests with the individual and not with any state duty to devise rules and regulations to protect it.

Some who take this position argue that if the individual feels victimized by expressions of hate directed at the group to which he “willy-nilly” belongs, that is his or her own choice. Waldron’s example is C. Edwin Baker (“[Harm, Liberty and Free Speech](#),” *Southern California Law Review*, 1997), who writes: “A speaker’s racial epithet ... harms the hearer only through her understanding of the message ... and [harm] occurs only to the extent that the hearer (mentally) responds one way rather than another, for example, as a victim rather than as a critic of the speaker.”

In this classic instance of blaming the victim, the fault lies with a failure of resolve; self-respect was just not strong enough to rise to the occasion in a positive way. Waldron calls this position “silly” (it is the majority’s position in [Plessy v. Ferguson](#)) and points out that it mandates and celebrates a harm by requiring victims of hate speech to grin and bear it: “It should not be necessary,” he declares, “for [hate speech victims] to laboriously conjure up the courage to go out and try to flourish in what is now presented to them as a ... hostile environment.” The damage, Waldron explains, is already done by the speech “in requiring its targets to resort to the sort of mental mediation that Baker recommends.” To the extent that those targets are put on the defensive, “racist speech has already succeeded in one of its destructive aims.”

Notice that here (and elsewhere in the book), Waldron refuses to distinguish sharply between harm and representation. In the tradition he opposes, harm or hurt is physically defined; one can be discomforted and offended by speech; but something more than speech or image is required for there to be genuine (and legally relevant) damage. After all, “sticks and stones will break my bones, but names will never hurt me.”

No, says Waldron (and here he follows Catharine MacKinnon’s argument about pornography), the speech *is* the damage: “[T]he harms emphasized in this book are often harms *constituted* by speech rather than merely *caused* by speech.” If the claim were that the harm is caused by speech, there would be room to challenge the finding by pointing to the many intervening variables that break or complicate the chain of causality. But there is no chain to break if harm is done the moment hate speech is produced. “The harm *is* the dispelling of assurance, and the dispelling of assurance is the speech act.”

Waldron knows that the underlying strategy of those he writes against is to elevate the status of expression to an ultimate good and at the same time either deny the harm – the statistics are inconclusive; the claims cannot be proved – or minimize it in relation to the threat regulation poses to free expression. If “free speech trumps any consideration of social harm ... almost any showing of harm resulting from hate speech ... will be insufficient

to justify restrictions on free speech of the kind that we are talking about.”

In short, the game is over before it begins if your opponent can be counted on to say that either there is no demonstrated harm or, no matter how much harm there may be, it will not be enough to justify restrictions on speech. If that’s what you’re up against, there is not much you can do except point out the categorical intransigence of the position and offer an (unflattering) explanation of it.

Waldron’s explanation is that the position is formulated and presented as an admirable act of unflinching moral heroism by white liberal law professors who say loudly and often that we must tolerate speech we find hateful. Easy to say from the protected perch of a faculty study, where the harm being talked about is theoretical and not experienced.

But what about the harm done “to the groups who are denounced or bestialized in pamphlets, billboards, talk radio and blogs? ... Can their lives be led, can their children be brought up, can their hopes be maintained and their worst fears dispelled in a social environment polluted by those materials”?

Waldron answers “no,” and he challenges society and its legal system to do something about it. But the likelihood that something will be done is slim if Waldron is right about the state of First Amendment discourse: “[I]n the American debate, the philosophical arguments about hate speech are knee-jerk, impulsive and thoughtless.” Not the arguments of this book, however; they hit the mark every time.